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NATIONAL REPORTER SYSTEM—UNITED STATES SERIES

THE
SUPREME COURT REPORTER

VOLUME 39

PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1918

WITH KEY-NUMBER ANNOTATIONS

NOVEMBER, 1918 — JULY, 1919

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JUSTICES
OF THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1918

CHIEF JUSTICE:

HON. EDWARD D. WHITE.

ASSOCIATES:

HON. JOSEPH McKENNA.

HON. OLIVER WENDELL HOLMES.

HON. WILLIAM R. DAY.

HON. WILLIS VAN DEVANTER.

HON. MAHLON PITNEY.

HON. JAMES C. McREYNOLDS.

HON. LOUIS D. BRANDEIS.

HON. JOHN H. CLARKE.

ATTORNEY GENERAL:

HON. A. MITCHELL PALMER.¹

SOLICITOR GENERAL:

HON. ALEX. C. KING.²

¹ Appointed March 5, 1919.

² Appointed November 21, 1912.

ALLOTMENT OF THE JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

FIRST CIRCUIT.

Comprising Maine, Massachusetts, New Hampshire, and Rhode Island.

JUSTICE OLIVER WENDELL HOLMES, of Massachusetts. Appointed December 4, 1902, by President Roosevelt.

SECOND CIRCUIT.

Comprising Connecticut, New York, and Vermont.

JUSTICE LOUIS D. BRANDEIS, of Massachusetts. Appointed June 1, 1916, by President Wilson.

THIRD CIRCUIT.

Comprising Delaware, New Jersey, and Pennsylvania.

JUSTICE MAHLON PITNEY, of New Jersey. Appointed March 13, 1912, by President Taft.

FOURTH CIRCUIT.

Comprising Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

JUSTICE EDWARD D. WHITE, of Louisiana. Appointed February 19, 1894, by President Cleveland; appointed Chief Justice December 12, 1910, by President Taft.

FIFTH CIRCUIT.

Comprising Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.

JUSTICE JAMES C. McREYNOLDS, of Tennessee. Appointed August 29, 1914, by President Wilson.

SIXTH CIRCUIT.

Comprising Kentucky, Michigan, Ohio, and Tennessee.

JUSTICE WILLIAM R. DAY, of Ohio. Appointed February 25, 1903, by President Roosevelt.

SEVENTH CIRCUIT.

Comprising Illinois, Indiana, and Wisconsin.

JUSTICE JOHN H. CLARKE, of Ohio. Appointed July 24, 1916, by President Wilson.

EIGHTH CIRCUIT.

Comprising Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming.

JUSTICE WILLIS VAN DEVANTER, of Wyoming. Appointed December 16, 1910, by President Taft.

NINTH CIRCUIT.

Comprising Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

JUSTICE JOSEPH McKENNA, of California. Appointed January 21, 1898, by President McKinley.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1918

(248 U. S. 9)

WATTS, WATTS & CO., Limited, v. UNIONE
AUSTRIACA DI NAVIGAZIONE.

(Argued April 17, 1918. Decided Nov. 4, 1918.)

No. 25.

1. ADMIRALTY 119—REVIEW—DISPOSITION
OF CAUSE—CHANGED CONDITIONS.

The Supreme Court, in the exercise of its appellate jurisdiction, cannot only correct error in the judgment below, but make such disposition of the case as justice may now require, considering changes in fact and in law occurring since the judgment, especially in an admiralty case triable de novo on appeal.

2. ADMIRALTY 119—REVIEW—DISPOSITION
OF CAUSE—CHANGED CONDITIONS.

Where after dismissal in the discretion of the court of a suit, because between alien belligerents in a court of a neutral nation because of entry of the United States in the war, it becomes a suit between one belligerent in a court of a cobelligerent against a common enemy, decree will be reversed, as inconsistent with demands of justice under changed circumstances.

3. WAR 10(2)—SUIT AGAINST ALIEN EN-
EMY.

Suit may be brought in a United States Court against an alien enemy.

4. WAR 10(2)—SUIT AGAINST ALIEN EN-
EMY—DEFENSE.

Respondent, though an alien enemy, is entitled to defend before judgment be entered.

5. WAR 10(2)—PROTECTING RIGHTS OF AL-
IEN ENEMY.

Action other than to preserve the status quo should not be taken in a suit against an alien enemy till, by reason of restoration of peace or otherwise, defense may be adequately presented; intercourse between residents of the enemy country and the United States being prohibited by Trading with the Enemy Act, § 3 (c), as well as physically impossible.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Libel by Watts, Watts & Co., Limited, against the Unione Austriaca di Navigazione, etc. Decree dismissing the libel was affirmed by the Circuit Court of Appeals (229 Fed. 136, 143 C. C. A. 412), and libelant brings certiorari. Reversed.

Messrs. John M. Woolsey, J. Parker Kirlin, and Mark W. McClay, Jr., all of New York City, for petitioner.

Mr. Charles S. Haight, of New York City, for respondent.

*Mr. Justice BRANDEIS delivered the opinion of the Court.

On August 4, 1914, Great Britain declared war against Germany and on August 12, 1914, against Austria-Hungary. Prior to August 4, Watts, Watts & Co., Limited, a British corporation, had supplied to Unione Austriaca di Navigazione, an Austro-Hungarian corporation, bunker coal at Algiers, a dependency of the French Republic. Drafts on London given therefor having been protested for nonpayment, the seller brought, on August 24, 1914, a libel in personam against the purchaser in the District Court of New York. Jurisdiction was obtained by attaching one of the steamers to which the coal had been furnished. The attachment was discharged by giving a bond which is now in force. The respondent appeared and filed an answer which admitted that the case was within the admiralty jurisdiction of the court; and it was submitted for decision upon a stipulation as to facts and proof of foreign law.

The respondent contended that the District Court, as a court of a neutral nation, should not exercise its jurisdictional power between alien belligerents to require the transfer, by process of judgment and execution, of funds by one alien belligerent to another; an act which it alleged was prohibited alike by the municipal law of both belligerents. The libelant replied that performance of the contract by respondent—that is, the payment of a debt due—was legal by the law of the place of performance, whether that place be taken to be Algiers or London; that it was immaterial whether it was

legal by the Austro-Hungarian law, since Austria-Hungary was not the place of performance; and that the enforcement of legal rights here would not infringe the attitude of impartiality which underlies neutrality. The District Court held that it had jurisdiction of the controversy, and that it was within its discretion to determine whether it should exercise the jurisdiction; since both parties were aliens and the cause of action arose and was to be performed abroad. It then dismissed the libel without prejudice, saying:

"From the standpoint of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries [Great Britain and Austria-Hungary] forbids a payment by one belligerent subject to his enemy during the continuance of war. This court, in the exercise of jurisdiction founded on comity, may not ignore that state of war and disregard the consequences resulting from it." 224 Fed. 188, 194.

The dismissal by the District Court was entered on May 27, 1915. On December 14, 1915, the decree was affirmed by the Circuit Court of Appeals, on the ground that it was within the discretion of the trial court to determine whether to take or to decline jurisdiction (*The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152), and that the exercise of this discretion should not be interfered with, since no abuse was shown (229 Fed. 136, 143 C. C. A. 412). On June 12, 1916, an application for leave to file a petition for writ of mandamus to compel the Court of Appeals to review the *exercise of discretion by the District Court was denied (*Ex parte Watts, Watts & Co.*, 241 U. S. 655, 36 Sup. Ct. 726, 60 L. Ed. 1224), and a writ of certiorari was granted by this court (241 U. S. 677, 36 Sup. Ct. 726, 60 L. Ed. 1232). The certiorari and return were filed July 21, 1916. On December 7, 1917, the President issued a proclamation declaring that a state of war exists between the United States and Austria-Hungary. The case was argued here on April 17, 1918.

[1] This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. *Butler v. Eaton*, 141 U. S. 240, 11 Sup. Ct. 985, 35 L. Ed. 713; *Gulf, Colorado & Santa Fé Ry. Co. v. Dennis*, 224 U. S. 503, 506, 32 Sup. Ct. 542, 56 L. Ed. 860. And in determining what justice now requires the court must consider the changes in fact and in law which have supervened since the decree was entered below. *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, 478, 36 Sup. Ct. 212, 60 L. Ed. 387; *Berry v. Davis*, 242 U. S. 468, 37 Sup. Ct. 208, 61 L. Ed. 441; *Crozier v. Krupp*, 224 U. S. 290, 302, 32 Sup. Ct. 488, 56 L. Ed. 771; *Jones v. Montague*, 194 U. S. 147, 24 Sup. Ct. 611, 48 L. Ed. 913; *Dinsmore v. Southern Express Co.*, 183 U. S. 115, 120, 22 Sup. Ct. 45, 46

L. Ed. 111; *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; *The Schooner Rachel v. United States*, 6 Cranch, 329, 3 L. Ed. 239; *United States v. Schooner Peggy*, 1 Cranch, 103, 109, 110, 2 L. Ed. 49. In the case at bar the rule is the more insistent, because in admiralty cases are tried de novo on appeal. *Yeaton v. United States*, 5 Cranch, 281, 3 L. Ed. 101; *Irvine v. The Hesper*, 122 U. S. 256, 266, 7 Sup. Ct. 1177, 30 L. Ed. 1175; *Reid v. American Express Co.*, 241 U. S. 544, 36 Sup. Ct. 712, 60 L. Ed. 1156.

[2, 3] Since the certiorari was granted, the relation of the parties to the court has changed radically. Then, as earlier, the proceeding was one between alien belligerents in a court of a neutral nation. Now, it is a suit by one belligerent in a court of a co-belligerent against a common enemy. A suit may be brought in our courts against an alien enemy. *McVeigh v. United States*, 11 Wall. 259, 267, 20 L. Ed. 80. See also *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617. If the libel had been filed under existing circumstances, security for *the claim being obtained by attachment, probably no American court would, in the exercise of discretion, dismiss it and thus deprive the libellant not only of its security, but perhaps of all possibility of ever obtaining satisfaction. Under existing circumstances dismissal of the libel is not consistent with the demands of justice.

[4, 5] The respondent, although an alien enemy, is, of course, entitled to defend before a judgment should be entered. *McVeigh v. United States*, supra. See also *Windsor v. McVeigh*, 93 U. S. 274, 280, 23 L. Ed. 914; *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215. It is now represented by counsel. But intercourse is prohibited by law between subjects of Austria-Hungary outside the United States and persons in the United States. Trading with the Enemy Act of October 6, 1917, c. 106, § 3 (c), 40 Stat. 412, Public—No. 91—65th Congress. And we take notice of the fact that free intercourse between residents of the two countries has been also physically impossible. It is true that, more than three years ago, a stipulation as to the facts and the proof of foreign law was entered into by the then counsel for respondent, who has died since. But reasons may conceivably exist why that stipulation ought to be discharged or modified, or why it should be supplemented by evidence. We cannot say that, for the proper conduct of the defense, consultation between client and counsel and intercourse between their respective countries may not be essential even at this stage. The war precludes this.

Under these circumstances, we are of opinion that the decree dismissing the libel should be set aside and the case remanded to the District Court for further proceedings, but that no action should be taken there (ex-

cept such, if any, as may be required to preserve the security and the rights of the parties in statu quo) until, by reason of the restoration of peace between the United States and Austria-Hungary, or otherwise, it may become *possible for the respondent to present its defense adequately. Compare *The Kaiser Wilhelm II* (C. C. A.) 246 Fed. 786, L. R. A. 1918C, 795; *Robinson & Co. v. Continental Insurance Company of Mannheim*, [1915] 1 K. B. 155, 161-162.

Reversed.

(248 U. S. 1)

PITTSBURGH MELTING CO. v. TOTTEN,
Inspector of Bureau of Animal Industry.

(Argued April 22, 1918. Decided Nov. 4, 1918.)

No. 28.

1. FOOD $\Leftrightarrow$ 3 — INSPECTION — "MEAT-FOOD PRODUCTS"—OLEO OIL.

Oleo oil made from slaughtered beeves, though by itself seldom used as food, being largely used in oleomargarine, is within Meat Inspection Acts, requiring as a condition to interstate or foreign shipment that "meat-food products" be inspected and passed by Department of Agriculture, unless denatured under its regulations.

2. FOOD $\Leftrightarrow$ 1 — INTERSTATE AND FOREIGN SHIPMENTS—INSPECTION OF FOOD PRODUCTS.

Meat Inspection Acts, requiring meat-food products to be inspected and passed as a condition to interstate or foreign shipment, are within the power of Congress.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Suit by the Pittsburgh Melting Company against G. E. Totten, Inspector of the Bureau of Animal Industry of the Department of Agriculture. Decree for complainant was reversed by the Circuit Court of Appeals (232 Fed. 694, 146 C. C. A. 620), and complainant appeals. Affirmed.

Messrs. Samuel McClay and David A. Reed, both of Pittsburgh, Pa., for appellant.

Mr. Assistant Attorney General, for appellee.

*Mr. Justice DAY delivered the opinion of the Court.

The Pittsburgh Melting Company filed a bill in the District Court of the United States for the Western District of Pennsylvania against the Baltimore & Ohio Railroad Company and G. E. Totten, Inspector of the Bureau of Animal Industry of the Department of Agriculture, seeking a mandatory injunction requiring the Railroad Company to receive and carry in interstate and foreign commerce shipments of oil, the manufacture of the Melting Company, and to restrain the government inspector from interfering with the shipments.

A decree in favor of the complainant was rendered in the District Court. 229 Fed. 214. Upon appeal this decree was reversed by the Court of Appeals, and the cause re-

manded to the District Court, with directions to dismiss the bill. 232 Fed. 694, 146 C. C. A. 620.

The case arises under the Meat Inspection Acts. Act June 30, 1906, c. 3913, 34 Stat. 674, and Act March 4, 1907, c. 2907, 34 Stat. 1260, 1265. The act provides an elaborate system of inspection of animals before slaughter, and of carcasses after slaughter and of meat-food products, with a view to prevent the shipment of impure, unwholesome, and *unfit meat and meat-food products in interstate and foreign commerce. The act in part provides:

"That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose an examination and inspection of all meat-food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and for the purposes of any examination and inspection said inspectors shall have access at all times, by day or night, whether the establishment be operated or not, to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as 'Inspected and Passed' all such products found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat or meat-food products unsound, unhealthful, unwholesome, or unfit for human food; and said inspectors shall label, mark, stamp, or tag as 'Inspected and Condemned' all such products found unsound, unhealthful, and unwholesome, or which contain dyes, chemicals, preservatives, or ingredients which render such meat or meat-food products unsound, unhealthful, unwholesome, or unfit for human food, and all such condemned meat-food products shall be destroyed for food purposes, as hereinbefore provided, and the Secretary of Agriculture may remove inspectors from any establishment which fails to so destroy such condemned meat-food products. * * *"

And the act further provides:

"That on and after October first, nineteen hundred and six, no person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one state or territory or the District of Columbia, to any state or territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat-food products thereof, which have not been inspected, examined, and marked as 'Inspected and Passed,' in accordance with the terms of this act and with the rules and regulations prescribed by the Secretary of Agriculture. * * *"

The facts appearing of record so far as we deem them necessary to the decision of the case are:

The Melting Company has long been engaged in rendering or converting animal fats into various products, including the oil which is the subject-matter of this controversy. At one time the company made oleomargarine, but owing to adverse legislation of the state of Pennsylvania desisted from doing so. Government inspectors were in the works of the Melting Company and inspected and marked the products until 1909 when a controversy

arose between the company and the government officers as to the purchase of the fats used by the company. Upon refusal to comply with the orders of such officers, inspection was withdrawn. Whether this action was right or not we do not stop to enquire, since the claim for relief is based upon the allegation that complainant's oil is not a meat-food product within the meaning of the statute.

After inspection was withdrawn the company continued to ship its oil, but did so under the then regulations of the Department of Agriculture concerning the shipment of fat for industrial use, as "inedible," and so marking the receptacle containing the same and making the certificate then required by the Department of Agriculture that it was inedible and not intended for food purposes. On November 1, 1914, the Department adopted a new regulation requiring a certificate to accompany the shipment of such fats claimed not to be food products, stating that the same "is not capable of being used as food by man, is suitable only for industrial purposes, is not for food purposes, and is of such character or for *such a use that denaturing is impracticable." The regulation permits the shipment of oil for industrial uses after it is "denatured"; that is, treated with a substance which renders it unfit for food, while still fit for use in industrial purposes. The Melting Company refused to make this certificate, which resulted in the notice to the Railroad Company to refuse to carry the oil, and brought about this suit to compel the carrier to receive and transport it.

The District Court found that the oil manufactured and shipped by the Melting Company was not within the terms of the act, as it was not a meat-food product, which is prohibited from shipment without inspection. The reasons for reaching that conclusion are set forth in the opinion of the District Judge. 229 Fed. 214, supra. The Circuit Court of Appeals reached the opposite conclusion upon the testimony adduced. 232 Fed. 694, 146 C. C. A. 620, supra.

[1] An examination of the record satisfies us that the Circuit Court of Appeals reached the right conclusion. The oil here in controversy, the testimony shows, is generally known as "oleo" oil, and is not "tallow" oil as that term is generally understood by the trade. Both oils are made from the fat of slaughtered beves. Oleo oil by itself is seldom used as a food. It is, however, largely used in the manufacture of oleomargarine. In fact it constitutes a large percentage of that product.

It is used in cooking for shortening purposes. Made as it is by the Melting Company it has no quality which prevents its use for such food purposes. It is not a tallow oil, distasteful and unfit to use in the making of food products. Without elaborating the discussion, we reach the conclusion that this product was clearly a "meat-food product," within the meaning of the statute. It is true that the Melting Company does not sell it as such, and now marks it as "inedible." But that does not change the fact that a main use of such oil is in making edible products. The company has no control over the use of the oil after it is shipped, and the record *does not disclose what use is made of a large percentage of its product which was shipped abroad at the time this action was begun.

[2] The enactment of the statute was within the power of Congress in order to prevent interstate and foreign shipment of impure or adulterated meat-food products. The statute does not specifically define a meat-food product. In our view the product of the Melting Company is a meat-food product in the sense of the use of those terms in the statute and as such subject to the regulations of the Secretary of Agriculture. It being such meat-food product the Melting Company could not truthfully claim that it was not capable of being used as food by man, and hence could not make the certificate required.

The theory of the bill is that the product in question was not within the terms of the act; the District Court reached the conclusion that this theory was the correct one, and so rendered a decree which required the Railroad Company to receive the oil for transportation in interstate and foreign commerce, without inspection, when labelled "inedible," and accompanied by the certificate of the Melting Company that such oil is inedible and not intended for food purposes and is of such a character that denaturing is impossible or will render the oil unavailable for the desired industrial use. This decree is consistent only with the finding of the District Court that the product was not a meat-food product within the meaning of the statute.

As we have said, we think the record shows, as found by the Circuit Court of Appeals, that the oil made and offered for shipment by the Melting Company was a meat-food product, and hence subject to the regulation of the statute requiring inspection before shipment. The decree requiring such oil to be shipped without inspection was properly reversed.

Affirmed.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1918.

(248 U. S. 587)

No. 236. The UNITED STATES of America, plaintiff in error, v. The FEDERAL PUBLISHING COMPANY; and

No. 237. The UNITED STATES of America, plaintiff in error, v. The BUTTERICK COMPANY. Oct. 8, 1918. In error to the District Court of the United States for the Southern District of New York. For opinion below, see 240 Fed. 539. Mr. Attorney General Todd and Mr. Assistant Attorney General, for the United States. Dismissed, on motion of Mr. Assistant to the Attorney General Todd for the plaintiff in error.

(248 U. S. 587)

No. 693. The BRUNSWICK-BALKE-CLENDER COMPANY, appellant, v. Walter H. EVANS et al. Oct. 8, 1918. Appeal from the District Court of the United States for the District of Oregon. For opinion below, see 228 Fed. 991. Mr. Frederick S. Tyler, of Washington, D. C., for appellees. Docketed and dismissed with costs, on motion of Mr. Frederick S. Tyler, for the appellees.

(248 U. S. 532)

No. —, original. Ex parte In the matter of Charles W. COON, petitioner. Oct. 21, 1918. Motion for leave to file petition for writ of habeas corpus denied.

No. —, original. Ex parte In the matter of WHITNEY STEAMBOAT CORPORATION, petitioner. Oct. 21, 1918. Motion for leave to file petition for writ of prohibition granted, and rule to show cause awarded returnable Monday, December 9, 1918.

(248 U. S. 587)

No. 5. INTERNATIONAL HARVESTER COMPANY OF NEW JERSEY et al., appellants, v. The UNITED STATES. Oct. 21, 1918. Appeal from the District Court of the United States for the District of Minnesota. For opinion below, see 214 Fed. 987. Messrs. John P. Wilson and Edgar A. Bancroft, both of Chicago, Ill., and Wm. D. McHugh, of Omaha, Neb., for appellants. The Attorney General, for the United States. Dismissed and mandate granted, on motion of counsel for the appellants.

(248 U. S. 588)

No. 39. Joseph HOLT et al., appellants, v. SUPREME LODGE, KNIGHTS OF PYTHIAS. Oct. 21, 1918. Appeal from the United States Circuit Court of Appeals for the Seventh Circuit. For opinion below, see 235 Fed. 885, 149 C. C. A. 197. Messrs. Elmer H. Adams, of Chicago, Ill., and Henry L. Lazarus and David Sessler, both of New Orleans, La., for appellants. Mr. Sol. H. Esarey, of Indianapolis, Ind., for appellee. Dismissed with costs, on motion of counsel for the appellants.

(248 U. S. 588)

No. 103. The ANN ARBOR RAILROAD COMPANY, appellant, v. Cassius L. GLASGOW et al. Oct. 21, 1918. Appeal from the District Court of the United States for the

Eastern District of Michigan. For opinion below, see 236 Fed. 387. Messrs. Alexander L. Smith, of Toledo, Ohio, Joseph B. Cotton, of New York City, and Chauncey C. Colton, of Duluth, Minn., for appellant. Mr. Grant Fellows, of Hudson, Mich., for appellees. Dismissed without costs to either party per stipulation.

(248 U. S. 588)

No. 110. NORFOLK SOUTHERN RAILROAD COMPANY, plaintiff in error, v. William L. WHITEHURST. Oct. 21, 1918. In error to the Supreme Court of Appeals of the State of Virginia. For opinion below, see 117 Va. 542, 85 S. E. 458. Mr. James G. Martin, of Norfolk, Va., for plaintiff in error. Mr. Sigmund M. Brandt, of Norfolk, Va., for defendant in error. Dismissed each party to pay their own costs per stipulation.

(248 U. S. 589)

No. 133. H. S. MCGOWAN et al., plaintiffs in error, v. EAGLE CLIFF FISHING COMPANY. Oct. 21, 1918. In error to the Supreme Court of the State of Oregon. For opinion below, see 70 Or. 1, 137 Pac. 766. Messrs. Franklin T. Griffith and Bert W. Henry, both of Portland, Or., for plaintiffs in error. Mr. C. W. Fulton, of Portland, Or., for defendant in error. Dismissed without costs to either party per stipulation.

(248 U. S. 531)

No. 135. RED JACKET, JR., COAL COMPANY, et al., appellants, v. UNITED THACKER COAL COMPANY. Oct. 21, 1918. Appeal from the District Court of the United States for the Southern District of West Virginia. See, also, 232 Fed. 49, 146 C. C. A. 241. Messrs. John H. Holt, of Huntington, W. Va., and E. Spencer Miller, of Philadelphia, Pa., for appellants. Messrs. C. W. Campbell, of Huntington, W. Va., Malcolm Jackson, of Charleston, W. Va., and Arthur S. Dayton, of Philippi, W. Va., for appellee.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Equitable Life Assurance Soc. v. Brown, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co., 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; Brolan v. United States, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; (2) Louisville & Nashville R. Co. v. Western Union Telegraph Co., 234 U. S. 369, 34 Sup. Ct. 810, 58 L. Ed. 1356; Male v. Atchison, etc., Ry. Co., 240 U. S. 97, 36 Sup. Ct. 351, 60 L. Ed. 544; (3) Shapiro v. United States, 235 U. S. 412, 35 Sup. Ct. 122, 59 L. Ed. 291. See Omaha Baum Iron Stove Co. v. Moline Plow Co., 244 U. S. 650, 37 Sup. Ct. 743, 61 L. Ed. 1371.

(248 U. S. 588)

No. 140. Arthur A. BONVILLAIN, petitioner, v. H. B. HOWELL, trustee, etc. Oct. 21, 1918. On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. For decisions below, see 232 Fed. 370; 237 Fed. 1015, 150 C. C. A. 660. Mr. H. Generes Dufour, of New Orleans, La., for pe-

tioner. Mr. E. A. O'Sullivan, of New Orleans, La., for respondent. Dismissed with costs per stipulation.

No. 202. SOUTHERN OREGON COMPANY, appellant, v. THE UNITED STATES. Oct. 21, 1918. Mr. John M. Gearin, of Portland, Or., for appellant. The Attorney General for the United States. Joint motion for leave to file petition in United States District Court for an order granting leave to sell certain timber granted.

No. 239. The DENVER & RIO GRANDE RAILROAD COMPANY, plaintiff in error, v. Oresta DA VELLA, Royal Italian consul, as administrator, etc. Oct. 21, 1918. Mr. Elroy N. Clark, of Denver, Colo., for plaintiff in error. Mr. F. W. Sanborn, of Denver, Colo., for defendant in error. Motion for leave to amend points relied on and for leave to print additional parts of the transcript of record herein granted without prejudice.

(248 U. S. 589)

No. 257. Ada T. CUSHING, executrix, etc., plaintiff in error, v. John H. WHALEY et al. Oct. 21, 1918. In error to the Supreme Court of the State of Oklahoma. See, also, 165 Pac. 135. Mr. D. M. Tibbetts, of Guthrie, Okl., for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(248 U. S. 558)

No. 442. The PENNSYLVANIA RAILROAD COMPANY, petitioner, v. Alice Frances BROWN et al. Oct. 21, 1918. For opinion below, see 250 Fed. 513. Messrs. Charles E. Hughes, of New York City, Francis I. Gowen, of Philadelphia, Pa., Frederic D. McKenney, of Washington, D. C., and John Hampton Barnes, of Philadelphia, Pa., for petitioner. Mr. T. R. White, of Philadelphia, Pa., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(248 U. S. 558)

No. 454. HUBBARD-ZEMURRAY STEAMSHIP COMPANY, petitioner, v. AKTIESELSKABET STAVANGEREN. Oct. 21, 1918. For opinion below, see 250 Fed. 67. Mr. Thomas J. Freeman, of New Orleans, La., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(248 U. S. 558)

Nos. 459 and 460. COLUMBIA-KNICKERBOCKER TRUST COMPANY, petitioner, v. Edwin Hale ABBOT;

Nos. 461 and 462. COLUMBIA-KNICKERBOCKER TRUST COMPANY, petitioner, v. Preston B. KEITH;

Nos. 463 and 464. COLUMBIA-KNICKERBOCKER TRUST COMPANY, petitioner, v. John S. AMES;

No. 465. COLUMBIA-KNICKERBOCKER TRUST COMPANY, petitioner, v. Maria A. EVANS, executrix;

Nos. 466 and 467. COLUMBIA-KNICKERBOCKER TRUST COMPANY, petitioner, v. George E. KEITH;

Nos. 468 and 469. COLUMBIA-KNICKERBOCKER TRUST COMPANY, petitioner, v. Mary O. CORDINGLY; and

Nos. 470 and 471. COLUMBIA-KNICKERBOCKER TRUST COMPANY, petitioner, v. F. Lothrop AMES. Oct. 21, 1918. For opinion below, see 247 Fed. 833. Messrs. Robert M. Morse, of Boston, Mass., and Julien T. Davies,

of New York City, for petitioner. Petitions for writs of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(248 U. S. 551)

No. 472. PHILADELPHIA, BALTIMORE & WASHINGTON RAILROAD COMPANY, petitioner, v. Alfred H. SMITH. Oct. 21, 1918. For opinion below, see 103 Atl. 945. See, also, 38 Sup. Ct. 582, 63 L. Ed. —. Messrs. Frederic D. McKenney and John Spalding Flannery, both of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the State of Maryland granted.

(248 U. S. 558)

No. 477. Stanley POLLUCK, petitioner, v. The MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY. Oct. 21, 1918. For opinion below, see 166 N. W. 641. Mr. Humphrey Barton, of St. Paul, Minn., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of South Dakota denied.

(248 U. S. 559)

No. 478. BLACK MOUNTAIN RAILWAY COMPANY, petitioner, v. Leona MUMPOWER, administratrix, etc. Oct. 21, 1918. For opinion below, see 174 N. C. 742, 94 S. E. 515. Mr. Murray Allen, of Raleigh, N. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied.

(248 U. S. 559)

No. 483. UNION TOOL COMPANY, petitioner, v. Elihu C. WILSON. Oct. 21, 1918. For opinion below, see 249 Fed. 736. Messrs. S. S. Gregory, of Chicago, Ill., and Frederick S. Lyon, of Los Angeles, Cal., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(248 U. S. 559)

No. 484. UNION TOOL COMPANY et al., petitioners, v. WILSON & WILLARD MANUFACTURING COMPANY. Oct. 21, 1918. For opinion below, see 249 Fed. 729. Messrs. S. S. Gregory, of Chicago, Ill., and Frederick S. Lyon, of Los Angeles, Cal., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(248 U. S. 552)

No. 485. WILLIAM KINZELL, petitioner, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY. Oct. 21, 1918. For opinion below, see 171 Pac. 1136. Mr. John P. Gray, of Coeur D'Alene, Idaho, for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Idaho granted.

(248 U. S. 559)

No. 488. THE NEW YORK CENTRAL RAILROAD COMPANY, petitioner, v. William P. GALLAGHER, as guardian of Anna L. Gearrity et al. Oct. 21, 1918. For decision below, see 180 App. Div. 88, 167 N. Y. Supp. 480, order affirmed 222 N. Y. 649, 119 N. E. 1044. Mr. Robert E. Whalen, of Albany, N. Y., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(248 U. S. 560)

No. 489. GULFPORT TOWING COMPANY, Claimant, etc., petitioner, v. The OLLINGER & BRUCE DRY DOCK COMPANY. Oct. 21, 1918. Mr. Palmer Pillans, of Mobile, Ala., for petitioner. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

For opinion below, see *The Gulfport*, 250 Fed. 577, 162 C. C. A. 593.

(248 U. S. 560)

No. 490. Claude A. P. TURNER, petitioner, v. LAUTER PIANO COMPANY et al. Oct. 21, 1918. For opinion below, see 248 Fed. 930. Mr. Frank A. Whiteley, of Minneapolis, Minn., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(248 U. S. 560)

No. 495. J. Carey KING, petitioner, v. Fred B. RHODES. Oct. 21, 1918. Mr. William Meyer Lewin, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(248 U. S. 560)

No. 503. Herbert E. EDWARDS, petitioner, v. The UNITED STATES of America. Oct. 21, 1918. For opinion below, see 249 Fed. 686. Messrs. Luther Day, of Cleveland, Ohio, and Rufus S. Day, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(248 U. S. 561)

No. 518. Lawrence F. CONNOLLY, administrator, etc., et al., petitioners, v. Celia DIAMOND et al. Oct. 21, 1918. For opinion below see 251 Fed. 234. Mr. Charles W. Beale, of Wallace, Idaho, for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(248 U. S. 561)

No. 520. GRAND RAPIDS & INDIANA RAILWAY COMPANY, petitioner, v. The UNITED STATES of America. Oct. 21, 1918. See, also, 249 Fed. 646, 650. Messrs. James H. Campbell, of Grand Rapids, Mich., and Frederic D. McKenney, of Washington, D. C., for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(248 U. S. 531)

No. 544. D. M. PHILLIPS et al., plaintiffs in error, v. W. O. MITCHELL et al. Oct. 21, 1918. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 172 Pac. 85. Mr. Milton Brown, of Oklahoma City, Okl., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; *Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co.*, 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544.

(248 U. S. 589)

No. 9, original. The STATE OF MISSOURI, complainant, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. Oct. 28, 1918. Messrs. John T. Barker, of Kansas City, Mo., and Frank W. McAllister, of Paris, Mo., for complainant. Judgment entered as per stipulation of counsel.

(248 U. S. 590)

No. 34. The SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY, plaintiff in error, v. The CITY OF DALLAS, TEX-

AS. Oct. 28, 1918. In error to the Court of Civil Appeals of the Fifth Supreme Judicial District of the State of Texas. For opinion below, see 174 S. W. 636. Messrs. A. P. Wozencraft and S. P. English, both of Dallas, Tex., for plaintiff in error. Messrs. Horace Chilton and Royall R. Watkins, both of Dallas, Tex., for defendant in error. Dismissed, per stipulation.

(248 U. S. 589)

No. 376. William B. BALES, plaintiff in error, v. The UNITED STATES of America. Oct. 28, 1918. In error to the District Court of the United States for the Southern District of New York. Mr. Harry Weinberger, of New York City, for plaintiff in error. Mr. Attorney General Todd and Mr. Assistant Attorney General, for the United States. Judgment reversed upon confession of error, and cause remanded for further proceedings, on motion of Mr. Assistant to the Attorney General Todd for the defendant in error.

(248 U. S. 590)

No. 421. CAMP BIRD, Limited, petitioner, v. Frank W. HOWBERT, as Collector, etc. Oct. 28, 1918. On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 249 Fed. 27. Mr. William V. Hodges, of Denver, Colo., for petitioner. Mr. Attorney General Todd and Mr. Assistant Attorney General, for the United States. Judgment reversed with costs upon confession of error, and cause remanded for further proceedings, on motion of Mr. Assistant to the Attorney General Todd for the respondent.

(248 U. S. 561)

No. 498. HOUSTON OIL COMPANY of TEXAS et al., petitioners, v. The STATE OF TEXAS et al. Oct. 28, 1918. For opinion below, see 250 Fed. 572. Mr. Thomas W. Kennerly, of Knoxville, Tenn., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(248 U. S. 561)

No. 501. The PENNSYLVANIA RAILROAD COMPANY, petitioner, v. Mary Ellen LONG, administratrix, etc. Oct. 28, 1918. Messrs. Frederic D. McKenney and John Spalding Flannery, both of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(248 U. S. 552)

No. 528. R. C. LEE, petitioner, v. CENTRAL OF GEORGIA RAILWAY COMPANY et al. Oct. 28, 1918. For opinion below, see 95 S. E. 718. Messrs. William W. Osborne and Alexander A. Lawrence, both of Savannah, Ga., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the State of Georgia granted.

(248 U. S. 552)

No. 529. Elizabeth HULL, administratrix, etc., petitioner, v. The PHILADELPHIA & READING RAILWAY COMPANY. Oct. 28, 1918. For opinion below, see 104 Atl. 274. Mr. Harvey R. Spessard, of Hagerstown, Md., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the State of Maryland granted.

(248 U. S. 561)

No. 530. NORTH MICHIGAN WATER COMPANY, petitioner, v. CITY OF ESCANABA et al. Oct. 28, 1918. For opinion below, see 165 N. W. 847. Mr. Arthur H. Ryall, of

Escanaba, Mich., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied.

(248 U. S. 562)

No. 533. GEE WOE, petitioner, v. The UNITED STATES of America. Oct. 28, 1918. For opinion below, see 250 Fed. 428. Mr. W. J. Waguespack, of New Orleans, La., for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(248 U. S. 562)

No. 535. Louis A. MEYRAN, petitioner, v. J. H. WATT, trustee in bankruptcy of H. M. Lasker & Company. Oct. 28, 1918. For opinion below, see *In re H. M. Lasker Co.*, 251 Fed. 53. Mr. William Macrum, of Pittsburgh, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(248 U. S. 552)

No. 542. The WESTERN UNION TELEGRAPH COMPANY, petitioner, v. George M. BROWN, executor, etc., et al. Oct. 28, 1918. Messrs. Rush Taggart, of New York City, and Beverly L. Hodghead, of San Francisco, Cal., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted. For opinion below, see *Western Union Telegraph Co. v. Lange*, 248 Fed. 656, 160 C. C. A. 556.

(248 U. S. 562)

No. 550. The UNION SAVINGS BANK & TRUST COMPANY OF CINCINNATI, Trustee, petitioner, v. George FEICK et al. Oct. 28, 1918. For opinion below, see 250 Fed. 185. Mr. Edmund B. King, of Sandusky, Ohio, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(248 U. S. 562)

No. 552. RIVER SAND & GRAVEL COMPANY, petitioner, v. BOARD OF COMMISSIONERS OF PORT OF NEW ORLEANS, Claimant, etc., et al. Oct. 28, 1918. Messrs. John D. Grace, of New Orleans, La., and Frederick S. Tyler, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied. For opinion below, see *The Dixie*, 249 Fed. 46, 161 C. C. A. 106.

(248 U. S. 563)

No. 555. Jessie G. DARROW, petitioner, v. POSTAL TELEGRAPH CABLE COMPANY. Oct. 28, 1918. For opinion below, see 250 Fed. 581. Mr. Frank W. Hackett, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(248 U. S. 563)

No. 557. Charles W. MAYER, petitioner, v. A. and H. G. MUTSCHLER et al. Oct. 28, 1918. For opinion below, see 248 Fed. 911. Mr. Martin Clark, of Buffalo, N. Y., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(248 U. S. 563)

No. 562. Newton MIDKIFF, petitioner, v. Sabin W. COLTON, Jr., et al., trustees, etc. Oct. 28, 1918. For opinions below, see 242 Fed. 373, 155 C. C. A. 149; 252 Fed. 420. Mr. Maynard F. Stiles, of Charleston, W. Va., for

petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(248 U. S. 553)

No. 567. REDERIAKTIEBOLAGET ATLANTEN, petitioner, v. AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET. Oct. 28, 1918. For opinion below, see 250 Fed. 935. Mr. John W. Griffin, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(248 U. S. 553)

No. 568. George A. COLE et al., petitioners, v. Joseph RALPH. Oct. 28, 1918. For opinion below, see 249 Fed. 81. Mr. William C. Prentiss, of Washington, D. C., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(248 U. S. 553)

No. 569. George A. COLE et al., petitioners, v. Joseph RALPH. Oct. 28, 1918. For opinion below, see 249 Fed. 81. Mr. William C. Prentiss, of Washington, D. C., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(248 U. S. 563)

No. 570. HARLEY-DAVIDSON MOTOR COMPANY et al., petitioners, v. Frederick S. ELLETT et al. Oct. 28, 1918. Messrs. E. Hayward Fairbanks, of Philadelphia, Pa., and William S. Hodges, of Washington, D. C., for petitioners. Mr. Charles L. Sturtevant, of Washington, D. C., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. For opinion below, see *Eclipse Mach. Co. v. Harley-Davidson Motor Co.*, 252 Fed. 805, 164 C. C. A. 645.

(248 U. S. 553)

No. 571. SEABOARD AIR LINE RAILWAY COMPANY, petitioner, v. Mrs. Lessie HORTON, administratrix, etc. Oct. 28, 1918. For opinion below, see 175 N. C. 472, 95 S. E. 883. Mr. Thaddeus A. Adams, of Charlotte, N. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina granted.

(248 U. S. 564)

No. 573. Louis MALVIN et al., petitioners, v. The UNITED STATES of America. Oct. 28, 1918. For opinion below, see 252 Fed. 449. Mr. Louis Marshall, of New York City, for petitioners. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(248 U. S. 564)

Nos. 574 and 575. David H. E. JONES and Howard E. Jones, copartners, etc., et al., petitioners, v. The UNITED STATES of America upon the relation of PRESSPRICH & SON COMPANY. Oct. 28, 1918. Mr. Frederick M. Brown, of New York City, for petitioners. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. For opinion below, see *United States v. James W. Elwell & Co.*, 250 Fed. 939, 163 C. C. A. 189.

(248 U. S. 564)

No. 579. Martha E. WHITAKER, individually and as executrix, etc., petitioner, v. The WHITAKER IRON COMPANY et al. Oct. 28, 1918. For opinion below, see 249 Fed. 531. Mr. Eugene Sweeney, of New York City, for

petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(248 U. S. 564)

No. 582. Clarence P. BROWNING, petitioner, v. FIDELITY TRUST COMPANY. Oct. 28, 1918. For opinion below, see 250 Fed. 321. Mr. Charles Trowbridge Tittmann, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(248 U. S. 564)

No. 583. The STATE of OHIO on the relation of The HARTFORD LIFE INSURANCE COMPANY, petitioner, v. Robert H. LANGDALE et al. Oct. 28, 1918. Messrs. Harry B. Arnold, of Columbus, Ohio, and James C. Jones, George F. Haid, and James C. Jones, Jr., all of St. Louis, Mo., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied. For opinion below, see 98 Ohio St. 470, 121 N. E. 903.

(248 U. S. 565)

No. 586. Nellie HODGE, as administratrix, etc., et al., petitioners, v. Arthur L. MEYER et al. Oct. 28, 1918. For opinion below, see 252 Fed. 479. Mr. Jules Chopak, of New York City, for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(248 U. S. 565)

No. 587. Ernest G. WALKER, petitioner, v. Genevieve K. GISH. Oct. 28, 1918. Mr. S. Herbert Giesy, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(248 U. S. 565)

No. 588. REICHERT TOWING LINE, Inc., petitioner, v. HOME INSURANCE COMPANY et al. Oct. 28, 1918. For opinion below, see 251 Fed. 214. Mr. Francis Martin, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(248 U. S. 565)

No. 589. REICHERT TOWING LINE, Inc., petitioner, v. Jacob RICE. Oct. 28, 1918. For opinion below, see 251 Fed. 214. Mr. Francis Martin, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(248 U. S. 566)

No. 590. William SNYDER, petitioner, v. Annie SNYDER, use of William L. Hunt. Oct. 28, 1918. For opinion below, see 261 Pa. 257, 104 Atl. 603. Mr. James B. Reilly, of Pottsville, Pa., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania denied.

(248 U. S. 564)

No. 591. The UNITED STATES of America, petitioner, v. Suda REYNOLDS. Oct. 28, 1918. For opinion below, see 252 Fed. 65. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(248 U. S. 566)

No. 593. The PENNSYLVANIA RAILROAD COMPANY et al., petitioners, v. NAAM LOOZE VENNOOT SCHAP et al. Oct. 28, 1918. Messrs. Frederic D. McKenney, of Washington, D. C., and Shirley Carter, of Baltimore,

Md., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. For opinion below, see 252 Fed. 35, 164 C.C.A. 147.

(248 U. S. 566)

No. 594. The PENNSYLVANIA RAILROAD COMPANY et al., petitioners, v. Edwin DYASON, master, etc. Oct. 28, 1918. For opinion below, see 252 Fed. 978. Messrs. Frederic D. McKenney, of Washington, D. C., and Shirley Carter, of Baltimore, Md., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(248 U. S. 566)

No. 596. Claude A. P. TURNER, petitioner, v. DEERE & WEBBER BUILDING COMPANY et al. Oct. 28, 1918. For opinion below, see 249 Fed. 752. Mr. Frank A. Whiteley, of Minneapolis, Minn., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(248 U. S. 567)

No. 600. Frank W. DARLING, plaintiff in error, v. CITY of NEWPORT NEWS. Oct. 28, 1918. Mr. John Winston Read, of Newport News, Va., for plaintiff in error. Petition for a writ of certiorari herein denied.

(248 U. S. 567)

No. 601. PACIFIC MAIL STEAMSHIP COMPANY, petitioner, v. PANAMA RAILROAD COMPANY. Oct. 28, 1918. For opinion below, see 251 Fed. 449. Mr. J. Parker Kirlin, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(248 U. S. 567)

No. 602. A. C. ROBINSON, trustee, etc., petitioner, v. SEABOARD NATIONAL BANK OF NEW YORK. Oct. 28, 1918. For opinion below, see 247 Fed. 667, 1007. Mr. Alvin A. Morris, of Pittsburgh, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(248 U. S. 567)

No. 603. A. C. ROBINSON, trustee, etc., petitioner, v. J. H. PURDY. Oct. 28, 1918. Mr. Alvin A. Morris, of Pittsburgh, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. For opinion below, see Robinson v. Seaboard Nat. Bank of New York, 247 Fed. 667, 159 C. C. A. 569.

(248 U. S. 568)

No. 604. A. C. ROBINSON, trustee, etc., petitioner, v. Edward W. HUTCHINS and Henry Wheeler, trustee, etc. Oct. 28, 1918. Mr. Alvin A. Morris, of Pittsburgh, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied. For opinion below, see Robinson v. Seaboard Nat. Bank of New York, 247 Fed. 667, 159 C. C. A. 569.

(248 U. S. 568)

No. 605. GRAND TRUNK RAILWAY COMPANY of CANADA, petitioner, v. MT. CLEMENS SUGAR COMPANY. Oct. 28, 1918. For opinion below, see 200 Mich. 33, 166 N. W. 531. Mr. Harrison Geer, of Detroit, Mich., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied.

(248 U. S. 568)

No. 610. Paul WIERSE and Johann Klatenhoff, petitioners, v. The UNITED STATES of America. Oct. 28, 1918. For opinion below, see 252 Fed. 435. Mr. Frank J. Hogan, of Washington, D. C., for petitioners. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(248 U. S. 568)

No. 612. R. McCulloch DICK, petitioner, v. Anton HOHMANN, Acting Chief of Police of Manila. Oct. 28, 1918. Messrs. W. A. Kincaid, of Manila, P. I., and Alex. Britton, and Evans Browne, both of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(248 U. S. 569)

No. 613. The MONTEZUMA VALLEY IRRIGATION DISTRICT et al., petitioners, v. Mark NORRIS et al. Oct. 28, 1918. For opinion below, see 248 Fed. 369. Mr. B. W. Ritter, of Durango, Colo., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(248 U. S. 554)

No. 614. MECCANO, Limited, petitioner, v. JOHN WANAMAKER, NEW YORK. Oct. 28, 1918. For opinion below, see 250 Fed. 450. Messrs. Reeves Lewis and W. B. Kerkam, both of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(248 U. S. 532)

No. 615. COUNTY of ROCK ISLAND et al., plaintiffs in error, v. Edmund M. DUNNE, Catholic bishop of the diocese of Peoria. Oct. 28, 1918. In error to the Supreme Court of the State of Illinois. For opinion below, see 283 Ill. 628, 119 N. E. 591. Mr. C. J. Searle, of Rock Island, Ill., for plaintiffs in error. Mr. George I. Haight, of Chicago, Ill., for defendant in error.

PER CURIAM: Dismissed for the want of jurisdiction upon the authority of (1) Cuyahoga River Power Company v. Northern Realty Company, 244 U. S. 300, 303, 37 Sup. Ct. 643, 61 L. Ed. 1153; Bilby v. Stewart, 246 U. S. 255, 38 Sup. Ct. 264, 62 L. Ed. 701; (2) Equitable Life Assurance Society v. Brown, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; Consolidated Turnpike Company v. Norfolk, etc., Railway Company, 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; Brolan v. United States, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544.

(248 U. S. 554)

No. 618. The BOARD OF PUBLIC UTILITY COMMISSIONERS, petitioner, v. YUCHAUSTI & COMPANY et al. Oct. 28, 1918. Mr. Edward S. Bailey, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands granted.

(248 U. S. 554)

No. 619. Michael U. BOEHMER, petitioner, v. PENNSYLVANIA RAILROAD COMPANY. Oct. 28, 1918. For opinion below, see 252 Fed. 553. Mr. Edwin C. Brandenburg, of Washington, D. C., for petitioner. Mr. Frederic D. McKenney, of Washington, D. C., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(248 U. S. 569)

Nos. 621 and 622. John A. S. BROWN et al., petitioners, v. Austin B. FLETCHER, as testamentary trustee, etc., et al. Oct. 28, 1918. For opinion below, see 253 Fed. 15. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(248 U. S. 569)

No. 623. The TOLEDO & OHIO CENTRAL RAILWAY COMPANY, petitioner, v. The S. J. KIBLER & BROTHERS COMPANY. Oct. 28, 1918. For opinion below, see 119 N. E. 733. Mr. John H. Doyle, of Toledo, Ohio, for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Ohio denied.

(248 U. S. 569)

No. 626. BALTIMORE & OHIO RAILROAD COMPANY, petitioner, v. John E. FUTHEY and The Pennsylvania Company. Oct. 28, 1918. Mr. S. H. Tolles, of Cleveland, Ohio, for petitioner. Petition for a writ of certiorari to the Court of Appeals, Eighth Judicial District, State of Ohio, denied.

(248 U. S. 570)

No. 627. Teresa O. DE PREVOST, petitioner, v. Robert A. YOUNG. Oct. 28, 1918. Mr. Frank W. Hackett, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(248 U. S. 570)

No. 629. B. F. WERTZ, petitioner, v. David ROSS. Oct. 28, 1918. For opinion below, see 172 Pac. 968. Mr. D. M. Tibbetts, of Guthrie, Okla., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(248 U. S. 570)

No. 630. J. W. FERGUSON and J. C. Blanchard, appellants, v. BABCOCK LUMBER & LAND COMPANY. Oct. 28, 1918. Mr. Mark W. Brown, of Asheville, N. C., for appellants. Mr. John Franklin Shields, of Philadelphia, Pa., for appellee. Petition for a writ of certiorari herein denied.

(248 U. S. 570)

No. 631. Jacob LANDES, etc., petitioner, v. Paul KLOPSTOCK, etc. Oct. 28, 1918. For opinion below, see 252 Fed. 89. Mr. Ernest A. Bigelow, of New York City, for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(248 U. S. 570)

No. 632. Louis LIEBMAN and Nathan Liebman, copartners, etc., petitioners, v. Paul KLOPSTOCK, etc. Oct. 28, 1918. For opinion below, see 252 Fed. 89. Mr. Ernest A. Bigelow, of New York City, for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(248 U. S. 554)

No. 637. NEW YORK CENTRAL RAILROAD COMPANY, petitioner, v. Wilbur H. MOHNEY. Oct. 28, 1918. Petition for a writ of certiorari to the Court of Appeals of Lucas County, State of Ohio, granted.

(248 U. S. 555)

No. 639. The CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY et al., petitioners, v. Fred WARD. Oct. 28, 1918.

For opinion below, see 173 Pac. 212. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted.

(248 U. S. 571)

No. 640. LIFE PRESERVER SUIT COMPANY, Inc., petitioner, v. NATIONAL LIFE PRESERVER COMPANY et al. Oct. 28, 1918. For opinion below, see 252 Fed. 139. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(248 U. S. 571)

No. 643. Joseph COHEN, petitioner, v. The PEOPLE of the State of New York. Oct. 28, 1918. See, also, 223 N. Y. 406, 119 N. E. 886. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(248 U. S. 571)

No. 645. NEW ORLEANS, MOBILE & CHICAGO RAILROAD COMPANY, petitioner, v. HILL MANUFACTURING COMPANY. Oct. 28, 1918. For opinion below, see 117 Miss. 548, 78 South. 187. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied.

(248 U. S. 571)

No. 646. Samuel J. ROSENTHAL and Harry Himmelman, petitioners, v. The UNITED STATES of America. Oct. 28, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(248 U. S. 572)

No. 647. The NEW YORK CENTRAL RAILROAD COMPANY, petitioner, v. Kathryn G. KIMBALL, as administratrix, etc. Oct. 28, 1918. For decisions below, see 175 App. Div. 965, 161 N. Y. S. 1131; 120 N. E. 865. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

No. 650. David F. MITCHELL, petitioner, v. Harry MASON et al. Oct. 28, 1918. Motion for leave to proceed in forma pauperis denied. Motion for leave to complete transcript of record granted, without prejudice.

(248 U. S. 572)

No. 651. Paul H. KING and Dudley E. Waters, receivers, etc., petitioners, v. Edwin L. BOYD. Oct. 28, 1918. For opinion below, see 201 Mich. 436, 167 N. W. 901. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied.

(248 U. S. 555)

No. 653. ANA MARIA SUGAR COMPANY, petitioner, v. Tomas QUINONES. Oct. 28, 1918. For opinion below, see 251 Fed. 499. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted.

(248 U. S. 572)

No. 654. ERIE RAILROAD COMPANY, petitioner, v. William H. MAHLA. Oct. 28, 1918. Petition for a writ of certiorari to the Court of Appeals of Richland County, State of Ohio, denied.

(248 U. S. 572)

No. 655. LA CROSSE PLOW COMPANY, petitioner, v. Louis PAGENSTECHEER. Oct. 28, 1918. For opinion below, see 253 Fed. 46.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(248 U. S. 555)

No. 656. Leo WEIDHORN, petitioner, v. Benjamin A. LEVY, trustee, etc. Oct. 28, 1918. For opinion below, see 253 Fed. 28. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted.

(248 U. S. 572)

No. 657. CAMP BROTHERS & COMPANY, petitioner, v. PORTABLE WAGON DUMP & ELEVATOR COMPANY. Oct. 28, 1918. For opinion below, see 251 Fed. 603. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(248 U. S. 573)

No. 660. SOUTHERN PACIFIC COMPANY, claimant, etc., et al., petitioners, v. STAG LINE, Limited, claimant, etc. Oct. 28, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(248 U. S. 573)

No. 662. ALASKA STEAMSHIP COMPANY, petitioner, v. NATIONAL CARBON COMPANY. Oct. 28, 1918. For opinion below, see 251 Fed. 222. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(248 U. S. 573)

No. 665. BOSTON & ALBANY RAILROAD COMPANY, petitioner, v. Charles J. BJORNQUIST, by his next friend, Alfred Wiggin. Oct. 28, 1918. For opinion below, see 250 Fed. 929. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(248 U. S. 573)

No. 668. The YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY et al., petitioners, v. Philip S. CRAIG et al., executors, etc. Oct. 28, 1918. For opinion below, see 79 South. 102. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied.

(248 U. S. 555)

No. 671. POSTAL TELEGRAPH-CABLE COMPANY, petitioner, v. J. L. DICKERSON. Oct. 28, 1918. For decision below, see 79 South. 719. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi granted.

(248 U. S. 574)

No. 672. The STATE INDUSTRIAL COMMISSION of the STATE of NEW YORK, petitioner, v. CLARENCE P. HOWLAND COMPANY, Inc., et al. Oct. 28, 1918. For opinion below, see Sullivan v. Hudson Navigation Co., 182 App. Div. 152, 169 N. Y. Supp. 645; Doey v. Clarence P. Howland Co., 224 N. Y. 30, 120 N. E. 53. Petition for a writ of certiorari to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, denied.

(248 U. S. 574)

No. 673. The STATE INDUSTRIAL COMMISSION of STATE of NEW YORK, petitioner, v. JOHNSON LIGHTERAGE COMPANY et al. Oct. 28, 1918. For opinions below, see Sullivan v. Hudson Navigation Co., 182

App. Div. 152, 169 N. Y. Supp. 645; *Ander-son v. Johnson Lighterage Co.*, 120 N. E. 55. Petition for a writ of certiorari to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, denied.

(248 U. S. 574)

No. 674. *The STATE INDUSTRIAL COMMISSION OF STATE OF NEW YORK*, petitioner, v. *ROCK PLASTER MANUFACTURING COMPANY et al.* Oct. 28, 1918. For opinions below, see *Sullivan v. Hudson Navigation Co.*, 182 App. Div. 152, 169 N. Y. Supp. 645; *Keator v. Rock Plaster Mfg. Co.*, 120 N. E. 56. Petition for a writ of certiorari to the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, denied.

(248 U. S. 556)

No. 675. *PIEDMONT & GEORGES CREEK COAL COMPANY*, petitioner, v. *SEABOARD FISHERIES COMPANY*, claimant, etc. Oct. 28, 1918. For opinion below, see 253 Fed. 20. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted.

(248 U. S. 574)

No. 676. *Charles W. RICE*, petitioner, v. *The UNITED STATES of America.* Oct. 28, 1918. For opinion below, see 251 Fed. 778. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(248 U. S. 575)

No. 680. *Louisa B. SCHNEIDER* and *David Peltz*, petitioners, v. *The CITY OF NEW YORK et al.* Oct. 28, 1918. For opinions below, see 173 App. Div. 709, 160 N. Y. Supp. 111; 119 N. E. 1076. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

No. 700. *Coleman J. WARD et al.*, petitioners, v. *The BOARD of COUNTY COMMISSIONERS of LOVE COUNTY, OKLAHOMA.* Oct. 28, 1918. For opinion below, see 173 Pac. 1050. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted.

(248 U. S. 575)

No. 702. *Dora FINLEY*, petitioner, v. *Mary E. HALLIBURTON.* Oct. 28, 1918. For opinion below, see 251 Fed. 860. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(248 U. S. 575)

No. 705. *The DULUTH STEAMSHIP COMPANY*, petitioner, v. *NORTHERN PACIFIC RAILWAY COMPANY.* Oct. 28, 1918. For opinion below, see 252 Fed. 544. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(248 U. S. 590)

No. 719. *Clarence W. TURNER et al.*, plaintiffs in error, v. *OLD HOMESTEAD COMPANY et al.* Oct. 28, 1918. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 170 Pac. 904. *Mr. John J. Shea*, of Bartlesville, Okl., for defendants in error. Docketed and dismissed with costs, on motion of *Mr. John J. Shea* for the defendants in error.

No. 1022, October Term, 1917. *Clinton H. PIERCE et al.*, plaintiffs in error, v. *The UNITED STATES of America.* Oct. 28, 1918. See, also, 247 U. S. 523, 38 Sup. Ct. 428, 62 L. Ed. 1247. Motion to set aside order docketing and dismissing case and for leave to file the transcript of record and docket case granted.

(248 U. S. 30)

DETROIT & M. RY. CO. v. FLETCHER PAPER CO. SAME v. ISLAND MILLS LUMBER CO. SAME v. CHURCHILL LUMBER CO. SAME v. RICHARDSON LUMBER CO. SAME v. MICHIGAN VENEER CO.

(Submitted on Motion to Dismiss or Affirm, or Place on Summary Docket, Oct. 8, 1918. Decided Nov. 18, 1918.)

Nos. 336-340.

1. COURTS $\hookrightarrow$ 366(1)—**FEDERAL COURTS—FOLLOWING DECISIONS OF STATE COURT—LOCAL LAW.**

As to questions depending on construction of state laws, decision of state court is controlling on writ of error to it; and this, even though a similar provision of a federal statute has been differently construed by the federal court.

2. CONSTITUTIONAL LAW $\hookrightarrow$ 298(2)—**DUE PROCESS—RATES FIXED BY COMMISSION—DETERMINATION OF REASONABLENESS.**

Laws of a state, construed as precluding inquiry into reasonableness of rates, fixed by its Railroad Commission, in action to recover charges in excess thereof, made and collected by a carrier, are not violative of Const. U. S. Amend. 14, where opportunity to have validity of the ordered rates judicially determined in suit for that purpose had been provided and availed of by the carrier, resulting in sustaining thereof.

In Error to the Supreme Court of the State of Michigan.

Separate actions by the Fletcher Paper Company, by the Island Mills Lumber Company, by the Churchill Lumber Company, by the Richardson Lumber Company, and by the Michigan Veneer Company, all against the Detroit & Mackinac Railway Company. Judgments for plaintiffs were affirmed by the Supreme Court of Michigan (164 N. W. 528), and defendant brings error. Affirmed.

Messrs. James McNamara and Fred A. Baker, both of Detroit, Mich., for plaintiff in error.

Messrs. Edward S. Clark, of Bay City, Mich., and Irwin S. Canfield, of Alpena, Mich., for defendants in error.

*Mr. Justice HOLMES delivered the opinion of the Court.

These five suits were actions of assumpsit brought to recover the difference between the rates fixed by the Michigan Railroad Commission on logs carried wholly within the State, from points on the defendant's (the plaintiff in error's) road to Alpena, and the higher rates that the defendant actually charged. The plaintiffs got judgments which were affirmed by the Supreme Court of Michigan, 164 N. W. 528, and the cases are brought here upon lengthy assignments of error. The plaintiffs now move to dismiss or affirm. We are of opinion that the judgments should be affirmed.

[1, 2] Most of the assignments of error concern questions of local law with which we

cannot deal. Such are whether the orders of the Commission were in force pending an injunction and before the defendant railroad had fixed rates in pursuance of a mandate of the State Court; whether the State laws permit an action to be maintained without an order of reparation by the Commission; and whether the statutes purport to make the order fixing the rates conclusive in the present suits. These questions depend upon the construction of the State laws, as to which, upon writs of error to the State Court that Court has the last word. Its power would not be diminished if similar provisions in an Act of Congress had been differently construed by this Court. The only question properly before us is whether the statutes as construed run against the Fourteenth Amendment of the Constitution of the United States. It is argued that they do, if, *as was held, they preclude an inquiry in these proceedings into the confiscatory character of the rates in present circumstances. But the defendant had had its chance to have the validity of the rates judicially determined in a suit for that purpose and had used it. Detroit & Mackinac Ry. Co. v. Michigan Railroad Commission, 235 U. S. 402, 35 Sup. Ct. 126, 59 L. Ed. 288. There is nothing to hinder a State from providing that after a judicial inquiry into the validity of such an order it shall be binding upon the parties until changed. The defendant was free to apply to the Commission.

A milling-in-transit rate allowing the defendant to add fifty cents a thousand feet on lumber if, instead of being carried on, after it was manufactured, on the through rate, the product was not reshipped by the defendant's line, was held to be permitted by the statute. It is said that this would be contrary to the interstate commerce act if these cases involved interstate commerce, which they do not. We see no question concerning it that requires to be dealt with here.

Judgment affirmed.

(248 U. S. 24)

LAY et al. v. LAY et al.

(Submitted Nov. 4, 1918. Decided Nov. 18, 1918.)

No. 633.

UNITED STATES $\hookrightarrow$ 111 — **CLAIMS — ASSIGNMENT.**

Rev. St. § 3477 (Comp. St. 1916, § 6383), does not prohibit claimant from assigning a claim against the United States.

In Error to the Supreme Court of the State of Mississippi.

Suit by J. F. Lay and others against R. C. Lay and others. Judgment for plaintiffs was reversed by the Supreme Court of Mississippi (79 South. 291), and plaintiffs bring error. On motion to dismiss or affirm. Affirmed.

Mr. John C. Bryson, of Vicksburg, Miss., for plaintiff in error.

Mr. William H. Watkins, of Jackson, Miss., for defendant in error.

*Memorandum for the Court by the CHIEF JUSTICE.

The right to a fund resulting from the payment of an appropriation by Congress to satisfy a judgment for the value of property taken during the Civil War is the issue here involved. The contestants are the heirs at law of the original claimant and persons holding under an assignment by her of all her right to the claim or fund. The court enforced the assignment.

Under the assumption that the claimant was prohibited by the law of the United States (section 3477, Rev. Stats. [Comp. St. 1916, § 6383]) from making an assignment, the heirs at law prosecute error to correct the federal error thus assumed to have been committed. But the assumption indulged in as to the effect of the law of the United States is without merit. *McGowan v. Parish*, 237 U. S. 285, 294, 35 Sup. Ct. 543, 59 L. Ed. 955, and cases cited. This renders it unnecessary to consider whether, if the heirs at law were entitled to the fund, they would be liable to pay the full sum of the attorney's fee contracted for by the transferee and the duty to pay which the transferee and those in privity do not dispute.

Judgment affirmed.

(243 U. S. 26)

STATE OF GEORGIA v. TRUSTEES OF CINCINNATI SOUTHERN RY. et al.

(Argued Nov. 7, 1918. Decided Nov. 18, 1918. No. 21 Original.

1. RAILROADS §80 — RIGHT OF WAY — GRANT TO TRUSTEES.

Where the statute under which a railway was constructed by a city provided for a board of trustees, to be appointed and kept filled by a designated court, with power to acquire and hold necessary property and franchises within or without the state, grant by sister state owning a railroad of a right of way was properly to the trustees.

2. RAILROADS §80 — "USE OF RIGHT OF WAY"—GRANT OF USE.

A grant of the use of a right of way is the grant of a right of way in the ordinary meaning of words.

3. RAILROADS §80 — RIGHT OF WAY — GRANT—WORDS OF PERPETUITY.

A grant of the use of a right of way to a corporation or to perpetual trustees holding for the corporate uses does not need the words in fee or words of succession to be perpetual.

4. DEEDS §120—FEE—LIMITATION.

The grantor, if wishing to limit the effect of words sufficient on their face to convey a fee, should express the limitation in the instrument.

5. RAILROADS §80—RIGHT OF WAY—CONSTRUCTION OF GRANT.

The purpose of a grant, to supply a roadbed for a trunk line, necessitating considerable expenditure by the grantee, confirms, if confirma-

tion were required, the legal effect of the words, unexplained, as a perpetual grant.

6. RAILROADS §80—RIGHT OF WAY—CONSTRUCTION OF GRANT.

Provisions of grant of right of way, that grade adopted by grantee along right of way of another railroad shall always be the same as that of the other road, and that grant is subject to consent and approval of the lessees of the other railroad "as to the term of the lease," confirms interpretation of the grant as perpetual.

7. STATES §119 — "GRATUITY" — RAILROAD RIGHT OF WAY.

Legislative grant of a right of way for a railroad is not a "gratuity," within the prohibition of Const. Ga. art. 7, § 16.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gratuity.]

Original suit by the State of Georgia against the Trustees of the Cincinnati Southern Railway and another. Bill dismissed.

See, also, 38 Sup. Ct. 191.

Mr. William A. Wimbish, of Atlanta, Ga., for the State of Georgia.

Messrs. Edward Colston, of Cincinnati, Ohio, and Michael M. Allison, of Chattanooga, Tenn., for defendants.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit brought in this Court by the State of Georgia to prevent the defendants from longer occupying or using any portion of the right of way of the Western & Atlantic Railroad, a railroad built and owned by the *plaintiff State. The question, although argued at considerable length is a very short one. On October 8, 1879, the State passed an Act (Acts 1878-79, p. 218) sufficiently explained by its contents.¹ On August 21, 1916,

¹ An Act granting right of way to the Cincinnati Southern Railway, where its route adjoins that of the Western & Atlantic Railroad.

Section 1. Be it enacted by the General Assembly of the State of Georgia, That whereas the city of Cincinnati has nearly completed the Cincinnati Southern Railway, a grand trunk line which will be of great benefit to the State of Georgia forming a most important feeder and practically an extension of the Western & Atlantic Railroad, which is the property of the State, and giving to our commerce the advantage of a direct and admirable connection with the railway system of the North and West;

And Whereas, said railway reaches the Western & Atlantic Railroad at Boyce's Station, and for the most of the distance to the terminus of the two railroads in Chattanooga, their routes run parallel to and adjoining each other, a distance of about five miles;

And Whereas, it is to the advantage of both railroads to be able to locate their tracks and works close together, thus saving expense to one in construction, and to both in maintaining the road-bed and facilitating railroad operations; and giving to both railroads the advantage of a stronger and firmer road-bed through a route subject to overflow by floods in the Tennessee River; there is hereby granted to the Trustees of the Cincinnati Southern Railway, for the use of said railway, the use of that portion of the right of way of the Western & Atlantic Railroad between Boyce's Station, Tennessee, and the Chattanooga, Tennessee, terminus that lies westerly of a line running parallel with, and nine and a half feet westerly from the center of the track of the Western & Atlantic Railroad, so as to admit of laying track, if desired, near enough

reciting that the Cincinnati *Southern Railway now is controlled by a competitor of the Western & Atlantic road and that the Western & Atlantic needs the space, Georgia undertook to repeal the former Act and to treat it as giving a license only, that the State was free to revoke. The defendants say that the words "there is hereby granted to the Trustees of the Cincinnati Southern Railway, for the use of said railway, the use of that portion of the right of way of the Western & Atlantic Railroad" &c., grant a right of way in fee.

[1-5] The Ohio statute under which the Cincinnati Southern Railway was constructed by the City of Cincinnati provided for a board of trustees to be appointed and kept filled by the Superior Court of the city, to have control of the fund raised by the city, and to acquire and hold all the necessary real and personal property and franchises either in Ohio or in any other State into which the line of railroad should extend. Therefore the grant to the trustees was the proper form for a grant in effect to the Railway, as it was styled in the title of the Georgia act, or to the city if the city was in strictness the cestui que trust. No other facts of much importance appear. Considerations are urged on behalf of Georgia to show that the motives for a perpetual grant were weak, but nothing that affects the construction of the words used or that shows that they are not to be given their ordinary meaning, as indeed the argument for the plaintiff agrees. But if that be true, cadit questio. A grant of the use of a right of way is the grant of a right of way in the ordinary meaning of words, and a grant of a right of way to a corporation or to perpetual trustees holding for the corporate uses does not need words of succession to be perpetual. The words "and its successors" or "in fee" would not enlarge the content of a grant to a corporation. *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S. 58, 66, 33 Sup. Ct. 988, 57 L. Ed. 1389; *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 395, 22 Sup. Ct. 410, 46 L. Ed. 592; **Great Northern Ry. Co. v. Manchester, Sheffield & Lincolnshire Ry. Co.*, 5 De G. & Sm. 138, 146. If a grantor wishes to limit the effect of words sufficient on their face to convey a fee it should express the limitation in the instrument. The purpose of the grant in this case,

to the track of the Western & Atlantic Railroad to leave the distance between the centers of tracks fourteen feet, and between the nearest rails of the two railroads nine feet: Provided always, that this grant is subject to the consent and approval of the lessees of the Western & Atlantic Railroad as to the term of their lease: Provided further, that the grade adopted by the said Cincinnati Southern Railroad along and over the aforegranted right-of-way shall always be the same as that of the Western & Atlantic Railroad.

Sec. 2. Be it further enacted, That all Acts and parts of Acts inconsistent with this Act are hereby repealed.

to supply a roadbed for a trunk line, necessitating considerable expenditure on the part of the grantee, confirms, if confirmation were required, the legal effect of the words unexplained. *City of Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U. S. 649, 663, 32 Sup. Ct. 572, 56 L. Ed. 934; *Llanely Ry. & Dock Co. v. London & Northwestern Ry. Co.*, L. R. 8 Ch. 942, 950; *Great Northern Ry. Co. v. Manchester, Sheffield & Lincolnshire Ry. Co.*, 5 De G. & Sm. 138.

[6, 7] We think it unnecessary to refer to the language in detail beyond saying that there is nothing in the statute to suggest an intent to limit the scope of the grant and that such expressions as "provided further, that the grade adopted by the said Cincinnati Southern Railroad along and over the aforegranted right of way shall always be the same as that of the Western & Atlantic Railroad," further confirms our interpretation, as does also the requirement of the consent of the lessees "as to the term of their lease," since those words imply that that grant is of something more that does not require their assent. Elaborate discussion of the circumstances seems to us superfluous. But it is necessary to mention the objection that by the Constitution of Georgia (article 7, § 16) the general assembly was forbidden to "grant any donation or gratuity in favor of any person, corporation or association," and that there was no consideration for this grant. Even if the contemplated and invited change of position on the part of the Cincinnati & Southern Railway and the benefit to the State expressly contemplated as ensuing from it were not the conventional inducement of the grant, and so, were not technically a consideration, we are of the opinion that the grant was not a gratuity within the meaning of *the State Constitution. A conveyance in aid of a public purpose from which great benefits are expected is not within the class of evils that the Constitution intended to prevent and in our opinion is not within the meaning of the word as it naturally would be understood. We deem further argument unnecessary to establish that the State of Georgia made a grant which it cannot now revoke.

Bill dismissed.

(248 U. S. 23)

KING v. PUTNAM INV. CO.

(Submitted Nov. 7, 1918. Decided Nov. 18, 1918.)

No. 10.

COURTS 399(2)—ERROR TO STATE COURT—FEDERAL QUESTION—JURISDICTION.

Writ of error to state court, based on a federal question being involved, because of a contract authorizing sale of land belonging to the United States covered by an inchoate home-

stead entry, will be dismissed; the state court, on sufficient evidence, expressly finding that such land was not included in the contract.

In Error to the Supreme Court of the State of Kansas.

Action by the Putnam Investment Company against H. C. King. Judgment for plaintiff was affirmed by the Supreme Court of Kansas (96 Kan. 109, 150 Pac. 559), and defendant brings error. Dismissed.

Mr. Lee Monroe, of Topeka, Kan., for plaintiff in error.

Mr. B. I. Litowich, of Salina, Kan., for defendant in error.

Memorandum for the Court by the CHIEF JUSTICE.

Having previously considered this case (82 Kan. 216, 107 Pac. 559; 87 Kan. 842, 126 Pac. 1093) the court awarded relief because of the violation of a contract of employment to procure the sale of real estate. 96 Kan. 109, 150 Pac. 559.

The case is here in reliance upon a federal question based upon the assumption that the authority to sell included land belonging to the United States covered by an inchoate homestead entry. But the court below expressly *found that such land was not included in the contract, hence the sole basis for the asserted federal question disappears.

And this result is not changed by considering, to the extent that it is our duty to do so, the question of fact upon which the existence of the alleged federal question depends. Northern Pac. R. R. Co. v. North Dakota, 236 U. S. 585, 593, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; Creswill v. Grand Lodge K. P., 225 U. S. 246, 261, 32 Sup. Ct. 822, 56 L. Ed. 1074; Kansas City Southern R. R. Co. v. C. H. Albers Commission Co., 223 U. S. 573, 591, 32 Sup. Ct. 316, 56 L. Ed. 556. We so conclude because the result of discharging that duty leaves us convinced that the finding below was adequately sustained; indeed, that the record makes it clear that the alleged ground for the federal question was a mere afterthought. The case, therefore, must be and is

Dismissed for want of jurisdiction.

(248 U. S. 32)

PALMER et al. v. STATE OF OHIO.

(Submitted on Motion to Affirm Oct. 28, 1918.
Decided Nov. 18, 1918.)

No. 260.

1. STATES $\S$ 191(1)—ACTION BY INDIVIDUAL—SOURCE OF RIGHT.

Right of individuals to sue a state can come only from consent of the state, and not from Constitution or laws of United States.

2. COURTS $\S$ 366(1)—FEDERAL COURTS—FOLLOWING DECISION OF STATE COURT—LOCAL LAW.

Whether state Constitution gave consent of state to be sued is a question of local state law,

decision of which by state Supreme Court is controlling with federal courts; no federal right being involved.

3. EMINENT DOMAIN $\S$ 70—AMENDMENTS OF FEDERAL CONSTITUTION—APPLICABILITY TO STATE.

As against act by the state, one cannot claim that he is deprived of property without compensation, in violation of Const. U. S. Amend. 5.

4. COURTS $\S$ 391(3)—ERROR TO STATE COURT—FEDERAL QUESTION—JURISDICTION.

No federal question being presented by the record, writ of error to state court will be dismissed by the court sua sponte.

In Error to the Supreme Court of the State of Ohio.

Action by Albert Palmer and others against the State of Ohio. Judgment dismissing the petition was affirmed by the Supreme Court of the state (96 Ohio St. 513, 118 N. E. 102), and plaintiffs bring error. Dismissed.

Messrs. John G. Romer, of St. Henry, Ohio, and T. F. Raudabaugh, of Celina, Ohio, for plaintiffs in error.

Messrs. Clarence D. Laylin and Frank Davis, Jr., both of Columbus, Ohio, for the State of Ohio.

*Mr. Justice CLARKE delivered the opinion of the Court.

The plaintiffs in error sued the state of Ohio for damages for flooding lands by elevating the spillway of a state-maintained dam. The Supreme Court of the state affirmed the action of the lower courts in dismissing the petition on the ground that the state had not consented so to be sued, and we are asked to review this decision.

The plaintiffs in error agree, as they must, that their suit cannot be maintained without the consent of the state, but they claim that such consent was given in an amendment to section 16 of article 1 of the state Constitution, adopted in 1912, which reads:

"Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

The state Supreme Court held that this amendment is not self-executing, and that the General Assembly of the state having failed to designate the courts and the manner in which such suits might be brought, effective consent to sue had not been given. This decision, the plaintiffs in error claim, vaguely and indefinitely, somehow deprives them of their property without due process of law, in *violation of the Fourteenth Amendment to the Constitution of the United States.

[1, 2] The right of individuals to sue a state, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the state. Beers v. State of Arkansas, 20 How. 527, 15 L. Ed. 991; Railroad Co. v. Tennessee, 101 U. S. 337, 25 L. Ed. 960; Hans v. Louisiana, 134

U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842. Whether Ohio gave the required consent must be determined by the construction to be given to the constitutional amendment quoted, and this is a question of local state law, as to which the decision of the state Supreme Court is controlling with this court, no federal right being involved. *Elmendorf v. Taylor*, 10 Wheat. 152, 159, 6 L. Ed. 289; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 116, 33 Sup. Ct. 967, 57 L. Ed. 1410; *Memphis Street Railway Co. v. Moore*, 243 U. S. 299, 301, 37 Sup. Ct. 273, 61 L. Ed. 733.

39 SUP. CT.—2

[3] The further claim that the plaintiffs in error are deprived of their property without compensation in violation of the Fifth Amendment to the Constitution of the United States, is palpably groundless. *Barron v. Mayor, etc., of Baltimore*, 7 Pet. 243, 250, 8 L. Ed 672; *Brown v. New Jersey*, 175 U. S. 172, 174, 20 Sup. Ct. 77, 44 L. Ed. 119.

[4] No federal question being presented by the record the motion to affirm is denied and this court sua sponte, dismisses the writ of error for want of jurisdiction.

Dismissed.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1918

(248 U. S. 534)

No. 352. **DESCHUTES RAILROAD COMPANY**, appellant, v. **EASTERN OREGON LAND COMPANY**. Nov. 4, 1918. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 246 Fed. 400, 158 C. C. A. 464. See, also, 245 U. S. 672, 38 Sup. Ct. 192, 62 L. Ed. 540. Messrs. Arthur C. Spencer and James G. Wilson, both of Portland, Or., for appellant. Messrs. Alex. Britton and Evans Browne, both of Washington, D. C., for appellee.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) a. Section 128 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. 1916, § 1120]); Louisville & Nashville R. R. Co. v. Western Union Telegraph Co., 237 U. S. 300, 35 Sup. Ct. 598, 59 L. Ed. 965; b. Equitable Assurance Soc. v. Brown, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; Deming v. Carlisle Packing Co., 226 U. S. 102, 33 Sup. Ct. 80, 57 L. Ed. 140; Consolidated Turnpike v. Norfolk, etc., Ry. Co., 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; (2) a. Bankers' Mutual Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co., 192 U. S. 371, 383, 385, 24 Sup. Ct. 325, 48 L. Ed. 484; Hull v. Burr, 234 U. S. 712, 34 Sup. Ct. 892, 58 L. Ed. 1557; b. Taylor v. Anderson, 234 U. S. 74, 34 Sup. Ct. 724, 58 L. Ed. 1218; Joy v. City of St. Louis, 201 U. S. 332, 26 Sup. Ct. 478, 50 L. Ed. 776. See writ of certiorari denied, Deschutes R. R. Co. v. Oregon Land Co., 245 U. S. 672, 38 Sup. Ct. 192, 62 L. Ed. 540.

(248 U. S. 533)

No. 380. **LOUISVILLE & NASHVILLE RAILROAD COMPANY**, plaintiff in error, v. **THE STATE OF ALABAMA**. Nov. 4, 1918. In error to the Supreme Court of the State of Alabama. For opinion below, see 78 South. 93. Messrs. H. L. Stone, of Corsicana, Tex., and E. Perry Thomas, of Montgomery, Ala., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of St. Louis S. W. Ry. Co. v. Arkansas, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265; Kansas City, Memphis & Birmingham Ry. Co. v. Stiles, 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176.

(248 U. S. 533, 575)

No. 457. **THE ZANESVILLE & WESTERN RAILWAY COMPANY**, plaintiff in error, v. **CHARLES F. WILLIAMS**, administrator, etc. Nov. 4, 1918. In error to the Court of Appeals of Muskingum County, State of Ohio. Mr. John H. Doyle, of Toledo, Ohio, for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of Congress of September 6, 1916, chap. 448, § 2, 39 Stat. 726 (Comp. St. 1916, § 1214); and petition for certiorari denied.

(248 U. S. 575)

No. 523. **WESTERN UNION TELEGRAPH COMPANY**, appellant, v. **THE ATLANTA & WEST POINT RAILROAD COMPANY**. Nov. 4, 1918. For opinion below, see 250 Fed. 208. Mr. William L. Clay, of Atlanta, Ga., for appellant. Messrs. Sanders McDaniel,

of Atlanta, Ga., and Leon Weil, of Montgomery, Ala., for appellee. Petition for a writ of certiorari herein denied.

(248 U. S. 532)

No. 524. **WESTERN UNION TELEGRAPH COMPANY**, appellant, v. **LOUISVILLE & NASHVILLE RAILROAD COMPANY**. Nov. 4, 1918. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. For opinion below, see 250 Fed. 199, which affirmed 243 Fed. 687. Mr. William L. Clay, of Atlanta, Ga., for appellant. Messrs. Henry L. Stone, of Louisville, Ky., and Henry C. Peeples, of Atlanta, Ga., for appellee.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) a. Section 128 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. 1916, § 1120]); Louisville & Nashville R. R. Co. v. Western Union Telegraph Co., 237 U. S. 300, 35 Sup. Ct. 598, 59 L. Ed. 965; b. Equitable Assurance Soc. v. Brown, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; Deming v. Carlisle Packing Co., 226 U. S. 102, 33 Sup. Ct. 80, 57 L. Ed. 140; Consolidated Turnpike v. Norfolk, etc., Ry. Co., 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; (2) Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 24 L. Ed. 708; Western Union Telegraph Co. v. Ann Arbor R. R. Co., 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052; Western Union Telegraph Co. v. Pennsylvania R. R. Co., 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; Western Union Telegraph Co. v. Richmond, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710; Louisville & Nashville R. R. Co. v. Western Union Telegraph Co., 237 U. S. 300, 35 Sup. Ct. 598, 59 L. Ed. 965. See Western Union Telegraph Co. v. Louisville & Nashville R. R. Co., 244 U. S. 649, 37 Sup. Ct. 743, 61 L. Ed. 1371.

(248 U. S. 576)

No. 524. **WESTERN UNION TELEGRAPH COMPANY**, appellant, v. **THE LOUISVILLE & NASHVILLE RAILROAD COMPANY**. Nov. 4, 1918. For opinion below, see 250 Fed. 199. Mr. William L. Clay, of Atlanta, Ga., for appellant. Messrs. Henry L. Stone, of Corsicana, Tex., and Henry C. Peeples, of Atlanta, Ga., for appellee. Petition for a writ of certiorari herein denied.

(248 U. S. 576)

No. 525. **WESTERN UNION TELEGRAPH COMPANY**, appellant, v. **THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY**. Nov. 4, 1918. For opinion below, see 250 Fed. 207, which affirms 243 Fed. 694. Mr. William L. Clay, of Atlanta, Ga., for appellant. Messrs. Henry C. Peeples, of Atlanta, Ga., and Claude Waller, of Nashville, Tenn., for appellee. Petition for a writ of certiorari herein denied.

(248 U. S. 576)

No. 558. **WESTERN UNION TELEGRAPH COMPANY**, petitioner, v. **LOUISVILLE & NASHVILLE RAILROAD COMPANY**. Nov. 4, 1918. For opinion below, see 249 Fed. 385. Mr. Adolphus Edward Richards, of

Louisville, Ky., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(248 U. S. 556)

No. 584. The ESTATE OF P. D. BECKWITH, Inc., petitioner, v. The COMMISSIONER OF PATENTS. Nov. 4, 1918. Mr. Harry C. Howard, of Kalamazoo, Mich., for petitioner. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted.

(248 U. S. 577)

No. 624. The CUDAHY PACKING COMPANY, petitioner, v. William K. BIXBY et al., receivers, etc. Nov. 4, 1918. For opinion below, see 205 S. W. 865. Mr. George T. Buckingham, of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the Kansas City Court of Appeals of the State of Missouri denied.

(248 U. S. 557)

No. 625. SEABOARD AIR LINE RAILWAY COMPANY, petitioner, v. J. J. GRAY. Nov. 4, 1918. Mr. Jo-Berry S. Lyles, of Columbia, S. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina granted.

(248 U. S. 577)

No. 648. LOUISIANA NAVIGATION COMPANY, petitioner, v. OYSTER COMMISSION OF LOUISIANA et al. Nov. 4, 1918. For opinion below, see 79 South. 213. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied.

(248 U. S. 556)

No. 649. Alvah CROCKER et al., trustees, petitioners, v. John F. MALLEY, Collector of Internal Revenue. Nov. 4, 1918. For opinion below, see 250 Fed. 817. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit granted.

(248 U. S. 577)

No. 678. S. T. HILLS, as trustee, etc., petitioner, v. C. D. STIMSON COMPANY. Nov. 4, 1918. For opinion below, see 172 Pac. 1181. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied.

(248 U. S. 556)

No. 682. Bessie TYRRELL, etc., petitioner, v. Charles B. SHAFFER et al. Nov. 4, 1918. For opinion below, see 174 Pac. 1074. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted.

(248 U. S. 577)

No. 683. The STATE OF LOUISIANA, petitioner, v. NEW ORLEANS LAND COMPANY. Nov. 4, 1918. For opinion below, see 79 South. 515. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana denied.

(248 U. S. 578)

No. 686. Maurice SUGAR, petitioner, v. The UNITED STATES. Nov. 4, 1918. For opinion below, see 252 Fed. 74. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(248 U. S. 578)

No. 687. Maurice SUGAR, petitioner, v. The UNITED STATES. Nov. 4, 1918. For opinion below, see 252 Fed. 79, which affirms 243 Fed. 423. Petition for a writ of certiorari to

the United States Circuit Court of Appeals for the Sixth Circuit denied.

(248 U. S. 578)

No. 703. Samuel R. MAYNARD, petitioner, v. Matt G. REYNOLDS et al., etc. Nov. 4, 1918. For opinion below, see 251 Fed. 784. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(248 U. S. 578)

No. 717. Drusa STURM et al., petitioners, v. John S. STUMP et al. Nov. 4, 1918. See, also, 239 Fed. 749. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

No. 1. STATE OF LOUISIANA ex rel. Willis J. ROUSSEL, etc., plaintiff in error, v. Jared Y. SANDERS, Governor, et al. Nov. 5, 1918. Death of Willis J. Roussel, the plaintiff in error herein, suggested, and the appearance of Wilhelmine G. Schmidt, widow of Willis J. Roussel, deceased, and testamentary executrix of his succession, as the party plaintiff in error herein, filed and entered.

(248 U. S. 590)

No. 12. Stephen W. ALLEN et al., plaintiffs in error, v. J. F. TRIMMER, as treasurer, etc. Nov. 7, 1918. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 45 Okl. 83, 144 Pac. 795. Mr. Albert Rennie, of Pauls Valley, Okl., for plaintiff in error. Mr. S. P. Freeling, of Oklahoma City, Okl., for defendant in error. Dismissed with costs, pursuant to the Sixteenth Rule (32 Sup. Ct. ix) on motion of Mr. S. P. Freeling for the defendant in error.

(248 U. S. 534)

No. 1. The STATE OF LOUISIANA ex rel. Wilhelmine G. SCHMIDT, widow, etc., plaintiff in error, v. Jared Y. SANDERS, Governor, et al. Nov. 11, 1918. In error to the Supreme Court of the State of Louisiana. Mr. Willis J. Roussel, for plaintiff in error. For opinion below, see State ex rel. Roussel v. Sanders, 128 La. 635, 54 South. 1036.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Bilby et al. v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 37 Sup. Ct. 643, 61 L. Ed. 1153; Stewart v. City of Kansas City, 239 U. S. 14, 36 Sup. Ct. 15, 60 L. Ed. 120; (2) Stearns v. Minnesota ex rel. Marr, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. Ed. 162; Board of Liquidation v. Louisiana ex rel. Wilder, 179 U. S. 622, 21 Sup. Ct. 263, 45 L. Ed. 347; (3) Empire State-Idaho Mining Co. v. Hanley, 205 U. S. 225, 27 Sup. Ct. 476, 51 L. Ed. 779; Goodrich v. Ferris, 214 U. S. 71, 29 Sup. Ct. 580, 53 L. Ed. 914; Brolan v. United States, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544.

(248 U. S. 591)

No. 30. METROPOLITAN STATE BANK, plaintiff in error, v. The PEOPLE OF THE STATE OF ILLINOIS. Nov. 11, 1918. In error to the Supreme Court of the State of Illinois. For opinion below, see 272 Ill. 311, 111 N. E. 992. Messrs. Philip J. McKenna and Howard F. Bishop, both of Chicago, Ill., for plaintiff in error. Messrs. Edward J. Brundage, Atty. Gen., and James H. Wilkerson, both of Chicago, Ill., for defendant in error. Dismissed with costs, pursuant to the 19th Rule (32 Sup. Ct. ix).

(248 U. S. 591)

No. 32. **Francis A. CHURCHILL** and **Stewart Tait**, copartners, doing business under the firm name and style of the **Mercantile Advertising Agency**, appellants and plaintiffs in error, v. **James F. RAFFERTY**, as **Collector of Internal Revenue of the Philippine Islands**. Nov. 11, 1918. Appeal from and in error to the Supreme Court of the Philippine Islands. Mr. E. Allen Frost, of Chicago, Ill., for plaintiffs in error. Mr. Samuel T. Ansell, of Washington, D. C., for defendant in error. Dismissed with costs, pursuant to the 19th Rule (32 Sup. Ct. ix).

(248 U. S. 535)

No. 290. **OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY**, plaintiff in error, v. **STODDARD LUMBER COMPANY**. Nov. 11, 1918. In error to the Supreme Court of the State of Oregon. For opinion below, see 84 Or. 399, 165 Pac. 363. Messrs. Waldemar Van Cott, Edward M. Allison, Jr., and William D. Riter, all of Salt Lake City, Utah, for plaintiff in error. Mr. W. Lair Thompson, of Portland, Or., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stats. at L. 726 (Comp. St. 1916, § 1214).

(248 U. S. 535)

No. 369. **John C. MADDEN**, plaintiff in error, v. **W. M. FORBES**. Nov. 11, 1918. In error to the Supreme Court of the State of Kansas. For opinion below, see 102 Kan. 46, 169 Pac. 211. Mr. Joseph M. Stark, of Topeka, Kan., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) *Bilby et al. v. Stewart*, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701; *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, 37 Sup. Ct. 643, 61 L. Ed. 1153; *Stewart v. City of Kansas City*, 239 U. S. 14, 36 Sup. Ct. 15, 60 L. Ed. 120; (2) *Empire State-Idaho Mining Co. v. Hanley*, 205 U. S. 225, 27 Sup. Ct. 476, 51 L. Ed. 779; *Goodrich v. Ferris*, 214 U. S. 71, 29 Sup. Ct. 580, 53 L. Ed. 914; *Brolan v. The United States*, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544.

(248 U. S. 535)

No. 523. **WESTERN UNION TELEGRAPH COMPANY**, appellant, v. **The ATLANTA & WEST POINT RAILROAD COMPANY**. Nov. 11, 1918. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. For opinion below, see 250 Fed. 208. Mr. William L. Clay, of Atlanta, Ga., for appellant. Messrs. Sanders McDaniel, of Atlanta, Ga., and Leon Weil, of Montgomery, Ala., for appellee.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Western Union Telegraph Co. v. Louisville & Nashville R. R. Co.*, 248 U. S. 576, 39 Sup. Ct. 18, 63 L. Ed. —, dismissed *per curiam* November 4, 1918.

(248 U. S. 557)

No. 599. **MINERALS SEPARATION, Limited, et al.**, petitioners, v. **BUTTE & SUPERIOR MINING COMPANY**. Nov. 11, 1918. For opinion below, see 250 Fed. 241. Messrs. Henry D. Williams, William Houston Kenyon, and Lindley M. Garrison, all of New York City, Frederic D. McKenney, of Washington, D. C., Garret W. McEnerney, of San Francisco, Cal., and Odell W. McConnell, of Helena, Mont., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(248 U. S. 557)

No. 691. **The BARBER ASPHALT PAVING COMPANY**, petitioner, v. **William H. WOERHEIDE et al.** Nov. 11, 1918. For opinion below, see 251 Fed. 196. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(248 U. S. 578)

No. 692. **ALTHEIMER & RAWLINGS INVESTMENT COMPANY**, petitioner, v. **E. B. ALLEN**, U. S. Collector of Internal Revenue. Nov. 11, 1918. For opinion below, see 248 Fed. 688. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(248 U. S. 578)

No. 709. **James F. BISHOP**, Administrator, etc., petitioner, v. **GREAT LAKES TOWING COMPANY**. Nov. 11, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

For opinion below, see *Great Lakes Towing Co. v. St. Joseph-Chicago S. S. Co.*, 253 Fed. 635, 165 C. C. A. 261.

(248 U. S. 579)

No. 710. **PITTSBURGH COAL COMPANY OF ILLINOIS**, petitioner, v. **GREAT LAKES TOWING COMPANY**. Nov. 11, 1918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(248 U. S. 579)

No. 726. **NORTHWESTERN ELECTRIC EQUIPMENT COMPANY**, petitioner, v. **BENJAMIN ELECTRIC MANUFACTURING COMPANY**. Nov. 11, 1918. For opinion below, see 251 Fed. 288. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(248 U. S. 591)

No. 48. **ATLANTIC COAST LINE RAILROAD COMPANY**, plaintiff in error, v. **A. M. KEELS**. Nov. 15, 1918. In error to the Supreme Court of the State of South Carolina. For opinion below, see 104 S. C. 497, 89 S. E. 388. Mr. P. A. Willcox, of Florence, S. C., for plaintiff in error. Dismissed with costs, and mandate granted, on motion of Mr. Frederic D. McKenney, of counsel for the plaintiff in error.

No. —. Original. Ex parte In the matter of Robert H. THORBURN, petitioner. Nov. 18, 1918. Motion for leave to file a petition for a writ of mandamus granted, and rule to show cause awarded returnable Monday, December 9 next.

(248 U. S. 536)

No. 41. G. L. HENDERSON et al., plaintiffs in error, v. Helen R. RESSOR, or Helen R. Henderson, et al. Nov. 18, 1918. In error to the Supreme Court of the State of Missouri. For opinion below, see 265 Mo. 718, 178 S. W. 175. Mr. Daniel V. Howell, of Kansas City, Mo., for plaintiffs in error. Mr. H. M. Langworthy, of Kansas City, Mo., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101; Empire State-Idaho Mining Co. v. Hanlev, 205 U. S. 225, 27 Sup. Ct. 476, 51 L. Ed. 779; Goodrich v. Ferris, 214 U. S. 71, 29 Sup. Ct. 580, 53 L. Ed. 914; Brolan v. United States, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544; (2) Louisville & Nashville R. Co. v. Melton, 218 U. S. 36, 51, 52, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84; Eastern Building & Loan Association v. Ebaugh, 185 U. S. 114, 22 Sup. Ct. 566, 46 L. Ed. 830; Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co., 243 U. S. 93, 96, 37 Sup. Ct. 344, 61 L. Ed. 610; Texas & New Orleans R. R. Co. v. Miller, 221 U. S. 408, 416, 31 Sup. Ct. 534, 55 L. Ed. 789.

(248 U. S. 536)

No. 42. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, plaintiff in error, v. Mary O'CONNOR, as administratrix, etc. Nov. 18, 1918. In error to the Supreme Court of the State of Wisconsin. For opinion below, see 163 Wis. 653, 158 N. W. 343. Messrs. C. H. Van Alstine and H. J. Killilea, both of Milwaukee, Wis., for plaintiff in error. Messrs. Victor I. Minahan and Eben R. Minahan, both of Green Bay, Wis., for defendant in error.

PER CURIAM. Affirmed with costs upon the authority of Seaboard Air Line v. Padgett, 236 U. S. 668, 673, 35 Sup. Ct. 481, 59 L. Ed. 777; Great Northern Ry. Co. v. Knapp, 240 U. S. 464, 466, 36 Sup. Ct. 399, 60 L. Ed. 745; Southern Ry. Co. v. Puckett, 244 U. S. 571, 574, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69.

(248 U. S. 537)

No. 46. Edmund PENFOLD et al., executors, etc., et al., plaintiffs in error, v. Eugene M. TRAVIS, as Comptroller of the State of New York. Nov. 18, 1918. In error to the Surrogate's Court, New York County, State of New York. For opinion below, see 216 N. Y. 171, 110 N. E. 499. Mr. William Mitchell, of New York City, for plaintiffs in error. Mr. John B. Gleason, of New York City, for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co., 228 U. S. 596, 33 Sup. Ct. 605, 57 L. Ed. 982; Bilby et al. v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701; Municipal Securities Corporation v. Kansas City, 246 U. S. 63, 69, 38 Sup. Ct. 224, 62 L. Ed. 579; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 37 Sup. Ct. 643, 61 L. Ed. 1153; (2) Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101; Empire State-Idaho Mining Co. v. Hanlev, 205 U. S. 225, 27 Sup. Ct. 476, 51 L. Ed. 779; Goodrich v. Ferris, 214 U. S. 71, 29 Sup. Ct. 580, 53 L. Ed. 914; Brolan v. United States, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544.

No. 55. Paul APPENZELLAR, plaintiff in error, v. Henry C. CONRAD, associate judge, etc., et al. Nov. 18, 1918. For opinion below, see 6 Boyce (Del.) 225, 99 Atl. 31. Messrs. Josiah Marvel and David T. Marvel, both of Wilmington, Del., for plaintiff in error. Mr. Robert H. Richards, of Wilmington, Del., for defendant in error. In error to the Supreme Court of the State of Delaware. Dismissed with costs, per stipulation.

(248 U. S. 592)

No. 229. The CLEVELAND - CLIFFS IRON COMPANY, plaintiff in error, v. TOWNSHIP OF REPUBLIC. Nov. 18, 1918. For opinion below, see 196 Mich. 189, 163 N. W. 90. Mr. Wm. P. Belden, of Ishpeming, Mich., for plaintiff in error. In error to the Supreme Court of the State of Michigan. Dismissed with costs, on motion of counsel for the plaintiff in error.

(248 U. S. 537)

No. 246. The CINCINNATI TRACTION COMPANY et al., plaintiffs in error, v. the CITY OF CINCINNATI. Nov. 18, 1918. In error to the Supreme Court of the State of Ohio. For opinion below, see 96 Ohio St. 602, 118 N. E. 1082. Messrs. Ellis G. Kinkead and Joseph Wilby, both of Cincinnati, Ohio, for plaintiffs in error. Mr. Charles A. Groom, of Cincinnati, Ohio, for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Consolidated Turnpike Co. v. Norfolk, etc., Railway Co., 228 U. S. 596, 33 Sup. Ct. 605, 57 L. Ed. 982; Bilby et al. v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701; Municipal Securities Corporation v. Kansas City, 246 U. S. 63, 69, 38 Sup. Ct. 224, 62 L. Ed. 579; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 37 Sup. Ct. 643, 61 L. Ed. 1153.

No. 571. SEABOARD AIR LINE RAILWAY COMPANY, petitioner, v. Mrs. Lessie HORTON, administratrix, etc. Nov. 18, 1918. See, also, 248 U. S. 553, 39 Sup. Ct. 8, 63 L. Ed. —. Messrs. Thaddeus A. Adams, of Charlotte, N. C., and E. Marvin Underwood, of Norfolk, Va., for petitioner. Motion for supersedeas submitted by Mr. E. Marvin Underwood for the petitioner and motion granted, a bond for \$25,000 to be given within ten days, to be approved by clerk of this court.

(248 U. S. 579)

No. 713. The BRENNAN CONSTRUCTION COMPANY, petitioner, v. John L. NEWBOLD. Nov. 18, 1918. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(248 U. S. 579)

No. 720. Thomas J. MOONEY, petitioner, v. The PEOPLE OF STATE OF CALIFORNIA. Nov. 18, 1918. For opinion below, see 174 Pac. 325. Petition for a writ of certiorari to the Supreme Court of the State of California denied.

(248 U. S. 592)

No. 57. Joseph FENSTERWALD, plaintiff in error, v. Selma R. BURK. Nov. 19, 1918. In error to the Court of Appeals of the State of Maryland. For opinion below, see 129 Md. 181, 98 Atl. 358. Mr. Samuel Want, of Baltimore, Md., for plaintiff in error. Messrs. J. Kent Rawley, of Richmond, Va., and Edward M. Hammond, of Baltimore, Md., for defendant in error. Dismissed with costs, pursuant to the 16th rule (32 Sup. Ct. ix) on motion of Mr. J. Kent Rawley for the defendant in error.

(248 U. S. 593)

No. 16. *THE UNITED STATES*, appellant, v. *E. W. BLISS COMPANY*. Nov. 20, 1918. Appeal from the United States Circuit Court of Appeals for the Second Circuit. For opinions below, see 224 Fed. 325, 139 C. C. A. 633, and 229 Fed. 376, 143 C. C. A. 496. The Attorney General, for the United States. Dismissed on motion of Mr. Assistant to the Attorney General Todd for the appellant.

(248 U. S. 592)

No. 71. *NEW ORLEANS, MOBILE & CHICAGO RAILROAD COMPANY*, plaintiff in error, v. *T. E. McCARDLE et al.* Nov. 20, 1918. In error to the Supreme Court of the State of Mississippi. For opinion below, see 71 South. 880. Mr. James N. Flowers, of Jackson, Miss., for plaintiff in error. Dismissed with costs, on authority of counsel for the plaintiff in error.

No. —. Original. Ex parte In the matter of *William F. HUDGINGS*, petitioner. Nov. 25, 1918. Motion for leave to file petition for a writ of habeas corpus granted, and a writ of habeas corpus awarded as prayed, returnable Monday, December 9, next.

(248 U. S. 537)

No. 69. *Mills W. BARSE*, plaintiff in error, v. *George W. SAUL*. Nov. 25, 1918. In error to the Supreme Court of the State of New York. For opinion below, see 158 App. Div. 560, 143 N. Y. Supp. 830. Mr. Max J. Kohler, of New York City, for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) *Stewart v. City of Kansas City*, 239 U. S. 14, 36 Sup. Ct. 15, 60 L. Ed. 120; *Cuyahoga River Power Co.*

v. *Northern Realty Co.*, 244 U. S. 300, 37 Sup. Ct. 643, 61 L. Ed. 1153; *Bilby et al. v. Stewart*, 246 U. S. 255, 257, 38, Sup. Ct. 264, 62 L. Ed. 701; (2) *Empire State-Idaho Mining Co. v. Hanley*, 205 U. S. 225, 27 Sup. Ct. 476, 51 L. Ed. 779; *Goodrich v. Ferris*, 214 U. S. 71, 29 Sup. Ct. 580, 53 L. Ed. 914; *Brolan v. United States*, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544.

(248 U. S. 538)

No. 77. *Willie M. GOING*, administratrix of *Nathan W. Going*, deceased, plaintiff in error, v. *NORFOLK & WESTERN RAILWAY COMPANY*. Nov. 25, 1918. In error to the Supreme Court of Appeals of the State of Virginia. For opinion below, see 119 Va. 543, 89 S. E. 914. Mr. W. L. Welborn, of Roanoke, Va., for plaintiff in error. Messrs. Waller R. Staples, of Roanoke, Va., Theodore W. Reath, of Philadelphia, Pa., and Roy B. Smith, of Norfolk, Va., for defendant in error.

PER CURIAM. Affirmed upon the authority of *Seaboard Air Line v. Padgett*, 236 U. S. 668, 673, 35 Sup. Ct. 481, 59 L. Ed. 777; *Great Northern Ry. Co. v. Knapp*, 240 U. S. 464, 466, 36 Sup. Ct. 399, 60 L. Ed. 745; *Southern Ry. Co. v. Puckett*, 244 U. S. 571, 574, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B. 69. See, also, *Chicago, Milwaukee & St. Paul Ry. Co. v. O'Connor*, administratrix, etc., 248 U. S. 536, 39 Sup. Ct. 21, 63 L. Ed. —, decided November 18, 1918.

(248 U. S. 580)

No. 723. *WILLIAM WRIGLEY, JR., COMPANY*, petitioner, v. *L. P. LARSON, JR., COMPANY*. Nov. 25, 1918. For opinion below, see 253 Fed. 914. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(248 U. S. 113)

NICOULIN v. O'BRIEN.

(Submitted Under Rule 20 Oct. 21, 1918. Decided Dec. 9, 1918.)

No. 113.

1. STATES ⇨12(2)—EXTENT AND BOUNDARIES—KENTUCKY.

Territorial limits of Kentucky extend across Ohio river to low-water mark on northerly shore.

2. FISH ⇨8—PROTECTION BY STATE—OHIO RIVER.

No limitation on power of Kentucky to protect fish within her boundaries, including Ohio river across to low-water mark on northerly shore, by proper legislation, resulted from mere establishment of concurrent jurisdiction with Indiana by Virginia Compact (13 Hening's Stat. at L. c. 14, pp. 17, 19).

In Error to the Court of Appeals of the State of Kentucky.

Action by Frank Nicoulin against John J. O'Brien, a Justice of the Peace, to restrain him from enforcing a judgment. From judgment denying writ of prohibition, plaintiff appealed to the Supreme Court of Kentucky, which affirmed (172 Ky. 473, 189 S. W. 724), and plaintiff brings error. Affirmed.

Mr. Augustus E. Willson, of Louisville, Ky., for plaintiff in error.

Mr. David A. Sachs, of Louisville, Ky., for defendant in error.

*Memorandum opinion by Mr. Justice McREYNOLDS.

Plaintiff in error was adjudged guilty of violating the prohibition of a Kentucky statute by seining for fish in the Ohio river south of low-water mark on the Indiana side. 172 Ky. 473, 189 S. W. 724. We are asked to hold that by reason of the Virginia Compact (13 Hening's St. at Large, c. 14, pp. 17, 19) Kentucky had no power to regulate fishing in the river at that point without Indiana's concurrence. The provision relied upon is this:

"Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."

[1, 2] The territorial limits of Kentucky extend across the river to low-water mark on the northerly shore. *Indiana v. Kentucky*, 136 U. S. 479, 519, 10 Sup. Ct. 1051, 34 L. Ed. 329. And we think it clear that no limitation upon the power of that commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia Compact. See *Wedding v. Meyler*, 192 U. S. 573, 24 Sup. Ct. 322, 48 L. Ed. 570, 66 L. R. A. 833; *Central R. R. Co. v. Jersey City*, 209 U. S. 473, 28 Sup. Ct. 592, 52 L. Ed. 896; *Nielsen v. Oregon*, 212 U. S.

315, 29 Sup. Ct. 383, 53 L. Ed. 528; *McGowan v. Columbia River Packers' Ass'n*, 245 U. S. 352, 38 Sup. Ct. 129, 62 L. Ed. 342.

The judgment below is affirmed.

(248 U. S. 35)

ORR v. ALLEN et al.

(Submitted Oct. 14, 1918. Decided Dec. 9, 1918.)

No. 288.

1. COURTS ⇨366(1)—CONSTITUTIONALITY OF STATE STATUTE—STATE DECISIONS.

A basic contention of plaintiff appellant, seeking injunction against enforcement of state drainage statute, which assumes that the statute has a significance which Supreme Court of state has expressly decided it has not, also that Constitution of state forbids exertion of legislative power which same court has expressly held Legislature possesses, cannot be sustained.

2. COURTS ⇨107—CONSTRUCTION OF DECISIONS.

A basic contention of plaintiff appellant, seeking to restrain enforcement of state drainage statute, which disregards line of conclusive decisions of Supreme Court of the United States by separating expressions in opinions from their context in order to give them a meaning which the opinions do not sanction, and which it has been repeatedly declared would be inconsistent with decided cases, cannot be sustained.

Appeal from the District Court of the United States for the Southern District of Ohio.

Suit by Louis H. Orr against Henry M. Allen and others. From judgment of the District Court refusing writ of injunction (245 Fed. 486), plaintiff appeals. Affirmed.

Mr. Robert J. Smith, of Piqua, Ohio, for appellant.

Mr. Oren Britt Brown, of Dayton, Ohio, for appellees.

Memorandum opinion by the CHIEF JUSTICE.

The "Conservancy Act of Ohio" is the name given the statute by its first section. Its seventy-nine sections are thus epitomized in the title:

"To prevent floods, to protect cities, villages, farms and highways from inundation, and to authorize the organization of drainage and conservation districts." Ohio Gen. Code, §§ 6828—1 to 6828—79; Laws of Ohio, vol. 104, p. 13.

The statute was admittedly designed to prevent the recurrence of the unprecedented and disastrous flood which invaded the Miami Valley in 1913. Briefly, there was provision for drainage districts, for boards to plan, construct and maintain the works contemplated, with the right to *exert eminent domain, and to raise money by taxation, by assessments for benefits, and, in some cases, by issue of bonds. Every person affected who was aggrieved was undoubtedly given ample means by the statute to test judicially his grievance.

A district was organized embracing land along each side of the Miami river which had

been flooded in 1913 or which was required for reservoir sites or for furnishing material.

The appellant, a citizen of California owning property within this district, filed his bill to enjoin the enforcement of the statute on the ground that it was repugnant to both the Constitution of the state and that of the United States. The court, organized under section 286 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1243]), in a careful and clear opinion disposed adversely of every proposition upon which the contention was based. The injunction was refused. This direct appeal was taken.

[1, 2] All the contentions rest upon one or the other or both of two propositions: (1) That the statute is unconstitutional because of some particular provision relied upon; and (2) because of the inherent want of constitutional authority by government to exert the powers which the statute gave. The first assumes that the statute has a significance which the Supreme Court of Ohio has expressly decided it has not, and, in addition, that the Constitution of the state forbids the exertion of a legislative power which the same court has expressly held the Legislature possessed. The second disregards a line of conclusive decisions of this court which leave nothing open for controversy, or, which is tantamount thereto, separates expressions in opinions of this court from their context in order to give to them a meaning which the opinions do not sanction and which it has been repeatedly declared would be inconsistent with the decided cases.

Thus concluding, we think nothing is required to dis*pose of the controversy but to cite the two lines of cases referred to. (1) *Snyder v. Deeds*, 91 Ohio St. 407, 110 N. E. 1068; *Miami Co. v. Dayton et al.*, 92 Ohio St. 215, 110 N. E. 726; *Com'rs v. Gates*, 83 Ohio St. 20, 34, 93 N. E. 255; *State ex rel. Franklin Co. Conservancy District v. Valentine*, 94 Ohio St. 440, 114 N. E. 947; (2) *Houck v. Little River District*, 239 U. S. 254, 262, 36 Sup. Ct. 58, 60 L. Ed. 266, and cases cited.

Affirmed.

(248 U. S. 67)

UNION PAC. R. CO. v. PUBLIC SERVICE COMMISSION OF MISSOURI.

(Argued Nov. 19 and 20, 1918. Decided Dec. 9, 1918.)

No. 65.

1. COMMERCE — INTERFERENCE BY PUBLIC SERVICE COMMISSION—FEE FOR BOND ISSUE.

A fee based on a percentage of total bond issue in accordance with Missouri statute, exacted by Public Service Commission of Missouri for certificate authorizing railroad bond issue of \$31,848,900, only \$3,000,000 worth of railroad's total property of \$281,000,000, and six-tenths of one mile of main track out of 3,500 miles, being in Missouri, was an unlawful interference with commerce among states.

2. COURTS — 391(1) — SUPREME COURT OF UNITED STATES — DUTY TO DETERMINE WAIVER OF FEDERAL RIGHT.

It is the duty of the Supreme Court of the United States to examine for itself whether there is any basis in the admitted facts, or in the evidence, when the facts are in dispute, for finding that the federal right involved has been waived by the party complaining of the judgment of a state court.

3. CONSTITUTIONAL LAW — 43(2)—RIGHT TO RAISE QUESTION—ESTOPPEL—DURESS.

Application by railroad to Public Service Commission of Missouri for certificate authorizing bond issue, and acceptance of certificate, for which fee was charged unlawfully interfering with interstate commerce, held made under duress, so that railroad was not estopped to attack statute of Missouri, if applicable, purporting to impose penalties for failure to procure certificate and to recover fee; certificate of commission being a commercial necessity for issue of bonds.

In Error to the Supreme Court of the State of Missouri.

Writ of review by the Union Pacific Railroad Company against the Public Service Commission of the State of Missouri to review an order of the Commission. From an order setting aside the order and remanding the case to the Commission with directions, the Commission appealed to the Supreme Court of Missouri, which reversed and remanded, with directions (268 Mo. 641, 187 S. W. 827), and the railroad brings error. Reversed.

Messrs. N. H. Loomis, of Omaha, Neb., H. W. Clark, of New York City, and I. N. Watson, of Kansas City, Mo., for plaintiff in error.

Mr. A. Z. Patterson, of Jefferson City, Mo., for defendant in error.

*Mr. Justice HOLMES delivered the opinion of the Court.

This case concerns the validity of a charge made by the Public Service Commission of Missouri for a certificate authorizing the issue of bonds secured by a mortgage of the whole line of the Union Pacific road. The statutes of Missouri have general prohibitions against the issue of such bonds without the authority of the Commission, impose severe penalties for such issue and purport to invalidate the bonds if it takes place. Moreover the bonds would be unmarketable if the certificate were refused. Upon these considerations the plaintiff in error applied, in all the States through which its line passed, for a certificate authorizing the issue of bonds to the amount of \$31,848,900. The Missouri Commission granted the authority and charged a fee of \$10,962.25. The Railroad Company accepted the grant as required by its terms, but protested in writing against the charge as an unconstitutional interference with interstate commerce, and gave notice that it paid under duress to escape the statutory penalties and to prevent the revocation of the certificate. It moved for a rehearing on the ground that the statutes of Missouri, if they gave the Commission jurisdiction, did not purport to authorize the charge, or, if they did purport to do so and to invalidate an issue without the Commission's assent, were in conflict with the Constitution of the United States. The rehear-

ing was denied and thereupon the Railroad, pursuant to State Law, applied to a local Court for a certiorari to set *the Commission's judgment aside as an interference with interstate commerce and as bad under the Fourteenth Amendment. The Court decided that the charge was unreasonable and that the minimum statutory fee of \$250 should have been charged. On appeal by the Commission the Supreme Court held the Railroad estopped by its application, reversed the Court below and upheld the charge. 263 Mo. 641, 187 S. W. 827.

[1] The Railroad Company is a Utah corporation having a line over thirty-five hundred miles long, extending through several States, from Kansas City, Missouri, and elsewhere, to Ogden, Utah. It has only about six-tenths of one mile of main track in Missouri, and its total property there is valued at a little more than three million dollars, out of a total valuation of over two hundred and eighty-one millions. The bonds were to reimburse the Company for expenditures of which again less than one hundred and twenty-five thousand dollars had been made in Missouri. The business done by the Railroad in Missouri is wholly interstate. On these facts it is plain, on principles now established, that the charge, which in accordance with the letter of the Missouri statutes, was fixed by a percentage on the total issue contemplated, was an unlawful interference with commerce among the States. *Looney v. Crane Co.*, 245 U. S. 178, 188, 38 Sup. Ct. 85, 62 L. Ed. 230; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 38 Sup. Ct. 292, 62 L. Ed. 624, Ann. Cas. 1918C, 617.

[2] The Supreme Court of the State avoided this question by holding that the application to the Commission was voluntary and hence that the Railroad Company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this Court. But the later decisions show that such is not the law and that on the contrary it is the duty of this Court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the federal *right has been waived. *Creswill v. Grand Lodge Knights of Pythias*, 225 U. S. 246, 32 Sup. Ct. 822, 56 L. Ed. 1074. Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in *Atchison, Topeka & Santa Fé Ry. Co. v. O'Connor*, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050.

[3] On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. The certificate was a commercial necessity for the

issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The Railroad Company and its officials were not bound to take the risk of these threats being verified. Of course, it was for the interest of the Company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called. The *Eliza Lines*, 199 U. S. 119, 130, 131, 26 Sup. Ct. 8, 50 L. Ed. 115, 4 Ann. Cas. 406. If, as may be, the Supreme Court of the State regards or will regard this statute as inapplicable, *Public Service Commission v. Union Pacific R. R. Co.*, 271 Mo. 258, 197 S. W. 39, probably the State would not wish to retain the charge, but we repeat, the Railroad Company was not bound to take the risk of the decision, and no proceeding has been pointed out to us by which it adequately could have avoided evils that made it practically impossible not to comply with the terms of the law. *Atchison, Topeka & Santa Fé R. R. Co. v. O'Connor*, 223 U. S. 280, 286, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050.

Judgment reversed.

(248 U. S. 154)

PETRIE et al. v. NAMPA & MERIDIAN IRR. DIST.

(Argued Nov. 19, 1918. Decided Dec. 9, 1918.)

No. 47.

1. COURTS ⇐394(10) — ERROR TO STATE COURT—FEDERAL QUESTION—DUE PROCESS.

A federal question was presented in proceeding in a state court by an irrigation district for confirmation of contract for the furnishing of water by the United States to the district, by answer and cross-complaint of owners of property within the district, alleging the contract would oblige them to pay an assessment for water rights which they did not require, because they had sufficient water, that there was no authority under the laws of the United States for the contract, and that for these reasons it, if approved, would deprive them of property without due process and without compensation, in contravention of the Fourteenth Amendment.

2. COURTS ⇐391(4)—ERROR TO STATE COURT —FEDERAL QUESTION.

Even if the state Supreme Court decided a federal question adversely to plaintiffs in error, it will not be considered, but writ of error to that court will be dismissed; it having also decided against them on an independent ground broad enough to support the judgment, and based wholly on state statutes and procedure, that the cross-complaint presenting the federal question was premature, and immaterial to the question presented by the petition, and should have been stricken.

In Error to the Supreme Court of the State of Idaho.

Proceeding by the Nampa & Meridian Irrigation District against James G. Petrie and others. Judgment for plaintiff was affirmed by the Supreme Court of Idaho (28 Idaho

227, 153 Pac. 425), and defendants bring error. Dismissed.

Mr. Oliver O. Haga, of Boise, Idaho, for plaintiffs in error.

Mr. B. E. Stoutemyer, of Boise, Idaho, for defendant in error.

*Mr. Justice CLARKE delivered the opinion of the Court.

The Board of Directors of the Nampa & Meridian Irrigation District, a quasi municipal corporation, organized under the laws of Idaho (Pioneer Irrigation District v. Walker, 20 Idaho, 605, 119 Pac. 304; Colburn v. Wilson, 23 Idaho, 337, 130 Pac. 381), filed an amended petition in the district court of that state, praying for the examination, approval, and confirmation by the court of a contract which it desired to enter into with the United States government, acting through the Secretary of the Interior, which provided that the United States should sell and the irrigation district should purchase, and in the manner prescribed pay for, a supply of water to irrigate an extensive tract of arid land within the district, and to supplement an insufficient supply, for other lands, which the district had theretofore acquired from other sources. The proposed contract also provided that the United States and the district should share in the expense of constructing a system of drainage, to reclaim considerable areas of land within the district which had become "water-logged" through seepage from both the government and the district systems of irrigation, and to prevent threatened damage to other lands from such seepage.

[1] The proceeding involved is prescribed by the state statutes, which provide that when such a petition is filed the court shall fix a day for hearing, and shall notify the persons interested therein by publication, for four weeks, in a newspaper published in the county. Any persons interested in the subject-matter may demur to or answer the petition, and the rules of pleading and practice prescribed in the Code of Civil Procedure of the state (Revised Codes Idaho, vol. 1, tit. 14, c. 4, §§ 2397, 2398, and 2401) are made applicable.

The required notice having been given, the plaintiffs in error, owners of lands within the irrigation district, filed an "answer and cross-complaint," in which they denied many allegations of the petition, and affirmatively alleged: That if the contract should be entered into they would be obliged to pay an assessment of \$75 upon each acre of their land for water rights which they did not require, because they had a sufficient supply from other sources; that neither the United States, nor the Secretary of the Interior, nor the irrigation district had authority under the laws of the United States to enter into the contract; and that, for these reasons, if it were approved and entered into, the plaintiffs in error would be deprived of

their property without due process of law and without compensation, in violation of the Fourteenth Amendment to the Constitution of the United States. A permanent injunction was prayed for, restraining the petitioners from entering into the proposed contract and from levying assessments to carry it into effect.

The District Court approved the contract, upon a full finding of facts, and its judgment was affirmed by the Supreme Court of the state in a judgment which we are asked to review upon this writ of error.

*A motion to dismiss the writ of error was postponed until the hearing upon the merits, which has now been had.

The statement which we have made of the issues presented by this record shows that the first ground of the motion—that a federal question was not presented—cannot be sustained. *Tregua v. Modesto Irrigation District*, 164 U. S. 179, 185, 17 Sup. Ct. 52, 41 L. Ed. 395.

[2] But the second ground of the motion to dismiss is valid, viz. that, even if it be conceded that the Supreme Court decided a federal question against the plaintiffs in error, nevertheless the court decided against them also upon an independent ground, not involving any federal question and broad enough to support the judgment, and for this reason the federal question involved will not be considered on this writ of error, under a series of decisions by this court extending at least from *Klinger v. State of Missouri*, 13 Wall. 257, 263, 20 L. Ed. 635, to *Enterprise Irrigation District et al. v. Farmers' Mutual Canal Co.*, 243 U. S. 157, 164, 37 Sup. Ct. 318, 61 L. Ed. 644.

While the state Supreme Court finds that the United States, acting through the Secretary of the Interior, could lawfully enter into the proposed contract and that the approval and confirmation of it by the court would not deprive the plaintiffs in error of their property without due process of law or without compensation, yet the court also holds that the "cross-complaint," in which these federal rights are asserted, was filed prematurely under the statutes and practice of the state of Idaho, and that no charge or burden would be imposed upon the lands of the plaintiffs in error by the approval of the contract, assuming that it should be executed. This for the reason that the state statute provides that any assessments upon such lands to carry into effect the purposes of the contract must subsequently be made by the Board of Directors of the Irrigation District on the basis of benefits conferred, at a meeting of the board, to be held at a time and place of which the owners of the lands to be charged must be notified by postal card and by newspaper publication. Revised Codes Idaho, vol. 1, tit. 14, c. 4, § 2400. At such meeting the landowner may object to any proposed assessment on his land, and

if the objection is overruled by the board, and he does not consent to the assessment as finally determined, such objection shall, without further proceeding, be regarded as appealed to the district court, and shall there again be heard in proceedings to confirm the assessment. It is expressly provided that upon such hearing the court shall disregard every error, irregularity, or omission which does not affect the substantial rights of any party, and shall correct any error which may be found in such assessment, or any injustice which may result from it.

For this reason the court held that the claims stated in the "cross-complaint" were prematurely asserted, were "wholly immaterial" to the inquiry presented by the petition of the district, and "should have been stricken from the answer." We cannot doubt that this conclusion of the state Supreme Court, based as it is wholly on state statutes and procedure, is broad enough to sustain the judgment rendered, irrespective of the disposition of any federal question involved, and therefore the writ of error will be dismissed.

(248 U. S. 73)

STERRETT v. SECOND NAT. BANK OF
CINCINNATI, OHIO.

(Argued Nov. 8, 1918. Decided Dec. 9, 1918.)

No. 378.

1. RECEIVERS ⇨210—SUIT IN FOREIGN JURISDICTION.

It is settled doctrine in federal jurisprudence that a chancery receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property situated therein; his functions and authority being confined to the jurisdiction of his appointment, and the practice permitting application for ancillary receivership in a foreign jurisdiction where local assets may be recovered, and, if necessary, administered.

2. COURTS ⇨96(1)—FEDERAL RULE—CHANGE.

The contrary rule having become the settled law of the federal courts, if the powers of chancery receivers are to be enlarged to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation, not from judicial action.

3. RECEIVERS ⇨210—AUTHORITY TO SUE IN FOREIGN JURISDICTION.

In view of Code Ala. 1907, §§ 3509, 3511, 3512, 3560, Alabama receiver of a banking corporation held not vested with title to its assets as assignee or statutory successor so as to authorize him to sue for their recovery in a foreign federal jurisdiction.

Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Suit by W. C. Sterrett, as receiver of the Alabama Trust & Savings Company, against the Second National Bank of Cincinnati, Ohio. From the decree of the District Court, both parties appealed to the Circuit Court of Appeals, which reversed (246 Fed. 753, 159 C. C. A. 55), and plaintiff petitions for certiorari. Decree of the Circuit Court of Appeals affirmed.

Messrs. Edmund H. Dryer and Forney Johnston, both of Birmingham, Ala., for petitioner.

Mr. Lawrence Maxwell, of Cincinnati, Ohio, for respondent.

*Mr. Justice DAY delivered the opinion of the court.

The plaintiff, as receiver of the Alabama Trust & Savings Company, a banking corporation organized under the laws of the state of Alabama, filed his bill in the United States District Court for the Southern District of Ohio, against the Second National Bank of Cincinnati to recover sums of money for which he alleged the Second National Bank was liable on account of certain transactions which had taken place between the National Bank and the Savings Company and its officers the details of which it is unnecessary to set forth. Upon final hearing the District Court found the defendant liable for the application of a balance of the Savings Company's deposit in the National Bank, upon paper held by it on which the Savings Company appeared as principal maker, but which was found to have been given for the benefit of certain of the Savings Company's officers. Plaintiff's remaining claims were rejected. Both parties appealed to the Circuit Court of Appeals for the Sixth Circuit, which reversed the decree of the District Court, upon the ground that the receiver had no authority to bring the suit (246 Fed. 753, 159 C. C. A. 55), and the case is here on writ of certiorari to the Circuit Court of Appeals.

In the year 1911 certain creditors of the Savings Company, an Alabama corporation, filed a bill against it in a chancery court of Alabama alleging its insolvency.

The chancery court on April 27, 1911, rendered a final administration decree wherein it found that the defendant Savings Company was insolvent; that its assets constituted a trust fund for the payment of its creditors, and the same should be marshaled and administered in that court; that the defendant was a corporation organized under the General Laws of Alabama; that upon final *settlement it should be dissolved; that it had suspended business and was not about to resume the same, and could not do so with safety to the public; that, therefore, W. C. Sterrett be appointed receiver of defendant, and empowered and directed to demand and take into his possession all of the defendant's assets and property to which it was entitled and to recover the same and reduce it to money, and administer the same under the further order of the court. And the court further authorized the receiver to employ counsel and to bring such actions at law or in equity as he might be advised and to incur such expenses as might be necessary. Later, on March 8, 1912, the Alabama chan-

cery court specifically directed the receiver, plaintiff herein, to bring this suit in the District Court of the United States for the Southern District of Ohio, Western Division.

The material parts of the sections of the Code of Alabama (1907, vol. 2, pp. 430, 433), pertinent to this case, provide as follows:

"3509. * * * The assets of insolvent corporations constitute a trust fund for the payment of the creditors of such corporations, which may be marshaled and administered in courts of equity in this state."

Section 3511 provides for the dissolution of corporations by action of the stockholders, and enacts that the court—

"* * * shall appoint a receiver of all the books, property, and assets of the corporation * * * (who) shall, under the direction of the court, collect all debts due the corporation, and sell all the property, real and personal, of the corporation, pay the debts thereof ratably or in full as the funds realized may admit, and divide the residue after the debts and costs are paid, among the several classes of stockholders, according to the amount owned by each, and according to the preferences, if any, of the several classes as provided in the certificates of incorporation."

*76 *Section 3512 covers the application for receivership and dissolution of insolvent corporations upon bill of creditors or stockholders in the chancery court, and provides:

"* * * * The court * * * may appoint a receiver of all the property and assets of the corporation * * * (who) under the direction of the court, must exercise the same powers and perform the same duties as are required of receivers in the next preceding section, and otherwise manage the affairs of the corporation pending final settlement thereof as the court shall direct. * * *"

There is also a provision for proceedings by the attorney general (page 444):

"3560. Proceedings when bank found not solvent—Whenever the treasurer finds that a bank or corporation chartered by the laws of this state and doing a banking business, is not in a solvent condition, he shall immediately report the condition of the bank to the governor, and the governor shall direct the attorney general to institute proceedings in a court having jurisdiction in the county where the bank or parent bank is located, to put the bank in the hands of some competent person, who shall give bond in an amount to be fixed by the judge for the faithful discharge of his duties, and said person so appointed shall immediately take charge of the business of said bank, collecting its assets and paying off its liabilities under the law and rules of such court."

The question presented for our consideration is whether the receiver appointed in the chancery court is authorized to sue in the federal court for the recovery of such property.

[1, 2] Since the decision of this court in *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164, it is the settled doctrine in federal jurisprudence that a chancery receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated. The functions and authority of such receiver are confined to the jurisdiction in which he was appointed. The reasons for this rule were fully discussed in *Booth v. Clark* and have been reiterated in

later decisions of this court. *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; *Great Western Mining & Manufacturing Co. v. Harris*, 198 U. S. 561, 575, 577, 25 Sup. Ct. 770, 49 L. Ed. 1163; *Keatley v. Furey*, 226 U. S. 399, 403, 33 Sup. Ct. 121, 57 L. Ed. 273. This practice has become general in the courts of the United States, and is a system well understood and followed. It permits an application for an ancillary receivership in a foreign jurisdiction where the local assets may be recovered and, if necessary, administered. The system established in *Booth v. Clark* has become the settled law of the federal courts, and, if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation and not from judicial action. *Great Western Mining & Manufacturing Co. v. Harris*, supra, 198 U. S. page 577, 25 Sup. Ct. 770, 49 L. Ed. 1163.

[3] Counsel for petitioner insists that the case is not ruled by the doctrine of *Booth v. Clark*, and that under the Alabama statutes and the decisions of the Supreme Court of that state the title to the property of the Trust Company is vested in the receiver in such wise that he is authorized to sue for its recovery in the courts of a foreign jurisdiction. If this contention is well founded there is no question of the authority of the receiver to prosecute the action. *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337; *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; *Bernheimer v. Converse*, 206 U. S. 516, 534, 27 Sup. Ct. 755, 51 L. Ed. 1163; *Converse v. Hamilton*, 224 U. S. 243, 257, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292; *Keatley v. Furey*, 226 U. S. 399, 403, 33 Sup. Ct. 121, 57 L. Ed. 273.

The Alabama cases, *Oates v. Smith*, 176 Ala. 39, 57 South. 438; *Montgomery Bank & Trust Co. v. Walker*, 181 Ala. 368, 61 South. 951; *Cobbs, Receiver, v. Vizard Investment Co.*, 182 Ala. 372, 62 South. 730, Ann. Cas. 1915D, 801; *Coffey v. Gay*, 191 Ala. 137, 67 South. 681, L. R. A. 1915D, 802; *Hundley v. Hewitt*, 195 Ala. 647, 71 South. 419—are fully reviewed in the opinion of the Circuit Court of Appeals. To rehearse them now would be but a repetition of what is said in that opinion.

*An examination of the sections of the statutes, here involved, in the light of the decisions of the Supreme Court of Alabama, does not in our opinion warrant the conclusion that title is vested in the receiver as assignee or as statutory successor of the insolvent corporation in such wise as to authorize the action to recover in a foreign jurisdiction. Collectively, these sections provide for a receivership to administer the property and assets of the insolvent corporation under the authority and direction of the appointing court. The statutes do not un-

dertake to vest in the receiver an estate in the property to be administered for the benefit of creditors as was the case in *Bernheimer v. Converse*, supra, and *Converse v. Hamilton*, supra, in which the right to sue in the courts of a foreign jurisdiction was sustained.

The Circuit Court of Appeals left open the question of the right to apply for an ancillary receivership in the District Court, and the effect of such appointment, if made, upon the pending suit. We pursue the like course, and as such an application could only originate in the District Court we express no opinion concerning it.

The decree of the Circuit Court of Appeals is affirmed.

(248 U. S. 65)

WATTERS v. PEOPLE OF STATE OF MICHIGAN.

(Submitted Nov. 19, 1918. Decided Dec. 9, 1918.)

No. 58.

COURTS $\hookrightarrow$ 366(6) — FEDERAL COURTS — FOLLOWING STATE COURTS—CONSTRUCTION OF ORDINANCE.

The state court having construed an ordinance declaring it unlawful to engage in peddling any goods without a license to apply to an isolated transaction, a sale of two small articles at rest in the state before the sale, though defendant's business was otherwise interstate commerce, judgment of state court must be affirmed.

In Error to the Supreme Court of the State of Michigan.

Harvey Watters was convicted of peddling without a license. Judgment of conviction was affirmed by the Supreme Court of Michigan (192 Mich. 462, 158 N. W. 865), and defendant brings error. Affirmed.

Mr. Maurice B. Dean, of New York City, for plaintiff in error.

*Mr. Justice HOLMES delivered the opinion of the Court.

The plaintiff in error was complained of for having engaged in peddling goods and having canvassed and taken orders from house to house for the sale of goods in the city of Munising, Michigan, without having received a license as required, by a city ordinance. It may be assumed that much the greater part of his business was interstate commerce and free from any obligation that the ordinance imposed. But in the course of his business he did sell two cans of toilet cream that were at rest in the state before the sale, and it is admitted that this transaction was not protected from state legislation. *Bacon v. Illinois*, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615. On this ground the Supreme Court of the State sustained a conviction and fine. *People v. Watters*, 192 Mich. 462, 158 N. W. 865. The ordinance makes it unlawful to engage in peddling any goods or to canvass from house to house for the sale of

property on subscription without a license, which may be had on payment of specified fees. The plaintiff in error argues that the application of this law should be determined by the general course of business, not by an isolated transaction, and the argument has force. It depends, however, on the construction of the ordinance, and as the State Court has construed it to apply to and forbid the act proved, the judgment must be affirmed.

Judgment affirmed.

(248 U. S. 49)

VAN DYKE et al. v. ARIZONA EASTERN R. CO.

(Argued Nov. 19, 1918. Decided Dec. 9, 1918.)

No. 59.

1. PUBLIC LANDS $\hookrightarrow$ 92—LOCATION OF RIGHT OF WAY UNDER FEDERAL ACT.

Definite location by railroad of right of way under Act Cong. March 3, 1875 (Comp. St. 1916, §§ 4921–4926), occurs by actual construction of road.

2. PUBLIC LANDS $\hookrightarrow$ 92—LOCATION OF RAILROAD RIGHT OF WAY—FOREST RESERVATION—DISCRETION OF SECRETARY OF INTERIOR.

Under Act Cong. March 3, 1875 (Comp. St. 1916, §§ 4921–4926) and Act March 3, 1899 (Comp. St. 1916, § 4945), railroad which platted line across public lands, filing in local land office map of definite location some months after land was incorporated in forest reserve, held to have acquired part of land involved, as against homesteader, despite change in right of way, as constructed, from filed map; Secretary of Interior having given permission to enter reserve and approved map.

3. PUBLIC LANDS $\hookrightarrow$ 92—LOCATION OF RAILROAD'S RIGHT OF WAY—ULTRA VIRES—RIGHT TO OBJECT.

Homesteaders of lands in forest reserve, claimed by railroad as within right of way under Act Cong. March 3, 1875 (Comp. St. 1916, §§ 4921–4926) and Act March 3, 1899 (Comp. St. 1916, § 4945), could not object, as against railroad, that it was beyond its charter powers to construct line involved, that being matter for Secretary of Interior when granting permission to locate line, while homesteaders had no relation to railroad entitling them to complain.

In Error to the Supreme Court of the State of Arizona.

Action by the Arizona Eastern Railroad Company against Cleve W. Van Dyke and others. From judgment for plaintiff, defendants appealed to the Supreme Court of Arizona, which affirmed (18 Ariz. 220, 157 Pac. 1019), and defendants bring error. Judgment affirmed.

Messrs. Richard E. Sloan, of Phoenix, Ariz., and William C. Prentiss, of Washington, D. C., for plaintiffs in error.

Messrs. Charles L. Rawlins, of Globe, Ariz., and Eugene S. Ives, of Tucson, Ariz., for defendant in error.

*Mr. Justice McKENNA delivered the opinion of the Court.

Error to review a judgment of affirmance of a judgment rendered in the Superior Court of Gila County, Arizona, quieting the title of

the Railroad Company to 2.23 acres of land in the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, Sec. 30, T. 1 N., R. 15, E., Gila County Arizona.

The trial court made findings of fact which were concurred in by the Supreme Court. 18 Ariz. 220, 157 Pac. 1019. And we see no reason for not accepting them, notwithstanding plaintiffs in error urge a review of them. They are as follows:

The railroad, as the successor of the Gila Valley Globe & Northern Railway Company, acquired its rights, including rights of way and all other assets. In March, 1906, the latter company platted a line of railroad from Globe to Miami, Arizona, about nine miles in length, passing over and across certain public land, and, November 5, 1908, filed in the local land office its map or profile of definite location as provided by the Act of Congress of March 3, 1875. Prior to that time the land covered by the map as well as the land in dispute was thrown into the Crook National Forest Reserve. April 16, 1909, written application to the United States Department of Agriculture, Forest Service, with map of right of way attached, was made by the railroad to enter and extend its line across a portion of the forest reserve. The railroad was given permission on July 6, 1909, to enter the reservation and to locate and construct its road therein. The map and profile of its road was approved September 21, 1909, by the Secretary of the Interior in accordance with the act of Congress.

In April, 1909, the Globe Company commenced the construction of its road and completed it in September of that year, and it and the appellee company have operated trains ever since October, 1909. Before construction was commenced, to wit, in November and December, 1908, *the Globe Company amended its line of survey and changed the course of its road upon and across the land in dispute and along its entire length to the extent of 100 feet in width on each side of the center line of its railroad and constructed its road on the amended location conforming on the ground to the staked and marked line.

At the time of the amended location the land was held by the Miami Land & Improvement Company, a corporation, as mineral land and the Globe Company accepted a deed from it to a right of way across the land. By executive order the land in dispute was restored to the public domain December 22, 1909, on which date appellant, Cleve Van Dyke, filed upon the same under the homestead law. He had theretofore accepted it under an option to purchase as a mineral location from the Miami Improvement Company. On that date he went off the land, but immediately returned and established his residence with a view to homesteading. In due course he made final proof and on February 12, 1912, a patent without any reservation was issued to him for his homestead.

December 30, 1909, the Globe Company filed

its amended map and profile of its right of way in the local land office which was regularly and duly approved March 4, 1911.

Van Dyke attempted to show that he had established residence upon the land prior to December 22, 1909, the date upon which he filed his homestead entry. But it is clear that he did not go upon the land prior to its inclusion in the Forest Reserve. He was upon the land under the option to purchase mentioned and he attempted to show that he was there under a verbal permit from the Forest Supervisor with the intention of entering the land as a homestead and that he made application to the Forestry Department for an examination and listing thereof under the Act of June 11, 1906; application, however, was rejected. ¹²

*That he did not rely upon the settlement prior to December 22, 1909, is clearly shown by his testimony. He said:

"It is a fact that about midnight on the 22d of December, 1909, I took up residence in the house testified to. That is, I went off the ground and back on again at midnight."

December 22d was the first time the land could have been settled upon without permission from the national government, and this permission he did not obtain.

Upon these facts the Supreme Court said certain contentions arose: (1) It is that of the railroad that its rights were fixed and established in August and September, 1909, when it completed the construction of its railroad. (2) Opposing, plaintiffs in error assert that because the railroad changed its route as located by its original map and profile approved by the Secretary of the Interior it acquired no rights until it filed with the local land office on December 30, 1909, its amended map of location, which was too late; Van Dyke having taken the land as a homestead December 22, 1909. And to the contention of the company that if the land was public it was not bound to follow the line as shown on its map and profile, plaintiffs in error reply that the land had ceased to be public land by being thrown into the National Forest Reserve and that the railroad was hence restricted to the specific right of way shown on its approved map and profile; or, if changed to another and different route, the consent of the Interior Department was necessary and that such permission had not been given and hence the railroad acquired no rights, at least against plaintiffs in error. It is conceded, however, that the railroad company was entitled to a right of way to the extent of 50 feet on each side of the center of its line of track acquired by deed from the Miami Land & Improvement Company, in the execution of which deed Van Dyke "acquiesced." Therefore, as said by the Supreme Court:

"Fifty feet on each side of *the center line of the track, or one hundred feet of the right of way, are not involved in this suit. The area in question being the excess of one hundred feet ¹³

up to two hundred feet, amounting to 2.23 acres."

[1] We have had occasion to consider the Act of March 3, 1875, c. 152, 18 Stat. 482 (Comp. St. 1916, §§ 4921-4926), and what constituted a definite location of the right of way under it, and have decided that such event occurs by the actual construction of the road. *Jamestown & Northern Railroad Co. v. Jones*, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698; *Minneapolis, etc., Ry. Co. v. Doughty*, 208 U. S. 251, 28 Sup. Ct. 291, 52 L. Ed. 474; *Stalker v. Oregon Short Line*, 225 U. S. 142, 32 Sup. Ct. 636, 56 L. Ed. 1027.

[2] It was found by the courts below that the construction of the railroad was commenced in April, 1909, and completed September, 1909, and that trains have been operated on it ever since. This satisfies the condition expressed in the cited cases of the appropriation of a right of way. But it is objected that the land was not then subject to appropriation, being within a Forest Reserve. In reply the Act of Congress of March 3, 1899, c. 427, 30 Stat. 1233 (Comp. St. 1916, § 4945), is adduced. It reads as follows:

"That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby."

Of this act we said, in *Chicago, Milwaukee & St. Paul Ry. v. United States*, 244 U. S. 351, 357, 358, 37 Sup. Ct. 625, 61 L. Ed. 1184, that it commits to the Secretary of the Interior the question of determining whether the public will be injuriously affected by the grant of a right of way to a railroad through a forest reserve and authorizes him to file and approve surveys and plats of the right of way. The measure of his discretion is large and only through his approval can a right of way be acquired.

The condition was satisfied in this case. The *Globe Company*—to the rights of which defendant in error *succeeded—in 1906, in preparation for the construction of its road, platted its road and filed in the local land office its map and profile of definite location under the Act of 1875, in November, 1908. Several months prior to the latter date the land of the platted line and the land in dispute were thrown into the Crook National Forest Reserve. In the following year the railroad company made application to the Commissioner of the General Land Office for permission to enter the reserve and to locate and construct its road thereon. And the application was communicated to the Department of Agriculture and approved by the Acting District Forester; the permission was granted and the map and profile of the road was approved September 21, 1909, by

the Secretary of the Interior pursuant to the Act of Congress of March 3, 1875. The road was constructed, and, as we have said, completed in September, 1909, and put in operation in October. And these successive steps were before the date on which Van Dyke attempted to initiate a homestead right. The discretion of the Secretary of the Interior was therefore exercised, and we agree with the Supreme Court that we cannot infer a rule of the Department which precluded the granting of permission upon the original map and profile.

[3] Plaintiffs in error contend that the railroad company had no power to construct a road from Globe to Miami, Arizona, because its charter failed to designate such a line as within the project for which it was incorporated. This was made an issue by the pleadings and the court found against it. Besides, it is not within the province of plaintiffs in error to make the objection; it was a matter for the Secretary of the Interior to determine. And, again, plaintiffs in error have not such relation to the railroad company as to complain of the exercise of power outside of its charter.

Judgment affirmed.

(248 U. S. 151)

MACMATH v. UNITED STATES.

(Argued and Submitted Nov. 22, 1918. Decided Dec. 9, 1918.)

No. 79.

1. OFFICERS ⇨94 — CREATION OF SALARIED OFFICE—RIGHT TO COMPENSATION.

When an office with a fixed salary has been created by statute, and a person duly appointed to it has qualified and entered upon his duties, he is entitled, during incumbency, to be paid salary prescribed by statute, and effect will not be given to any attempt to deprive him thereof, whether by unauthorized agreement, by condition, or otherwise.

2. CUSTOMS DUTIES ⇨60—SUBORDINATE OFFICERS—CLAIM OF WIDOW OF CLERK—SALARY AS ACTING WEAIGHER.

Widow of one originally appointed assistant weigher of customs, statutes not providing for such assistants, later appointed by collector clerk, class 3, new office, to act as acting United States weigher, and still later appointed clerk, class 4, could not recover from United States salary of her deceased husband as United States weigher of customs from time of appointment as clerk, class 3, up to his death, though he performed some or all duties of weigher.

Appeal from the Court of Claims.

Action against the United States by Jessie McCarthy MacMath, administratrix. From judgment of the Court of Claims dismissing the petition (51 Ct. Cl. 356), petitioner appeals. Affirmed.

Messrs. William E. Russell, of New York City, and L. T. Michener, of Washington, D. C., for appellant.

Mr. Assistant Attorney General Thompson, for the United States.

*Mr. Justice BRANDEIS delivered the opinion of the Court.

[1] When an office with a fixed salary has been created by statute, and a person duly appointed to it has qualified and entered upon the discharge of his duties, he is entitled during his incumbency to be paid the salary prescribed by statute; and effect will not be given to any attempt to deprive him of the right thereto, whether it be by unauthorized agreement, by condition, or otherwise. *United States v. Andrews*, 240 U. S. 90, 36 Sup. Ct. 349, 60 L. Ed. 541; *Glavey v. United States*, 182 U. S. 595, 21 Sup. Ct. 891, 45 L. Ed. 1247.

Section 3 of the Act of July 26, 1866, c. 269 (14 Stat. 289), provides, that weighers at the port of New York shall receive an annual salary of \$2,500. Section 2621 of the Revised Statutes (Comp. St. 1916, § 5359) authorizes collectors to employ, with the approval of the Secretary of the Treasury, weighers at the several ports; and it does not prescribe their number. Section 2634 authorizes the Secretary of the Treasury to fix the number and compensation of clerks to be employed by any collector. The statutes appear to have made no specific provision for the appointment of assistant or acting United States weighers. On May 12, 1909, plaintiff's intestate (who had been appointed on August 1, 1896, "assistant weigher of customs" at a salary, "when employed," of \$3 per diem, and had later received a like appointment at \$4 per diem) was appointed by the collector "clerk, class 3, new office, to act as acting U. S. weigher" with compensation at the rate of \$1,600 per annum. On August 18, 1911, he received a like appointment as clerk, class 4, at the rate of \$1,800 per annum. He continued to perform the duties assigned and was paid the salary named until his death, October 8, 1913. In February, 1915, his administratrix filed with the Auditor of the Treasury a claim for salary of her intestate as "United States weigher of customs" at the rate of \$2,500 per annum, from May 12, 1909, to and including October 7, 1913. Upon disallowance of the claim she brought this suit in the Court of Claims for the amount, namely, \$11,013.89. The court found for the defendant and entered judgment dismissing the petition. 51 Ct. Cl. 356. The case comes here on appeal.

[2] There is a fundamental objection to the allowance of the claim or any part thereof. MacMath was never appointed weigher and never held office as such. His only appointment was that of clerk; his oath of office being "as clerk and acting U. S. weigher, class 3." The Secretary of the Treasury clearly had the right to create and the collector to make appointment to the position of clerk and to designate duties of the appointee. The fact that the incumbent performed also some or all the duties of a

weigher does not operate to promote him automatically to the statutory office of weigher. And the fact that his appointment as clerk in 1909 was made as a part of a reorganization of the service, whereby four of the five positions of United States weigher were abolished, is immaterial; except as showing even more clearly that it was the intention not to appoint him weigher. No contention is, or could successfully be, made that the weighing should be paid for as an extra service, even if it was not a duty attaching to his position as clerk. See *United States v. Garlinger*, 169 U. S. 316, 18 Sup. Ct. 364, 42 L. Ed. 762.

We have, therefore, no occasion to consider whether effect should be given to the agreement by the intestate not to make claim to compensation as acting weigher, or *to his acceptance of the lower compensation without protest during the entire term of his service; nor need we consider the effect of section 2 of the act of July 31, 1894, c. 174 (28 Stat. 162, 205 [Comp. St. 1916, § 3231]), which provides that—

"No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law."

The judgment of the Court of Claims is affirmed.

(249 U. S. 112)

PAYNE et al. v. STATE of KANSAS ex rel. BREWSTER, Atty. Gen.

(Argued Nov. 15, 1918. Decided Dec. 9, 1918.)

No. 49.

1. CONSTITUTIONAL LAW §206(4)—LICENSES §7(1)—CLASS LEGISLATION—REGULATION OF COMMISSION DEALERS IN FARM PRODUCE.

Laws Kan. 1915, c. 371, forbidding sale of farm produce on commission without annual license from state board of agriculture, on proper showing of character, responsibility, etc., is not a violation of Const. U. S. Amend. 14, as abridging rights and privileges of dealers as citizens of United States.

2. CONSTITUTIONAL LAW §240(1)—LICENSES §7(1)—EQUAL PROTECTION OF LAWS—REGULATION OF COMMISSION DEALERS.

Laws Kan. 1915, c. 371, forbidding sale of farm produce on commission without annual license from state board of agriculture, on proper showing of character, responsibility, etc., is not violative of Const. U. S. Amend. 14, as depriving dealers of equal protection of laws.

3. CONSTITUTIONAL LAW §287 — LICENSES §7(1) — DUE PROCESS — REGULATION OF COMMISSION DEALERS.

Laws Kan. 1915, c. 371, forbidding sale of farm produce on commission without annual license from state board of agriculture, on proper showing of character, responsibility, etc., is not violative of Const. U. S. Amend. 14, as depriving such dealers of their property without due process of law.

In Error to the Supreme Court of the State of Kansas.

Original proceeding in mandamus by the

State of Kansas, on the relation of S. M. Brewster, Attorney General, against J. C. Mohler, as Secretary of the State Board of Agriculture, W. S. Payne, L. H. Powell, and others. To review judgment of the Supreme Court of Kansas allowing the writ (98 Kan. 465, 158 Pac. 408), respondents W. S. Payne, L. H. Powell, and others bring error. Affirmed.

Mr. Ray Campbell, of Wichita, Kan., for plaintiffs in error.

Messrs. J. L. Hunt and James P. Coleman, both of Topeka, Kan., and T. F. Railsback, of Kansas City, Kan., for defendant in error.

Memorandum opinion by Mr. Justice McREYNOLDS.

The validity of chapter 371, Laws of Kansas 1915—"An act in relation to the sale of farm produce on commission"—is challenged by certain grain dealers carrying on business in that state. It forbids the sale of farm produce on commission without an annual license, to be procured from the State Board of Agriculture upon a proper showing as to character, responsibility, etc., and a bond conditioned to make honest accounting. A fee of \$10 is required.

[1-3] *Plaintiffs in error maintain that the statute is class legislation which abridges their rights and privileges, that it deprives them of the equal protection of the laws and also of their property without due process of law—all in violation of the Fourteenth Amendment.

Manifestly, the purpose of the state was to prevent certain evils incident to the business of commission merchants in farm products by regulating it. Many former opinions have pointed out the limitations upon powers of the states concerning matters of this kind and we think the present record fails to show that these limitations have been transcended. *Rast v. Van Deman & Lewis*, 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; *Brazee v. Michigan*, 241 U. S. 340, 36 Sup. Ct. 561, 60 L. Ed. 1034, Ann. Cas. 1917C, 522; *Adams v. Tanner*, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973.

The judgment of the court below is affirmed.

(243 U. S. 115)

STATE OF IOWA v. SLIMMER, JR., et al.

(Argued April 15, 1918. Decided Dec. 9, 1918.)

No. — Original.

COURTS 514—SUPREME COURT OF UNITED STATES—ORIGINAL SUIT BY STATE—LEAVE.

Leave will be denied a state to file an original bill in the Supreme Court of the United States against another state and others; it not being entitled to the only effective relief sought, to enjoin further administration by the courts of defendant state of the estate of a decedent resident of plaintiff, who died leaving personal property in defendant state, which under its

statutes are there subject to probate proceedings and inheritance taxes.

On Motion for Leave to File Original Bill.

Motion by the State of Iowa for leave to file an original bill against Abraham Slimmer, Jr., and others. Motion denied.

Mr. H. M. Havner, of Des Moines, Iowa, for complainant.

Mr. Thomas D. O'Brien, of St. Paul, Minn., for defendants.

*Mr. Justice BRANDEIS delivered the opinion of the Court.

With a view to collecting ultimately at least \$13,750 for taxes which the state of Iowa alleges it is entitled to have assessed and levied against the property of Abraham Slimmer, deceased, it asks leave to file in this court an original bill of complaint against the state of Minnesota, Abraham Slimmer, Jr., and Charles Bechhoefer, citizens of Minnesota, and Adolph Lipman, a citizen of Wisconsin. The bill alleges in substance as follows:

(1) Slimmer, who had for many years been a resident of and domiciled in Iowa, died there testate on August 15, 1917, leaving personal property valued at \$550,000, and *consisting, with the exception of personal effects and a few United States Liberty Bonds, wholly of promissory notes. All of this property, except the personal effects and one note for \$3,000, was then in Minnesota in the possession of Slimmer, Jr., who had had custody of the decedent's property for at least five years before his death. The \$3,000 note was brought by him and Bechhoefer into Minnesota immediately thereafter.

(2) For the period of at least five years before his death, Slimmer, Sr., had conspired with Slimmer, Jr., and Bechhoefer to defraud the state of Iowa of taxes which, by reason of his domicile in Iowa, might and should have been assessed there against his property during his lifetime; and to this end he had arranged with them that his will (if he should leave one) should be probated in Minnesota, had placed in the custody of Slimmer, Jr., in Minnesota, all his property, except his personal effects and the one note for \$3,000, and had concealed his property from the Iowa officials and refused to return the same for taxation there.

(3) Pursuant to this conspiracy Slimmer, Jr., and Bechhoefer filed his will for probate in Minnesota on or about August 21, 1917, and procured the appointment of Bechhoefer as special administrator, and by falsely claiming that decedent was domiciled there, secured ex parte a finding to that effect, the probate of the will, and the appointment of themselves as executors. From this decree, the defendant Lipman, claiming to be an heir, appealed; and this appeal, which is now pending, has the effect of suspending the

decree and leaving the property in the hands of the special administrator. The state of Iowa has not become a party to these proceedings.

(4) Under the laws of Iowa, omissions to list and assess property may be corrected and the taxes collected within five years from the date of such omission. But the amount properly payable for taxes by Slimmer's estate cannot be *collected without assessment and levy thereof against his personal representatives, and such assessment and levy must be made within the state of Iowa.

(5) On January 7, 1918, the district court of Dubuque county, Iowa (in a proceeding begun apparently on or about that day), decreed, at the instance of the treasurer of that state, that Slimmer, Sr., was domiciled therein and granted to one Mullany letters of administration of his estate. About the same date the state, learning that Slimmer, Jr., and Bechhoefer were about to come into it for the purpose of taking testimony in the Minnesota probate proceedings, obtained from said district court an injunction restraining the witness from testifying and the designated officers from taking their depositions. Slimmer, Jr., and Bechhoefer have not been served in the Iowa suit and have declared their purpose to avoid service within that state.

The bill prays that it be adjudged and decreed: (a) That Slimmer, Sr., had for more than five years prior to his death been domiciled in Iowa; (b) that his estate consisted of evidences of indebtedness to him and that no part of his estate was, at his death, in Minnesota; (c) that Iowa has and Minnesota has not jurisdiction to administer upon his estate; and prays also (d) that such order be entered as will insure the dismissal of the Minnesota probate proceedings and the administration of the estate in Iowa; and (e) that, pending this suit, an injunction issue restraining the prosecution of the Minnesota probate proceedings.

The motion for leave to file the bill was submitted ex parte. In view of doubt entertained as to the propriety of granting it, consideration of the application was postponed (as in *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 22 Sup. Ct. 308, 46 L. Ed. 499, and *Washington v. Northern Securities Co.*, 185 U. S. 254, 22 Sup. Ct. 623, 46 L. Ed. 897), so that the parties might be heard; and the motion was fully argued orally and upon briefs. Both the state *of Minnesota and the individual defendants, other than Lipman, objected to the granting of leave to file the bill. The state objected on the grounds that the only effective relief sought was an injunction against a proceeding in a state court; that the Minnesota probate court had exclusive jurisdiction to administer assets of a decedent within its borders, regardless of his domicile; and also that there was no authority granted by

the state Legislature for such an action in the federal courts. The individual defendants objected on the grounds that the Iowa administrator was the proper party plaintiff; that he was in any event a necessary party and joining him would oust the court of jurisdiction; that the relief sought would deny to the action of the Minnesota court full faith and credit; and that plaintiff had an adequate remedy at law. The original jurisdiction of the court to entertain a bill of this character was also questioned. Only one of these objections need be considered, for it presents a conclusive reason why leave to file the bill of complaint should be denied.

Substantially the whole of decedent's estate consisted of notes and bonds. Under an arrangement which had been in force for five years or more, these securities were, at the time of his death, in Minnesota in the custody and possession of an agent resident there. Minnesota imposes inheritance taxes; and its statutes provide (G. S. Minn. 1913, § 2281) that no transfer of the property of a nonresident decedent shall be made until the taxes due thereon shall have been paid. Regardless of the domicile of the decedent, these notes and bonds were subject to probate proceedings in that state and likewise subject, at least, to inheritance taxes. G. S. Minn. 1913, §§ 7205, 2271; *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. Ed. 701; *Wheeler v. New York*, 233 U. S. 434, 34 Sup. Ct. 607, 58 L. Ed. 1030. Furthermore, so far as concerns the property of the decedent, located at his death in Minnesota, the probate courts of *that state had jurisdiction to determine the domicile. *Overby v. Gordon*, 177 U. S. 214, 20 Sup. Ct. 603, 44 L. Ed. 741. But even if decedent was not domiciled in Minnesota, its court had the power either to distribute property located there according to the terms of the will applicable thereto, or to direct that it be transmitted to the personal representative of the decedent at the place of his domicile to be disposed of by him. G. S. Minn. 1913, § 7278; *Harvey v. Richards*, 1 Mason, 381, Fed. Cas. No. 6,154. See *Wilkins v. Ellett*, 108 U. S. 256, 258, 2 Sup. Ct. 641, 27 L. Ed. 718.

On or about August 21, 1917, Slimmer's executors filed their petition in the probate court for Ramsey county, Minn.; and the court, in the exercise of its jurisdiction, appointed the defendant Bechhoefer special administrator. As such, he took and now holds, pending an appeal to the state district court, possession of the whole of decedent's estate, consisting of the notes and Liberty Bonds as well as the personal effects. The only effective relief sought here is to enjoin the further administration of the estate of the deceased by the courts of Minnesota. It is clear that the state of Iowa is not entitled to such relief.

The motion for leave to file the bill of complaint is, therefore, denied.

(248 U. S. 71)

GULF OIL CORPORATION v. LEWELLYN,
Collector of Internal Revenue.

(Argued Nov. 4, 1918. Decided Dec. 9, 1918.)

No. 310.

**INTERNAL REVENUE — 9 — INCOME TAX —
DIVIDEND—ORDINARY COURSE.**

A transaction effected by entries on the respective companies' books whereby plaintiff corporation, owning the stock, except directors' shares, of subsidiary corporations, took over their earnings and surplus, accumulated and used as capital before the taxing year, and their debts inter se, the corporations being related as one enterprise, *held* bookkeeping, rather than "dividends declared and paid in the ordinary course by a corporation," within Act Oct. 3, 1913, § 2, and so not subject to income tax.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Action by the Gulf Oil Corporation against C. G. Lewellyn, Collector of Internal Revenue for the Twenty-Third District of Pennsylvania. Judgment for plaintiff (242 Fed. 709) was reversed by the Circuit Court of Appeals (245 Fed. 1, 158 C. C. A. 1), and plaintiff brings certiorari. Reversed.

Messrs. William A. Seifert and James H. Beal, both of Pittsburgh, Pa., for plaintiff.
Mr. William C. Herron, of Washington, D. C., for respondent.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit to recover a tax levied upon certain dividends as income, under the Act of October 3, 1913, c. 16, section II, 38 Stat. 114, 166. The District Court gave judgment for the plaintiff, 242 Fed. 709, but this judgment was reversed by the Circuit Court of Appeals. 245 Fed. 1, 158 C. C. A. 1.

The facts may be abridged from the findings below as follows: The petitioner was a holding company owning *all the stock in the other corporations concerned except the qualifying shares held by directors. These companies with others constituted a single enterprise, carried on by the petitioner, of producing, buying, transporting, refining and selling oil. The subsidiary companies had retained their earnings, although making some loans inter se, and all their funds were invested in properties or actually required to carry on the business, so that the debtor companies had no money available to pay their debts. In January, 1913, the petitioner decided to take over the previously accumulated earnings and surplus and did so in that year by votes of the companies that it controlled. But, disregarding the forms gone through, the result was merely that the petitioner became the holder of the debts previously due from one of its companies to another. It was no richer than before, but its property now was represented by stock in and debts due from its subsidiaries, whereas formerly it was represented by the stock

alone, the change being effected by entries upon the respective companies' books. The earnings thus transferred had been accumulated and had been used as capital before the taxing year. Lynch v. Turrish, 247 U. S. 221, 228, 38 Sup. Ct. 537, 62 L. Ed. 1087.

We are of opinion that the decision of the District Court was right. It is true that the petitioner and its subsidiaries were distinct beings in contemplation of law, but the facts that they were related as parts of one enterprise, all owned by the petitioner, that the debts were all enterprise debts due to members, and that the dividends represented earnings that had been made in former years and that practically had been converted into capital, unite to convince us that the transaction should be regarded as bookkeeping rather than as "dividends declared and paid in the ordinary course by a corporation." Lynch v. Hornby, 247 U. S. 339, 346, 38 Sup. Ct. 543, 62 L. Ed. 1149. The petitioner did not itself do the business of its subsidiaries and have *possession of their property as in Southern Pacific Co. v. Lowe, 247 U. S. 330, 38 Sup. Ct. 540, 62 L. Ed. 1142, but the principle of that case must be taken to cover this. By section II, G, (c), 38 Stat. 174, and S, 38 Stat. 202, the tax from January 1 to February 28, 1913, is levied as a special excise tax, but in view of our decision that the dividends here concerned were not income it is unnecessary to discuss the further question that has been raised under the latter clause as to the effect of the fact that excise taxes upon the subsidiary corporations had been paid.

Judgment reversed.

(248 U. S. 158)

PURE OIL CO. v. STATE OF MINNESOTA.

(Argued Nov. 21 and 22, 1918. Decided Dec. 9, 1918.)

No. 74.

**1. COMMERCE — 51 — INTERSTATE COMMERCE—
INSPECTION LAWS—OILS.**

A state, under its police power, may enact laws for inspection of oils and gasoline, tending to promote public safety, or to protect public from frauds, and may charge a fee reasonably sufficient to pay cost of inspection, though property may be moving in interstate commerce; but, if charge is obviously and largely in excess of cost of inspection, act will be declared void as burden on interstate commerce.

**2. CONSTITUTIONAL LAW — 48 — INSPECTION
FEE — DISCRETION OF LEGISLATURE — JUDICIAL
INQUIRY.**

Discretion of state Legislature in determining amount of fee for inspection of oils and gasoline, prima facie reasonable, will not be lightly disturbed by federal courts in determining whether exaction for inspection of such products, moving in interstate commerce, constitutes burden thereon, on account of excessive character of charge, rendering state act a revenue, instead of an inspection, measure.

**3. EVIDENCE — 28 — JUDICIAL NOTICE—STATE
STATUTES—INSPECTION FEES.**

In determining whether fees for inspection of oils and gasoline exacted by state of Minneso-

ta are so much in excess of cost of inspection as to constitute law a revenue measure, invalid as burden on interstate commerce, Supreme Court of United States takes judicial notice that inspection fee on oil and gasoline in tank cars was twice reduced by the Legislature.

4. CONSTITUTIONAL LAW — 48 — OIL INSPECTION FEE—VALIDITY OF LAW—JUDICIAL INQUIRY.

In view of rapid increase in use of gasoline, and action of Legislature of Minnesota in reducing fee for inspection of oils and gasoline in tank cars, the federal Supreme Court will not impute a purpose other than to conform to requirements of federal Constitution in enactment of Gen. St. Minn. 1913, §§ 3619-3632, exacting fees for inspection of oils and gasoline, claimed to be invalid as revenue measure and burden on interstate commerce.

5. COURTS — 399(2)—ERROR TO STATE COURT—FINDING OF FACT—CONCLUSIVENESS.

In suit attacking constitutionality of state statute whereunder fees for inspection of oils and gasoline were exacted, claim being that act was revenue measure, and burden on interstate commerce, finding of fact by trial court of state, approved by its Supreme Court, is accepted as conclusive by Supreme Court of United States.

In Error to the Supreme Court of the State of Minnesota.

Suit by the State of Minnesota against the Pure Oil Company. From judgment for the State, defendant appealed to the Supreme Court of the State, which affirmed (134 Minn. 101, 158 N. W. 723), and defendant brings error. Affirmed.

Messrs. Nathan H. Chase and William A. Lancaster, both of Minneapolis, Minn., and Clifford Thorne, of Chicago, Ill., for plaintiff in error.

Egbert S. Oakley and Lyndon A. Smith, both of St. Paul, Minn., for the State of Minnesota.

*Mr. Justice CLARKE delivered the opinion of the Court.

In this case the state of Minnesota sued the plaintiff in error, an extensive dealer in oils, to recover fees, which were charged for the inspection of oils and gasoline, between February 1, 1913, and April 25, 1915. The judgment of the state Supreme Court (134 Minn. 101, 158 N. W. 723) affirming that of the trial court in favor of the state, is before us for review on writ of error.

*The inspection involved was provided for by chapter 502 of the General Laws of the State of Minnesota for the year 1909, the title of which is:

"An act relating to the inspection of petroleum products, the appointment of chief inspector of oils and deputy inspectors, manner of inspection, establishing fees for inspection and salaries of inspectors, prohibiting the sale of adulterated oils, and providing penalties for violation thereof"

—and the title of the chapter in which the original act is embodied in the General Statutes of the State is "Inspection of Oils" (General Statutes of Minnesota 1913, c. 20).

Section 3622 provides that no person shall sell or offer for sale in the state illuminating oil which has not been inspected as provid-

ed for by the act, or which will ignite at a temperature below 120° Fahrenheit. A method is prescribed for making this "fire test" and for determining the gravity of such oils, and the results must be stenciled on each container of oil.

Section 3625 deals with gasoline, and requires that it shall be subject to the same inspection and control as is prescribed for illuminating oils, "except that the inspectors are not required to test it other than to ascertain its gravity."

All containers of gasoline must be labeled conspicuously with the word "Gasoline," the gravity must be stenciled thereon, and it is made unlawful to sell or offer it for sale until inspected and approved. Provision is also made (section 3626) for the inspection of gasoline "receptacles" to keep them "free from water and all other foreign substances" and the sale of "adulterated" gasoline is prohibited (section 3627). Obviously this is, in form, a not unusual type of inspection law.

The findings of fact by the trial court include the following:

During the period under discussion the state inspected 9,914 barrels of oil and 81,998 barrels of gasoline owned *by the plaintiff in error, all of which were brought into Minnesota from other states by common carriers in tank cars, which were held at the place of business of the plaintiff in error until inspected, and all were unloaded from the cars in which they arrived and were held for general sale and distribution. And this in terms:

"That the testing of gasoline in the manner provided by the statute * * * indicates to the public the degree of safety of such gasoline, and has a fair relation to the quality and value thereof. That such inspection protects the community, as applied to sales of gasoline in Minnesota, from frauds and impositions, and advises, informs, and warns the public of the volatile character of said gasoline and the relative degree of care to be exercised in handling, storing, and using the same."

On the case thus stated it is claimed that the Supreme Court of Minnesota erred in refusing to hold:

First, that the inspection fees imposed were so excessive in amount as to render the act a revenue rather than an inspection measure and that as such it offends against section 8, article 1, of the federal Constitution, as an attempt by the state to regulate interstate commerce; and

Second, that to the extent that the act applies to gasoline it is not a valid exercise of the police powers of the state, because it does not serve to protect or safeguard the health, morals or convenience of the public, and therefore offends against the Fourteenth Amendment to the federal Constitution, by depriving the plaintiff in error of its property without due process of law to the extent of the fees which it in terms exacts.

The principles of law applicable to the decision of the case thus before us are few, and they are perfectly settled by the decisions of this court.

[1] In the exercise of its police power a state may enact inspection laws, which are valid if they tend in a direct and substantial manner to promote the public safety and *welfare or to protect the public from frauds and imposition when dealing in articles of general use, as to which Congress has not made any conflicting regulation, and a fee reasonably sufficient to pay the cost of such inspection may constitutionally be charged, even though the property may be moving in interstate commerce when inspected. *Patapasco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, 357, 358, 361, 18 Sup. Ct. 862, 43 L. Ed. 191; *New Mexico v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38, 27 Sup. Ct. 1, 51 L. Ed. 78; *Asbell v. State of Kansas*, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101; *Patterson v. Kentucky*, 97 U. S. 501, 504, 24 L. Ed. 1115; *Savage v. Jones*, 225 U. S. 501, 525, 32 Sup. Ct. 715, 56 L. Ed. 1182.

Specifically, state laws providing for the inspection of oils and gasoline have several times been recognized as valid by this court. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *Red "C" Oil Mfg. Co. v. Board of Agriculture of North Carolina*, 222 U. S. 380, 32 Sup. Ct. 152, 56 L. Ed. 240; *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453.

But, if such inspection charge should be obviously and largely in excess of the cost of inspection, the act will be declared void, because constituting, in its operation, an obstruction to and burden upon that commerce among the states the exclusive regulation of which is committed to Congress by the Constitution. *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64, 24 Sup. Ct. 208, 48 L. Ed. 342; *Foote v. Stanley*, *Comptroller of Maryland*, 232 U. S. 494, 504, 508, 34 Sup. Ct. 377, 58 L. Ed. 698.

[2] Plainly the application of the principles thus stated leaves open for consideration only the question as to whether the inspection charge is so excessive as to render the act a revenue measure, as the plaintiff in error claims that it is, and not an inspection law enacted in good faith to promote the public safety and prevent fraud and imposition upon the users of oil and gasoline. In the consideration of this question the discretion of the Legislature in determining the amount of the inspection fee will not lightly be disturbed. Its determination is *prima facie* reasonable, and the courts will not "enter into any nice *calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services

rendered." *Foote v. Maryland*, 232 U. S. 494, 505, 34 Sup. Ct. 377, 379 (58 L. Ed. 698); *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240.

The findings of fact give the following statement of receipts and expenses under the law assailed, from and including the year 1909, in which it was passed, to April 30, 1915, which includes the last day covered by the claim in suit, viz.:

YEAR.	RECEIPTS.	EXPENSES.	PERCENTAGE OF RECEIPTS USED FOR DEPARTMENT EXPENSES.
1909	\$34,934	\$30,288	87%
1910	50,687	40,044	79%
1911	56,852	40,494	71%
1912	63,354	39,999	63%
1913	72,656	47,117	65%
1914	81,565	52,467	64%
July 31, 1914 to Apr. 30, 1915	62,689	46,863	75%

[3, 4] This statement of expenses, however, does not include any charge for offices for the Oil Department, which were in the state capitol, for the services of the state auditor and treasurer in keeping accounts and making collections, for legal counsel, and for services of chemists, or for the Public Examiner's Department, these not being susceptible of exact determination. The reduced percentage of expenses to receipts in several of the years was obviously due to the rapid expansion in the use of gasoline without a corresponding increase in the expenses of administration. This percentage, however, was rising in 1915 and doubtless has increased greatly since, under war conditions. We take judicial notice also of the fact that in 1915 the inspection *fee on oil and gasoline in tank cars was reduced by the Legislature from 10 to 7 cents and in 1917 from 7 to 5 cents. It was obviously impossible for the state Legislature to determine accurately in advance either what the receipts from or the cost of inspection would be, and having regard to the period of rapid increase in the use of gasoline, through which the country was passing in the years under consideration and to the action of the Legislature in reducing the fee, we cannot consent to impute to that body a purpose other than to conform to the requirements of the Constitution when enacting this legislation.

The conclusion thus arrived at sustains the validity of the state law as an inspection measure and renders it unnecessary to consider the much argued question as to whether or not the oil and gasoline in question were in interstate transit when inspected. As an inspection law, under the decisions cited, the act is validly applicable, alike whether the property was in intra or in inter state commerce when inspected.

[5] Neither is it necessary to consider

whether the evidence sustains the contention that the inspection of gasoline provided for by the act was of a character such that it did not serve to promote the public safety or to protect the community against fraud and imposition. The finding of fact by the trial court, approved by the Supreme Court of the state, is accepted as conclusive by this court. *Northern Pacific Railway Co. v. State of North Dakota*, 236 U. S. 585, 593, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1.

It results that the judgment of the Supreme Court of Minnesota must be affirmed.

(248 U. S. 55)

BUCKEYE POWDER CO. v. E. I. DUPONT DE NEMOURS POWDER CO. et al.

(Argued April 30 and May 1, 1917. Ordered for Reargument June 10, 1918. Reargued Nov. 13, 1918. Decided Dec. 9, 1918.)

No. 7.

1. APPEAL AND ERROR ¶1039(9)—HARMLESS ERROR—ELECTION BETWEEN CAUSES OF ACTION.

Plaintiff, in an action for damages under Sherman Anti-Trust Act, § 7 (Comp. St. 1916, § 8829), cannot complain of the granting of motion at the end of the trial that it elect whether to rely on section 1 or section 2 of the act (Comp. St. 1916, §§ 8820, 8821); it, in then going through the form of electing to rely on acts done contrary to section 2, simply adhering to the interpretation of its declaration it had accepted, when a motion to strike it out as duplicitous was made and overruled and had endeavored to maintain throughout the trial.

2. APPEAL AND ERROR ¶1033(5)—HARMLESS ERROR—FAVORABLE INSTRUCTION.

Plaintiff may not complain of instruction allowing it to recover for injury from unsuccessful as well as successful attempt to monopolize.

3. APPEAL AND ERROR ¶1061(4)—HARMLESS ERROR—DIRECTING VERDICT.

Directing verdict for certain defendants was harmless; no acts aimed at plaintiff having been done by them, and the jury having exonerated the other defendant with whom they were alleged to have conspired.

4. MONOPOLIES ¶28—ACTION FOR DAMAGES—EVIDENCE.

Decrees in a proceeding by the government finding a company guilty under the Sherman Anti-Trust Act were not, prior to Clayton Act Oct. 15, 1914, § 5 (Comp. St. 1916, § 8835e), admissible in an action by an individual against the company for damages from attempt to monopolize.

5. MONOPOLIES ¶10—ACTION FOR DAMAGES—LIMITATIONS—STATUTES—RETROACTIVE EFFECT.

Clayton Act Oct. 15, 1914, § 5 (Comp. St. 1916, § 8835e), suspending the running of the statute of limitations against a private right of action pending proceedings by the government for violation of the anti-trust laws, has no application to prior proceedings and a cause of action already barred.

6. MONOPOLIES ¶28—VIOLATION OF ANTI-TRUST ACT—PRIVATE RIGHT OF ACTION.

Mere existence of defendant's power as it was when plaintiff was created does not avail plaintiff under Sherman Anti-Trust Act, § 7 (Comp. St. 1916, § 8829), giving a private action to persons injured by breach of the statute.

7. MONOPOLIES ¶28—VIOLATION OF ANTI-TRUST ACT—PRIVATE ACTION—MOTIVE OF PLAINTIFF'S ORGANIZATION—INSTRUCTIONS.

Instruction, in action under Sherman Anti-Trust Act, § 7 (Comp. St. 1916, § 8829), for private injury for breach of the statute, construed as stating correctly that, on the question whether plaintiff's failure was due to defendant's oppression or to plaintiff's incapacity, the jury in estimating the evidence and finding what the facts were might consider the motive of plaintiff's organizer if they should find it to have been, what defendant alleged, to organize it merely to sell it out to defendant without any real intent to compete.

8. EVIDENCE ¶269(1)—STATEMENTS OF THIRD PERSONS—FACTS RECITED AS FURNISHING MOTIVE.

Statements of third persons of their reasons for refusing or ceasing to do business with plaintiff are inadmissible as evidence of the facts recited as furnishing the motives, as distinguished from evidence of their motives.

In Error to the United States Circuit Court of Appeals for the Third Circuit.

Action by the Buckeye Powder Company against the E. I. Dupont de Nemours Powder Company and others. Judgment for defendants was affirmed by the Court of Civil Appeals (223 Fed. 881, 139 C. C. A. 319), and plaintiff brings error. Affirmed.

Mr. Twyman O. Abbott, of New York City, for plaintiff in error.

Messrs. Frank S. Katzenbach, Jr., of Trenton, N. J., and William H. Button, of New York City, for defendants in error.

*Mr. Justice HOLMES delivered the opinion of the court.

This is an action brought by the plaintiff in error to recover triple damages under the Sherman Act, July 2, 1890, c. 647, § 7, 26 Stat. 209, 210 (Comp. St. 1916, § 8829). There was a trial that lasted five months, in which the facts were shown at great length, and after a very full and fair charge by the presiding judge the jury found a verdict in favor of the principal defendant, the E. I. Dupont de Nemours Powder Company, on the merits and for the other two by direction of the Court. Elaborate exceptions were taken but they were overruled by the Circuit Court of Appeals. 223 Fed. 881, 139 C. C. A. 319.

[1, 2] The first one that we shall deal with complains of the Court's sustaining a motion at the end of the trial that the plaintiff should elect whether it would rely upon the first or the second section of the Sherman Act (Comp. St. 1916, §§ 8820, 8821). If the case were different the question presented might be grave. In the one before the Court the only error was in the use of the word election and the implied admission that the trial possibly could be taken not to have proceeded upon the second section of the Act, coupled of course with section 7, giving a private action to persons injured by breach of the statute. The first section deals with contracts in restraint of trade, the second

with monopolizing and attempting to monopolize it. The declaration, after stating the organization of the plaintiff in January, 1903, for the purpose of manufacturing and selling powder, particularly black blasting powder, alleges a long previous conspiracy on the part of various companies to monopolize the trade in explosives, which ended in the organization of the E. I. Dupont de Nemours Powder Company in May, 1903, in order more completely to carry out that end. It is alleged that the defendants and others have carried out that end, and that in pursuance of it they did acts, detailed at great length, for the purpose of compelling the plaintiff to join them or else go out of business. That, with an allegation that they succeeded and forced the plaintiff to sell out at a loss, is the whole scope of the declaration. There was a motion to strike it out for duplicity, but the motion was overruled on the ground that the declaration was as we have stated. (D. C.) 196 Fed. 514. The trial proceeded on that footing without complaint. So far as contracts bore upon the supposed attempt to subject plaintiff to the monopoly the jury was allowed to consider them. The case was fully tried upon the ground taken by the plaintiff at the outset and the only one on which it could hope to succeed. The plaintiff did not ask to amend. It is unnecessary to advert to the statement of the judge that in his opinion the exception to be considered should have the whole record behind it, or whether, as has been suggested, the *second section is not the only one addressed to transactions such as were alleged. *Northern Securities Co. v. United States*, 193 U. S. 197, 404, 24 Sup. Ct. 436, 48 L. Ed. 679. When the plaintiff, after the ruling of the judge, went through the form of electing to rely upon acts done contrary to section 2 of the statute, it simply adhered to the interpretation of its declaration that it had accepted at the beginning and had endeavored to sustain throughout. Portions of the charge are criticised in this connection for pointing out to the jury that section 2 embraced not only monopoly but attempts to monopolize. But this was wholly to the plaintiff's advantage, as it explained that if the plaintiff was driven out of business by the defendant's acts it was entitled to recover if those acts were done in the course of an attempt to monopolize, whether or not they were crowned with success. It allowed the jury to consider everything that indicated such an attempt.

[3] Next in importance is an exception to the Court's directing a verdict in favor of the Eastern Dynamite Company and the International Smokeless Powder and Chemical Company. There were no acts done by either of these companies that were aimed at the plaintiff. The only substantial ground for charging them was that if they were parties to a conspiracy as alleged they be-

came responsible for the acts of the Dupont Company as their own. As the jury exonerated the latter company this ground fails. So that even if the ruling was wrong it did no harm unless something more can be found in the case. *Portland Gold Mining Co. v. Stratton's Independence*, 158 Fed. 63, 85 C. C. A. 393, 16 L. R. A. (N. S.) 677. The ruling did not import that there was no evidence against the Dupont Company, the case against which was put fairly to the jury, but that there was no evidence that the other defendants conspired with it, so far at least as the plaintiff was concerned. These companies did not make black blasting powder and had no interest immediately adverse to the plaintiff. *The basis of the charge of conspiracy affecting the black blasting powder business was that the Dupont Company directly or through another company was interested in their stock. No other is suggested in the declaration and it would be hard to extract any act from the evidence. Certainly none could be found that was more than an infinitesimal fraction of those done by the Dupont Company. Here again the Court was of opinion that the exceptions to be considered should have the whole record behind it, but on the record as it stands we think it sufficiently appears that the plaintiff suffered no real harm.

[4, 5] The next matter requires but a few words. The plaintiff offered in evidence decrees in a proceeding by the Government finding the Dupont Company guilty under the Sherman Act of an attempt to monopolize. *United States v. E. I. Dupont de Nemours & Co. (C. C.)* 188 Fed. 127. These of course were held inadmissible. The Court also ruled that the statute of limitations barred recovery for any damage suffered before September 18, 1905, six years before the beginning of the present suit. The plaintiff now contends that the Clayton Act of October 15, 1914, c. 323, § 5, 38 Stat. 731 (Comp. St. 1916, § 8835e) making admissible such criminal judgments "hereafter rendered," in some way should affect our decision upon a ruling made years before, and that by virtue of the same section the running of the statute of limitations was suspended retrospectively as to claims already barred, pending the Government suit. These matters do not need more than a statement of what was argued and what was done.

[6] Another exception seems to us over critical. Mr. Waddell, the organizer of the plaintiff corporation and chief witness on its behalf, started it directly after leaving the Dupont Company, with which he had been for many years. He knew all the elements of the situation before he embarked on the venture, and did not do so until the Dupont Company had reached the height of its power. The judge remarked in his charge that the plaintiff did *not stand like a competitor that had been in existence while the de-

defendant's influence was being developed and that had been injured in its business during the course of such development—that the mere existence of the defendant's power as it was when the plaintiff was born was not in itself a cause of action to the plaintiff, but that the plaintiff must show that the defendant uses its power oppressively, if not against the plaintiff, at least in the course of defendant's business. This was innocuous truth. The plaintiff could not be called in to being in order to maintain a suit for conduct that made it not pay to be born. Claims for such antenatal detriments are not much favored by the law. See *National Council, United American Mechanics v. State Council of Virginia*, 203 U. S. 151, 161, 27 Sup. Ct. 46, 51 L. Ed. 132.

[7] Another statement in the charge concerning Mr. Waddell's knowledge of the defendant's power and policy is complained of, but the complaint seems to us based upon a perversion of its meaning. The defendant had put in evidence tending to show that Mr. Waddell organized the plaintiff merely to sell it out to the defendant, without any real intent to compete. The Court said that of course Mr. Waddell had a right to go into business and that his motive was of little moment so far as that was concerned, but that it might have a bearing on the question whether the plaintiff was sufficiently capitalized to meet normal conditions, adding that it did not matter whether it was or not as against a competition forced upon it by unlawful means. This is treated as if it had made the motive an answer to the claim. What it really did was to state correctly that, on the question whether the plaintiff's failure was due to the defendant's oppression or to the plaintiff's incapacity, the jury in estimating the evidence and finding what the facts were might consider Mr. Waddell's motive if they should find it to have been what the defendants alleged.

[8] We agree with the Circuit Court of Appeals that it is not *necessary to deal specifically with all the details brought up by the dragnet of the plaintiff's exceptions and assignments of error, sixty-nine in number and occupying more than sixty pages of the record. *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 508, 509, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252. Several exceptions were taken to the exclusion of statements by third persons of their reasons for refusing or ceasing to do business with the plaintiff. We should be slow to overthrow a judgment on the ground of either the exclusion or admission of such statements except in a very strong case. But the exclusion in this instance was proper. The statement was wanted not as evidence of the motives of the speakers but as evidence of the facts recited as furnishing the motives. *Lawlor v. Loewe*, 235 U. S.

522, 536, 35 Sup. Ct. 170, 59 L. Ed. 341; *Elmer v. Fessenden*, 151 Mass. 359, 362, 24 N. E. 208, 5 L. R. A. 724. In view of the finding of the jury the rulings as to damages are immaterial and need no discussion here. The defendant put in evidence tending to show that its conduct was not the cause of the plaintiff's failure and its evidence, or the weakness of the plaintiff's prevailed. Our conclusion upon the whole case is that the plaintiff has had a fair trial and that the judgment should not be disturbed.

Judgment affirmed.

(248 U. S. 73)

ALASKA PACIFIC FISHERIES v. UNITED STATES.

(Argued Nov. 4, 1918. Decided Dec. 9, 1918.)

No. 212.

1. INDIANS ↔ 12—ESTABLISHMENT OF "RESERVATION" IN ALASKA—POWER OF CONGRESS.

Congress had power, by Act March 3, 1891, § 15 (Comp. St. 1916, § 5096a), to make reservation of Annette Islands in Alaska, for Metlakahla Indians, inclusive of adjacent waters and submerged land; the "reservation" not being in nature of private grant, but simply a setting apart, until otherwise provided, designated public property for recognized public purpose to advance dependent Indian people.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reservation.]

2. FISH ↔ 3—INDIANS ↔ 12—RESERVATION AS INCLUDING ADJACENT WATERS.

In view of purpose of Indians in going to islands, character of islands, and purpose of creating reservation, reservation of Annette Islands in Alaska for Metlakahla Indians, created by Act Cong. March 3, 1891, § 15 (Comp. St. 1916, § 5096a), includes adjacent waters and submerged land, to protect fish supply of Indians, principal source of their sustenance and industry.

3. INDIANS ↔ 6—CONSTRUCTION OF STATUTES.

Statutes passed for benefit of dependent Indian tribes or communities are to be liberally construed, and doubtful expressions resolved in favor of the Indians.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the United States against the Alaska Pacific Fisheries. From a decree granting the relief sought, defendant appealed to the Circuit Court of Appeals, which affirmed (240 Fed. 274, 153 C. C. A. 200), and defendant appeals. Affirmed.

Mr. C. H. Hanford, of Seattle, Wash., for appellant.

Mr. Assistant Attorney General Brown, for the United States.

*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit by the United States to enjoin the Alaska Pacific Fisheries, a California corporation, from maintaining, and to compel it to remove, an extensive fish trap erected by it in navigable waters at the Annette

Islands in Alaska. The objections urged against the trap are, first, that it is within a reservation lawfully established for the use of the Metlakahtla and other Indians, and, second, that it is an unauthorized obstruction to the navigable capacity of waters of the United States. A decree was entered granting the relief sought and this was affirmed by the Circuit Court of Appeals. 240 Fed. 274, 153 C. C. A. 200.

The Annette Islands are a group of small islands in southeastern Alaska. During the summer of 1887 some 800 Metlakahtla Indians emigrated from British Columbia and settled on one of these islands. The emigration and settlement were not only acquiesced in but encouraged by executive and administrative officers of the United States,¹ and subsequently were sanctioned by Congress through the enactment of section 15 of the Act of March 3, 1891, c. 561, 26 Stat. 1101 (Comp. St. 1916, § 5096a). That section reads as follows:

"That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such *other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to time by the Secretary of the Interior."

The fish trap was erected in 1916 without the consent of the Indians or the Secretary of the Interior. It is a formidable structure consisting of heavy piling and wire webbing, is located in water of considerable depth approximately 600 feet from the high tide line of the island on which the Indians settled, is intended to catch about 600,000 salmon in a single season, and its operation will tend materially to reduce the natural supply of fish accessible to the Indians.

The principal question for decision is whether the reservation created by the Act of 1891 embraces only the upland of the islands or includes as well the adjacent waters and submerged land. The question is one of construction—of determining what Congress intended by the words "the body of lands known as Annette Islands."

As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created—the power of Congress in the premises, the location and character of the islands, the situation and

needs of the Indians and the object to be attained.

[1] That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. *National Bank v. County of Yankton*, 101 U. S. 129, 133, 25 L. Ed. 1046; *Shively v. Bowlby*, 152 *U. S. 1, 47-48, 58, 14 Sup. Ct. 548, 38 L. Ed. 331; *United States v. Winans*, 198 U. S. 371, 383, 25 Sup. Ct. 662, 49 L. Ed. 1089. The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safe-guarding and advancing a dependent Indian people dwelling within the United States. See *United States v. Kagama*, 118 U. S. 375, 379, et seq., 6 Sup. Ct. 1109, 30 L. Ed. 228; *United States v. Rickert*, 188 U. S. 432, 437, 23 Sup. Ct. 478, 47 L. Ed. 532.

[2] The islands are in the interior of the Alexander Archipelago and separated from other islands by well-known bodies of water. Before the Metlakahtla settlement they were wild and uninhabited. While bearing a fair supply of timber, only a small portion of the upland is arable, more than three-fourths consisting of mountains and rocks. Salmon and other fish in large numbers frequent and pass through the waters adjacent to the shore and the opportunity thus afforded for securing fish for local consumption and for salting, curing, canning and sale gives to the islands a value for settlement and inhabitation which otherwise they would not have.

The purpose of the Metlakahtlans in going to the islands was to establish an Indian colony which would be self-sustaining and reasonably free from the obstacles which attend the advancement of a primitive people. They were largely fishermen and hunters, accustomed to live from the returns of those vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development.

After their settlement and before the reservation was created, the Indians, under the guidance of a noted missionary, adopted a form of self-government suited to their needs; established for themselves a village with substantial dwellings, schoolhouses and the like, and *constructed and installed an extensive establishment where they canned salmon for the market.²

¹ House Ex. Docs. 50th Cong. 1st Sess. vol. 10, p. 64, vol. 13, p. 34; Sen. Mis. Doc. No. 144, 53d Cong. 2d Sess.; Sen. Doc. No. 275, 55th Cong. 2d Sess.

² House Ex. Docs. 50th Cong. 2d Sess. vol. 10, p. cli; House Mis. Docs. 52d Cong. 1st Sess. vol. 56, part 9, pp. 27-29, 188.

The purpose of creating the reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life. True, the Metlakahtians were foreign born, but the action of Congress has made that immaterial here.

The circumstances which we have recited shed much light on what Congress intended by "the body of lands known as Annette Islands." The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. They had done much for themselves and were striving to do more. Evidently Congress intended to conform its action to their situation and needs. It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands. This, as we think, shows that the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland—in other words, as descriptive of the area comprising the islands.

[3] This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. *Choate v. Trapp*, 224 U. S. 665, 675, 32 Sup. Ct. 565, 56 L. Ed. 941, and cases cited. And it has further support in the facts that, save for the defendant's conduct in 1916, the statute from the time of its enactment has been treated, as stated in the opinion of the Alaska court, by the Indians and the public as reserving the adjacent fishing grounds as well as the upland, and that in regulations prescribed by the Secretary of the Interior on February 9, 1915, the Indians are recognized as the only persons to whom permits may be issued for erecting salmon traps at these islands.

These views are decisive of the suit and sustain the decree below.

Decree affirmed.

(248 U. S. 37)

E. W. BLISS CO. v. UNITED STATES.

(Argued Nov. 20 and 21, 1918. Decided Dec. 9, 1918.)

No. 15.

1. UNITED STATES $\S$ 70(1)—CONTRACTS—CONSTRUCTION—"FURNISH"—"INVENT."

Where a contract between the United States and defendant for manufacture of torpedoes provided that defendant would not make use of any device the design for which was furnished to it

by the United States in any torpedo constructed for any person or other governments, and would not exhibit such device, the United States could restrain exhibition of a balanced turbine torpedo, whether or not patentable or within the prior art, or known to defendant, plans for which the government furnished defendant; "furnish" meaning to supply, while "invent" means to create.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Furnish.]

2. UNITED STATES $\S$ 58 — CONTRACTS — CONSTRUCTION—EXHIBITION OF TORPEDO.

Where defendant, contracting to manufacture torpedoes for the United States, engaged not to exhibit any device for which the design was furnished to it by the United States, the latter could restrain it from exhibiting a device incorporated in a torpedo which was first communicated or suggested verbally, and then by letter, unaccompanied by blueprints of design.

3. INJUNCTION $\S$ 189 — RELIEF — RESTRAINING EXHIBITION OF TORPEDO — VIOLATION OF GOVERNMENT CONTRACT.

In injunction suit by the United States to restrain its contractor for the manufacture of torpedoes from exhibiting devices furnished by the United States, decree should not include devices not used in the existing torpedo, where the contractor does not display disposition to violate its trust, but the exclusion should be without prejudice to the government's right to obtain injunction against disclosure on proof of intention to use them.

Mr. Chief Justice White dissenting.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Suit by the United States against the E. W. Bliss Company. From a decree of the District Court for plaintiff, defendant appealed to the Circuit Court of Appeals, which amended and affirmed (139 C. C. A. 633, 224 Fed. 325; 143 C. C. A. 496, 229 Fed. 376), and defendant appeals. Affirmed.

Messrs. George W. Field and Arthur C. Fraser, both of New York City, for appellant.

Mr. G. Carroll Todd, Asst. Atty. Gen., for appellee.

*Mr. Justice McKENNA delivered the opinion of the Court.

Appeal from a decree of the United States Circuit Court of Appeals (United States v. E. W. Bliss Co., 224 Fed. 325, 139 C. C. A. 633) amending and affirming a decree of the District Court for the Eastern District of New York entered in a suit brought by the United States against appellant (herein referred to as the Bliss Company) restraining the latter from exhibiting or communicating the construction and operation of a torpedo known as the Bliss-Leavitt torpedo.

The controversy turns upon the construction and application of certain clauses of the contracts between the Bliss Company and the United States and is not, we think, in broad compass. In support of its contention in the main the United States has the sanction of the two courts.

The development, construction and opera-

tion of the torpedo gave animation and attraction to the argument, but it is enough to say that its method of propulsion is the balanced turbine method, so called, that is, turbines revolving in opposite directions. The United States asserts that to this method of propulsion the excellence and efficacy of the torpedo is due and that it was the conception of the United States; that it was the result of much experimentation on the part of its engineers and those of the Bliss Company and the expenditure of substantial sums of money by the government, and that because of the superior speed, range and power of this new weapon, other nations have been eager to learn the secrets of its construction.

The Bliss Company denies these assertions, opposes them, besides, by the contentions that the balancing of rotary bodies analogous to turbines rotating in opposite directions was a matter of common knowledge long prior to any transactions with the United States and that the *torpedoes constructed by it under its contract contained balanced turbines, so called, of its own design and property; or, to quote counsel:

"The torpedo is the product of the assiduity and genius of the defendant's officers and engineers, and not that of the government."

And, further, that it purchased from Lieutenant Davison, with full knowledge of the United States, all of his rights to foreign patents, and to this patent, it is said, the United States assigns a special excellence. This is the issue in outline. The Bliss Company asserts the right to have other customers than the United States and to seek other markets, and not subject to restriction by the United States. The United States claims an exclusive service and even concealment from all others except as it may concede it. The resolution of the contentions is in the contract of the parties.

Those transactions date to 1905 and are exhibited in three contracts, one of November 22, 1905, one of June 12, 1912, and an intervening one dated July 16, 1909. In the 1905 contract there was a provision, which it is admitted was embodied in all subsequent contracts. Disputes arose as to the meaning of the provision, the rights and restraints under it, and the Bliss Company brought them to litigation by expressing its desire to negotiate with Messrs. Whitehead & Company for the right to manufacture the torpedo in foreign countries. The Bureau of Ordnance objected, and on May 9, 1913, the company addressed the Secretary of Navy as follows:

"As a means to this end we notify you hereby that it is our intention to communicate the complete construction and operation of the existing type of Bliss-Leavitt torpedo, and to make a demonstration of the operation of said torpedo, to a representative of Messrs. Whitehead & Company on or immediately after June 1, 1913."

[1] To restrain the threatened action this suit was brought. The prayer of the bill

covers the balanced turbine and *certain other features, and it is manifest that whether it should be granted depends particularly upon a provision of the contract which prohibits the exhibition of the torpedo or its performance to any person whatsoever or to any other government, or its representatives, than that of the United States. That provision is that the Bliss Company "will not make use of any device the design for which is furnished to it" by the United States "in any torpedo constructed or to be constructed for any person or persons, firms, corporations, or others, or for other governments than" the United States and "will not exhibit such device or in any way describe it to or give any information in regard to it to any person * * * or to other governments, or their representatives" or exhibit its performance "either in shop or in service tests." A violation of the contract incurs its cancellation and releases the United States from all claims or demands under it. It is, however, provided that no design shall be considered as coming within the provisions unless the United States communicates in writing to the Bliss Company that it (the United States) thinks it is embraced by the provision.¹ It is disputed whether the

¹ "Nineteenth. It is hereby expressly further stipulated, covenanted and agreed, that the party of the first part will not make use of any device the design for which is furnished to it by the party of the second part in any torpedo constructed or to be constructed for any person or persons, firms, corporations or others, or for other governments than the party of the second part hereto; that the party of the first part will not exhibit such device or in any way describe it to, or give any information in regard to it to any person or persons, firms, corporations, or others, or to other governments, or their representatives, than the party of the second part hereto; that the party of the first part will not exhibit the performance of any torpedo containing such device either in shop or in service tests, to any person or persons, firms, corporations or others, or to other governments, or their representatives, than the party of the second part hereto:

"Provided furthermore, that no device or design shall be considered as coming within the provisions of this clause unless the party of the second part shall state to the party of the first part in writing, at the time when the said device or design is itself conveyed to the party of the first part by written communication from the party of the second part, that the party of the second part considers that the said device or design is embraced within the provisions of this clause."

"In the contract of June 12, 1912, the foregoing clause became clause Twentieth. The 1912 contract contained, however, in the second clause, the following new matter, which (save that part enclosed by brackets) had not been included in previous contracts:

"[Second. The manufacture of said torpedoes] (the word "torpedoes" as used throughout this contract being intended to include everything covered by the drawings, plans and specifications above referred to) [shall conform in all respects to and with said drawings, plans and specifications] including duly authorized changes therein, but said drawings, plans and specifications are not hereto annexed or made a part hereof. They contain information of a confidential character that cannot be made public without detriment to the government's and the contractor's interests, and they are

condition of the provision was performed, but both the lower courts have found that it was, and we concur in their judgment. The condition of the provision, then, having been performed, we come to its meaning, the Bliss Company contending that the device must be of the invention of the United States, and the latter contending that it need only be "furnished" by the United States.

The Bliss Company's contention in its detail is somewhat difficult to state concisely. It rests as much in implication as in expression. It is said that the restrictive clause "applies only to a 'device the design for which is furnished by the government'" and "expressly and clearly excludes ideas, methods or principles." And it is further urged that—

"To furnish a design, it is necessary to furnish something concrete. A device is also something concrete. One cannot accept an idea."

To support these declarations legal and other definitions are adduced. One is selected from *Armour Packing Co. v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, which explains a device to be "a thing devised or formed by design, a contrivance, an invention." It is hence asserted that the United States did not comply with these definitional requirements—indeed, from the state of the art, could not; and therefore could not impose secrecy upon the Bliss Company.

The tangibility of the definitions and the arguments based upon them are not very clear nor what purpose they tend to establish. The company asserts a right to employ the principle of propulsion and this principle it asserts to be—to quote counsel—"the balancing of rotary bodies analogous to turbines rotating in opposite directions and of equal speeds for the purpose of eliminating gyroscopic effect," and that it was "long prior to 1906 [the first contract was made in 1905] a matter of common knowledge and known to the defendant" (the company); and again:

"The balanced turbine principle was public property and not the property of the government. It was a matter of public knowledge and not a secret."

Therefore, as we have said, the contention is that it was not within the prohibition of the contracts. Immediately it may be asked: This being the condition, of what value was the restrictive clause to the government? Surely the government sought to secure something valuable and practical, and yet it was apparently only the promise of words never to have effective realization. Instead of security the government got a controversy. Anything it might offer or suggest or, to use the word of the contract, "fur-

nished," would be open to dispute and the charge of being anticipated, already in existence among the things available to the company as "public property and not the property of the government"—"a matter of public knowledge and not a secret." And the government could not even fortify itself by the presumptions of a patent. To have done so would have been to break the seal of secrecy and relieve the company from the obligations imposed by the contract. To this contention the Bliss Company is driven to get rid of the Davison patent, the design for which was furnished the company by the United States. Counsel say:

"Assuming that the particular design of a balanced turbine produced by Davison was a secret, it lost every attribute of the secret upon the issuance by the United States government of letters patent to Davison."

And further:

"The issuance of this patent, therefore, became an act of the Navy Department. Thus the government through the same department by which it entered into the several contracts with the defendant [the company], caused the secret of the balanced turbine to be laid open to the public."

And, besides, it is said that the government "tacitly permitted Davison, one of its officers and subject to its discipline, to assign" to the company "foreign patents for the device in issue"; and that therefore "it cannot now successfully contend that its design is within the restrictive clause." But this gives an exaggerated effect of publicity to a patent and cannot dispense with the explicit obligation of the restrictive clause. Indeed, we may repeat, Of what avail was the restrictive clause to the government under the contentions of the company? It was assured of nothing but opposition and litigation. We may cite in further illustration of this that the Bliss Company asserts that the Davison device was without novelty in the field of "opposite revolving turbines" (another name for a balanced turbine) and that all he did was to take a "design of unbalanced turbine shown" in a prior patent "and reverse one of the turbine wheels with the incidental and necessary change in the gearing." The assertion is that "the design of this gearing is what occupied Lieutenant Davison's time and thought." We may say that we concur with the lower courts and think the patent is not so limited. The Bliss Company thought well enough of it to buy its foreign rights.

The several contentions of the company are but fragments of the broader one that there were in the world's knowledge and available to the company practical devices as well as principles of operation which precluded a demand of secrecy by the government and which left the company free to use, or exhibit or sell to anybody torpedoes embodying them, the final and dominant contention being that the government's reservation was only of inventions, inventions, however,

to be treated as confidential by the parties of this contract, it being understood, however, that nothing in this clause shall be construed as depriving the party of the first part of the right to make and sell such torpedoes to any other party or government whatsoever, except as limited by clause twentieth of this contract."

undisclosed, patentable but not patented. Yet the word of the contract is "furnished," not invented, and the words are of different significance. To invent means to create; to furnish means to supply. And the difference was too important, too pertinent to the purpose to have been overlooked—indeed, must have been deliberately contemplated to achieve the object of the parties. The government in its situation, considering the use of torpedoes and the uncertainty against whom to be used, would want to avail itself of the whole universe of things then existing or that might be brought into existence, in whatever way or combination it could. It is easy to believe that an arrangement of old devices might have value. And secrecy was an especial object, as far as it could be maintained and for such length of time as it could be maintained. The fact and the time might in instances be critical and determinative of a decisive result. The government considered the provision important to insert in the contract of 1905 and to repeat in every subsequent contract, to and including that of 1912, and to disregard the plea of the company for some relaxation of it to accommodate the company's interests. There was some relaxation in 1912 and 1913, but the confidential relation of the parties was emphasized as we have seen. *This was the simple situation. It is free from the tangle and perplexities of the company's contentions. It gives use to the restrictive clause, directness of right and remedy, not dependent upon explorations into the prior art or the delays and termination of lawsuits. These observations apply to other parts of the torpedo as well as to the balanced turbine. The remarks of the Circuit Court of Appeals are pertinent. The court said:

"Throughout the entire record, in the contracts, correspondence and dealings of the parties, the importance of secrecy is everywhere manifest. The nature of the services rendered was such that secrecy might almost be implied. It is difficult to imagine a nation giving to one of its citizens contracts to manufacture implements necessary to the national defense and permitting that citizen to disclose the construction of such implement or sell it to another nation. The very nature of the service makes the construction urged by the defendant untenable. We are of the opinion, therefore, that the injunction should include all designs, drawings, plans and specifications used by the defendant in making the Bliss-Leavitt torpedo for the government which were approved by the Ordnance Bureau, notice of which was given to the Bliss Company pursuant to the provisions of Clauses 19 and 20 of the contracts in question."

The court hence directed the amendment of the decree of the District Court, "adding such a provision."

[2] A rehearing was asked of the case, 229 Fed. 376, 143 C. C. A. 496. It was denied as to the balanced turbine and granted as to the other devices, that is, Double Regulation of Air, Ball Bearings for Gyroscope, and Inside Superheater. To the inclusion of these in the decree it is objected, as to the Double

Regulation of Air, that written notice was not given the company as required by the restrictive clause. The assertion is that what was done by the government was *nothing but suggestions, first verbal, and then by letter, but not accompanied by "blueprints of design."² The objection is based on the contention already referred to that a device or design must be something concrete or, it is now said, if not that, "it at least imports something as to dimensions, size, shape, weight, etc., from which a device could be constructed." The objection *is hypercritical and we are somewhat surprised at it. There was no uncertainty in the government's demand and no misunderstanding of it. There were discussions concerning the practical means of using it, and it was testified that "the sole question practically reducing itself to whether or not they had sufficient space to apply this design or principle." And the design was subsequently worked out by the employees of the company. The objection was rested on other grounds, and it was rightfully dealt with by the Circuit Court of Appeals.

[3] The same objection is not made as to the superheater and the ball bearings. It is said of them that they are not used in the existing type of torpedo. As this is conceded by the government and as we do not agree with its assertion that the company "displays a disposition to violate its trust whenever it seems advantageous to do so," we think the decree should not include the devices. In other words, it should be modified

² Bureau of Ordnance, Navy Department.

25698/102-(G)-O.

January 18, 1913.

Sirs: 1. The Bureau is pleased to note the decided improvement shown in the dynamometer tests of the Mark VII torpedo by the use of double regulating valves.

2. This plan or idea of double regulation was first submitted to the Bureau by a letter from Lieut. E. Frederick, then Assistant Inspector of Ordnance at your works, dated March 9, 1911, which was received and filed in this office on or about March 15, 1911, and the value of the invention was successfully established by the actual tests at the Naval Torpedo Station, Newport, R. I.

3. The Bliss Company had been furnished verbally with the idea and the fact that its value had been established by actual trials. This was also furnished the E. W. Bliss Company by the Bureau's letter No. 25698/92 (G) of January 4, 1913.

4. In view of the above the Bureau requests that you will note for record that the double regulating principle has been submitted by the Bureau, and that this principle of any device embodying the same falls under the provisions of Clause 20 of the contracts now existing.

5. While the Bureau has no actual blue prints of design it has on record cards and certain data obtained by experiments at the Torpedo Station which the Bureau will be pleased to furnish the E. W. Bliss Company for their information if they so desire and will request it.

6. The Bureau again desires to express its pleasure in noting the improvement in the dynamometer tests due to the double regulation and the change in angle spray which was introduced at the suggestion of the Bureau's inspectors at your works.

Respectfully, N. C. Twining, Chief of Bureau.

E. W. Bliss Co., Brooklyn, N. Y.
(Through Inspector of Ordnance.)

to exclude them, without prejudice, however, to the government's right to obtain an injunction against their disclosure upon proper proof of an intention to use the devices in proceedings supplemental to this action or in an independent action. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 262, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461.

The decree is modified as stated, and, as modified, affirmed.

Affirmed.

The CHIEF JUSTICE dissents.

Mr. Justice McREYNOLDS took no part in the consideration or decision of the case.

(248 U. S. 104)

RUDDY v. ROSSI.

(Submitted Nov. 13, 1918. Decided Dec. 9, 1918.)

No. 17.

1. PUBLIC LANDS — 7 — LANDS OF UNITED STATES—POWER OF CONGRESS.

Under Const. U. S. art. 4, § 3, cl. 2, Congress has power to dispose of public lands of the United States, and they may be leased, sold, or given away on such terms and conditions as the public interests require.

2. PUBLIC LANDS — 140 — EXEMPTION OF HOMESTEAD LANDS FROM LIABILITY FOR DEBTS.

Under Const. U. S. art. 4, § 3, cl. 2, Congress, in exercise of its discretion in disposal of public lands, had power, by Rev. St. § 2296 (Comp. St. 1916, § 4551), the fourth section of the Homestead Act, to restrict alienation of homestead lands after conveyance by United States in fee simple, by providing no such lands shall become liable to satisfaction of debts contracted prior to issuance of patent.

Mr. Justice Holmes, dissenting.

In Error to the Supreme Court of the State of Idaho.

Action by Charles F. Ruddy against Herman J. Rossi. From a judgment for plaintiff, defendant appealed to the Supreme Court of Idaho, which modified and affirmed (28 Idaho, 376, 154 Pac. 977), and plaintiff brings error. Reversed, and cause remanded.

Messrs. Charles E. Miller and Carlton Fox, both of Wallace, Idaho, for plaintiff in error.

*Mr. Justice McREYNOLDS delivered the opinion of the Court.

By "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862 (12 Stat. c. 75, p. 392), Congress prescribed the conditions under which citizens could acquire unappropriated public lands in tracts of not exceeding 160 acres. A manifest purpose was to induce settlement upon and cultivation of these lands by those who, five years after proper entry, would become owners in fee through issuance of patents. The great end in view was to convert waste places into permanent homes.

Such occupancy and use constituted a most important consideration and were rightly expected to yield larger public benefits than the small required payment of one dollar and a quarter per acre.

Decision of this cause requires us to consider the meaning and validity of section 4 of the Act (R. S. § 2296 [Comp. St. 1916, § 4551]), which provides:

"No lands acquired under the provisions of this Act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor."

Plaintiff in error made preliminary homestead entry of designated land within the state of Idaho August 6, 1903; submitted final proofs October 4, 1909; obtained final receipt and certificate November 12, 1909; final patent issued August 26, 1912. In 1914 two judgments were obtained against him; the first upon indebtedness incurred prior to November 12, 1909; the second upon debts contracted subsequent to that date and prior to patent. Executions were issued and levied upon the homestead; and thereupon the original proceeding was begun to declare asserted liens invalid and a cloud upon the title. The court below held the first judgment unenforceable against the land since it represented indebtedness which accrued prior to final entry. It further held the second judgment could be so enforced as it was based upon debts contracted after final entry, at which time the homesteader became legally entitled to his patent. 28 Idaho, 376, 154 Pac. 977.

The language of section 4 is clear and we find no adequate reason for thinking that it fails precisely to express the lawmaker's intention.

Did Congress have power to restrict alienation of homestead lands after conveyance by the United States in fee simple? This question undoubtedly presents difficulties which we are not disposed to minimize. In *Wright v. Morgan*, 191 U. S. 55, 58, 24 Sup. Ct. 6, 48 L. Ed. 89, a similar point was suggested but not decided.

[1] The Constitution (article 4, § 3, cl. 2) declares:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

And it is settled that Congress has plenary power to dispose of public lands. *United States v. Gratiot et al.*, 14 Pet. 526, 537 (10 L. Ed. 573). They may be leased, sold or given away upon such terms and conditions as the public interests require. Instead of granting fee simple titles with exemption from certain debts, long leases might have been made or conditional titles bestowed in such fashion as practically to protect homesteads from all indebtedness.

*"The sound construction of the Constitution must allow to the national Legislature that dis-

cretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 316, 421 (4 L. Ed. 579).

[2] Acting within its discretion, Congress determined that in order promptly to dispose of public lands and bring about their permanent occupation and development it was proper to create the designated exemption; and we are unable to say that the conclusion was ill-founded or that the means were either prohibited or not appropriate to the adequate performance of the high duties which the Legislature owed to the public.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice HOLMES (dissenting). This case involves a question of theory that may be important and I think it desirable to state the considerations that make me doubt. The facts needing to be mentioned are few. On August 26, 1912, the United States conveyed land in Idaho to Ruddy in fee simple, in pursuance of a homestead entry by Ruddy on August 6, 1903, final proof on October 4, 1909, and final receipt of the purchase price on November 12, 1909. In September 1912, after the conveyance, Rossi began suits against Ruddy, attaching this land, and in June, 1914, levied executions upon the same. The debts for which the suits were brought were incurred before the issue of the patent and the present proceeding is to prevent Rossi from selling the land to satisfy the judgments. The question arises under Rev. St. § 2296 (Comp. St. 1916, § 4551), providing that no lands acquired under that chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor. The Supreme Court of Idaho narrowed the issue to the case of debts contracted after final proof, but that distinction is not important to the difficulty in my mind.

My question is this: When land has left the ownership and control of the United States and is part of the territory of a State not different from any other privately owned land within the jurisdiction and no more subject to legislation on the part of the United States than any other land, on what ground is a previous law of Congress supposed any longer to affect it in a way that a subsequent one could not? This land was levied upon not on the assertion that any lien upon it was acquired before the title passed from the United States, but merely

as any other land might be attached for a debt that Rossi had a right to collect, after the United States had left the premises. I ask myself what the United States has to do with that. There is no condition, no reserved right of reentry, no reversion in the United States, saved either under the Idaho law as any private grantor might save it, or by virtue of antecedent title. All interest of the United States as owner is at an end. It is a stranger to the title. Even in case of an escheat the land would not go to it, but would go to the State. Therefore the statute must operate, if at all, purely by way of legislation, not as a qualification of the grant. If section 2296 is construed to apply to this case, there is simply the naked assumption of one sovereignty to impose its will after whatever jurisdiction or authority it had has ceased and the land has come fully under the jurisdiction of what for this purpose is a different power. It is a pure attempt to regulate the alienability of land in Idaho by law, without regard to the will of Idaho, which we must assume on this record to authorize the levy if it is not prevented by an act of Congress occupying a paramount place.

I believe that this Court never has gone farther in the way of sustaining legislation concerning land within a State than to uphold a law forbidding the enclosure of public lands, which little, if at all, exceeded the rights of a private owner, although it was construed to prevent the erection of fences upon the defendants' own property manifestly for the sole purpose of enclosing land of the United States. *Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260. At most it was a protection of the present interests of the United States under a title paramount to the State. On the other hand, it is said in *Pollard v. Hagan*, 3 How. 212, 224, 11 L. Ed. 565, that no power in the nature of municipal sovereignty can be exercised by the United States within a State; that such a power is repugnant to the Constitution. This case was referred to in *Withers v. Buckley*, 20 How. 84, 15 L. Ed. 816, and it was decided that the act of Congress authorizing the formation of the State of Mississippi and providing that the Mississippi River should be forever free "could have no effect to restrict the new State in any of its attributes as an independent sovereign government," and both these cases were cited upon this point with approval in *Ward v. Race Horse*, 163 U. S. 504, 511, 512, 16 Sup. Ct. 1076, 41 L. Ed. 244. See also *Shively v. Bowlby*, 152 U. S. 1, 27, 14 Sup. Ct. 548, 38 L. Ed. 331. In *Irvine v. Marshall*, 20 How. 558, 15 L. Ed. 994, where it was held that the laws of a territory abolishing constructive trusts were ineffectual to protect the holder of a certificate from the United States against the establishment of such a trust, it was said that "when the subject,

and all control over it, shall have passed from the United States, and have become vested in a citizen or resident of the territory, then indeed the territorial regulations may operate upon it," and "later in the decision there is cited a passage from *Wilcox v. Jackson*, 13 Pet. 498, 517, 10 L. Ed. 264, to the same effect—a passage also cited and relied upon by the four justices who dissented and held that the territorial laws governed even them. It has been repeated ever since. *McCune v. Essig*, 199 U. S. 382, 390, 26 Sup. Ct. 78, 50 L. Ed. 237; *Buchser v. Buchser*, 231 U. S. 157, 161, 34 Sup. Ct. 46, 58 L. Ed. 166.

Coming to the precise issue, the question of the power of the United States to restrict alienation of land within a State after it had conveyed the land in fee was left open in *Wright v. Morgan*, 191 U. S. 55, 58, 24 Sup. Ct. 6, 48 L. Ed. 89, but it was said that the clearest expression would be necessary before it would be admitted that such a restriction was imposed. In *Buchser v. Buchser*, 231 U. S. 157, 34 Sup. Ct. 46, 58 L. Ed. 166, it was held that the laws of the United States did not prevent homestead land becoming community property at the moment that title was acquired, and it was said that, the acquisition under the United States law being complete, that law had released its control. The statement in *Wilcox v. Jackson*, supra, that when the title has passed the land "like all other property in the State is subject to state legislation" was repeated. In *Alabama v. Schmidt*, 232 U. S. 168, 34 Sup. Ct. 301, 58 L. Ed. 555, following *Cooper v. Roberts*, 18 How. 173, 15 L. Ed. 338, it was held that land conveyed to the State by the United States for the use of schools could be acquired by adverse possession under state law, and that the trust, although as was said in the earlier case "a sacred obligation imposed on its public faith" imposed only an honorary obligation on the State. *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044, was distinguished as having been decided on the ground that in the grant to the Railway there was an implied condition of reverter in case the company ceased to hold the land for the purpose for which it was granted, a ground, which, as I have said, is absent here.

It is said that where a statute is susceptible of two constructions, by one of which grave constitutional questions arise and by the other of which they are avoided, our duty is to adopt the latter. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408, 29 Sup. Ct. 527, 53 L. Ed. 836. I am aware that this principle like some others more often is invoked in aid of a conclusion reached on other grounds than made itself the basis of decision, but it seems to me that it properly should govern here. It might without vio-

lence. When the Act of 1862, now Rev. St. § 2296, was passed the United States owned territories to which it could be applied with full scope. *Irvine v. Marshall*, 20 How. 558, 15 L. Ed. 994. The greater part of the public land was in those territories. Without stopping to suggest other possibilities of construction this fact is enough to explain and give validity to the Act when passed. There is no need to import to it the intent to anticipate the future and to reach the States that were still in the bosom of time.

Of course the United States has power to choose appropriate means for exercising the authority given to it by the Constitution. But I see no sufficient ground for extending that authority to a case like this. It is not the business of the United States to determine the policy to be pursued concerning privately owned land within a State. According to all cases in this Court, so far as I know, when the patent issued its authority was at an end.

I am aware that my doubts are contrary to manifest destiny and to a number of decisions in the State Courts. I know also that when common understanding and practice have established a way it is a waste of time to wander in bypaths of logic. But as I have a real difficulty in understanding how the Congressional restriction is held to govern this case—a question which nothing that I have heard as yet appears to me to answer—I think it worth while to mention my misgivings, if only to show that they have been considered and are not shared.

(248 U. S. 90)

UNITED DRUG CO. v. THEODORE RECTANUS CO.

(Argued March 12 and 13, 1918. Decided
Dec. 9, 1918.)

No. 27.

1. COURTS ⇨382(1) — CERTIORARI AND AP- PEAL—DISMISSAL OF APPEAL—STATUTE.

Under Judicial Code, § 128, as amended by Act Jan. 28, 1915, § 2 (Comp. St. 1916, § 1120), where plaintiff in trade-mark infringement suit was allowed appeal from decree of Circuit Court of Appeals, and brought certiorari, and pursuant to stipulation, transcript of record filed for purposes of appeal was treated as return to writ, appeal must be dismissed, and cause will be determined on writ of certiorari.

2. TRADE-MARKS AND TRADE-NAMES ⇨31— CHARACTER OF RIGHT.

A trade-mark right is not a right in gross, or at large, like a statutory copyright or a patent for an invention, the law of trade-marks being but a part of the broader law of unfair competition, for the right to a particular mark grows out of its use in trade, not its mere adoption, and the owner of a trade-mark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly.

3. TRADE-MARKS AND TRADE-NAMES 31— PROTECTION IN ADVANCE OF EXTENSION OF TRADE.

Adoption of trade-mark in connection with proprietary medicine sold in New England States did not, in absence of valid legislation, project adopter's right of protection in advance of extension of her trade, or operate as claim of territorial rights over areas into which it was thereafter advisable to extend trade, as Kentucky, where New England adopter was subject to rights of subsequent user of name, who had been a prior user in the Kentucky field.

4. TRADE-MARKS AND TRADE-NAMES 23— —LAWS OF STATES.

Property in trade-marks and right to their exclusive use rest upon laws of several states, and depend upon them for security and protection; power of Congress to legislate on subject being only that arising from authority to regulate commerce with foreign nations, among the states, and with Indians.

5. COMMON LAW 11—EXISTENCE OF PRINCIPLES IN KENTUCKY.

The principles of the common law obtain in Kentucky.

6. TRADE-MARKS AND TRADE-NAMES 42— REGISTRATION—STATE STATUTE—EXTRATERRITORIAL EFFECT.

A Massachusetts statute for the registration of trade-marks could have no extraterritorial effect.

7. TRADE-MARKS AND TRADE-NAMES 21— PRIORITY OF APPROPRIATION.

The general rule is that, as between conflicting claimants to the right to use the same trade-mark, priority of appropriation determines the question; the underlying reason being that purchasers have come to understand the mark as indicating the origin of the wares.

8. TRADE-MARKS AND TRADE-NAMES 97— ENJOINING INFRINGEMENT—CONSCIOUS INFRINGEMENT—FRAUDULENT IMITATION.

The rule that, where proof of infringement of trade-mark or trade-name is clear, equity will not ordinarily refuse injunction for future protection of proprietor, even where his acquiescence and laches disentitle him to accounting for profits, applies in cases of conscious infringement or fraudulent imitation, not to cases of good-faith use of mark or name.

On Writ of Certiorari to and Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Suit by the United Drug Company against Theodore Rectanus Company. From a decree of the District Court for plaintiff (206 Fed. 570), defendant appealed to the Circuit Court of Appeals, which reversed and remanded the cause, with directions to dismiss the bill (226 Fed. 545, 141 C. C. A. 301), and plaintiff appeals and brings certiorari. Decree affirmed.

Messrs. Lawrence A. Janney, of Chicago, Ill., and Frederick L. Emery, of Boston, Mass., for petitioner and appellant.

Mr. Clayton B. Blakey, of Louisville, Ky., for respondent and appellee.

*Mr. Justice PITNEY delivered the opinion of the Court.

This was a suit in equity brought September 24, 1912, in the United States District Court for the Western District of Kentucky by the present petitioner, a Massachusetts corporation, against the respondent, a Ken-

tucky corporation, together with certain individual citizens of the latter state, to restrain infringement of trade-mark and unfair competition.

[1] The District Court granted an injunction against the corporation defendant pursuant to the prayer of the bill. 206 Fed. 570. The Circuit Court of Appeals reversed the decree and remanded the cause with directions to dismiss the bill. 226 Fed. 545, 141 C. C. A. 301. An appeal was allowed by one of the judges of that court, and afterwards we allowed a writ of certiorari. Pursuant to a stipulation, the transcript of the record filed for the purposes of the appeal was treated as a return to the writ. Under section 128, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133), as amended by Act of January 28, 1915 (38 Stat. 803, c. 22, § 2; Comp. St. 1916, § 1120), the appeal must be dismissed, and the cause will be determined on the writ of certiorari.

*The essential facts are as follows: About the year 1877 Ellen M. Regis, a resident of Haverhill, Mass., began to compound and distribute in a small way a preparation for medicinal use in cases of dyspepsia and some other ailments, to which she applied as a distinguishing name the word "Rex"—derived from her surname. The word was put upon the boxes and packages in which the medicine was placed upon the market, after the usual manner of a trade-mark. At first alone, and afterwards in partnership with her son under the firm name of "E. M. Regis & Co.," she continued the business on a modest scale; in 1898 she recorded the word "Rex" as a trade-mark under the laws of Massachusetts (Acts 1895, p. 519, c. 462, § 1); in 1900 the firm procured its registration in the United States Patent Office under the Act of March 3, 1881 (21 Stat. 502, c. 138); in 1904 the Supreme Judicial Court of Massachusetts sustained their trade-mark right under the state law as against a concern that was selling medicinal preparations of the present petitioner under the designation of "Rexall Remedies" (Regis v. Jaynes, 185 Mass. 458, 70 N. E. 480); afterwards the firm established priority in the mark as against petitioner in a contested proceeding in the Patent Office; and subsequently, in the year 1911, petitioner purchased the business with the trade-mark right, and has carried it on in connection with its other business, which consists in the manufacture of medicinal preparations, and their distribution and sale through retail drug stores, known as "Rexall stores," situate in the different states of the Union, four of them being in Louisville, Ky.

Meanwhile, about the year 1883, Theodore Rectanus, a druggist in Louisville, familiarly known as "Rex," employed this word as a trade-mark for a medicinal preparation known as a "blood purifier." He continued this use to a considerable extent in Louisville

and vicinity, spending money in advertising and building up a trade, so that—*except for whatever effect might flow from Mrs. Regis' prior adoption of the word in Massachusetts, of which he was entirely ignorant—he was entitled to use the word as his trade-mark. In the year 1906 he sold his business, including the right to the use of the word, to respondent; and the use of the mark by him and afterwards by respondent was continuous from about the year 1883 until the filing of the bill in the year 1912.

Petitioner's first use of the word "Rex" in connection with the sale of drugs in Louisville or vicinity was in April, 1912, when two shipments of "Rex Dyspepsia Tablets," aggregating 150 boxes and valued at \$22.50, were sent to one of the "Rexall" stores in that city. Shortly after this the remedy was mentioned by name in local newspaper advertisements published by those stores. In the previous September, petitioner shipped a trifling amount—5 boxes—to a drug store in Franklin, Ky., approximately 120 miles distant from Louisville. There is nothing to show that before this any customer in or near Kentucky had heard of the Regis remedy, with or without the description "Rex," or that this word ever possessed any meaning to the purchasing public in that state, except as pointing to Rectanus and the Rectanus Company and their "blood purifier." That it did and does convey the latter meaning in Louisville and vicinity is proved without dispute. Months before petitioner's first shipment of its remedy to Kentucky, petitioner was distinctly notified (in June, 1911) by one of its Louisville distributors, that respondent was using the word "Rex" to designate its medicinal preparations, and that such use had been commenced by Mr. Rectanus as much as 16 or 17 years before that time.

There was nothing to sustain the allegation of unfair competition, aside from the question of trade-mark infringement. As to this, both courts found, in substance, that the use of the same mark upon different but somewhat *related preparations was carried on by the parties and their respective predecessors contemporaneously, but in widely separated localities, during the period in question—between 25 and 30 years—in perfect good faith; neither side having any knowledge or notice of what was being done by the other. The District Court held that, because the adoption of the mark by Mrs. Regis antedated its adoption by Rectanus, petitioner's right to the exclusive use of the word in connection with medicinal preparations intended for dyspepsia and kindred diseases of the stomach and digestive organs must be sustained, but without accounting for profits or assessment of damages for unfair trade, citing *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S.

19, 39, 21 Sup. Ct. 7, 45 L. Ed. 60; *Saxlehner v. Siegel-Cooper Co.*, 179 U. S. 42, 21 Sup. Ct. 16, 45 L. Ed. 77. The Circuit Court of Appeals held that in view of the fact that Rectanus had used the mark for a long period of years in entire ignorance of Mrs. Regis' remedy or of her trade-mark, had expended money in making his mark well known, and had established a considerable though local business under it in Louisville and vicinity, while on the other hand during the same long period Mrs. Regis had done nothing, either by sales agencies or by advertising, to make her medicine or its mark known outside of the New England States, saving sporadic sales in territory adjacent to those states, and had made no effort whatever to extend the trade to Kentucky, she and her successors were bound to know that, misled by their silence and inaction, others might act, as Rectanus and his successors did act, upon the assumption that the field was open, and therefore were estopped to ask for an injunction against the continued use of the mark in Louisville and vicinity by the Rectanus Company.

The entire argument for the petitioner is summed up in the contention that whenever the first user of a trade-mark has been reasonably diligent in extending the *territory of his trade, and as a result of such extension has in good faith come into competition with a later user of the same mark who in equal good faith has extended his trade locally before invasion of his field by the first user, so that finally it comes to pass that the rival traders are offering competitive merchandise in a common market under the same trade-mark, the later user should be enjoined at the suit of the prior adopter, even though the latter be the last to enter the competitive field and the former have already established a trade there. Its application to the case is based upon the hypothesis that the record shows that Mrs. Regis and her firm, during the entire period of limited and local trade in her medicine under the Rex mark, were making efforts to extend their trade so far as they were able to do with the means at their disposal. There is little in the record to support this hypothesis; but, waiving this, we will pass upon the principal contention.

[2] The asserted doctrine is based upon the fundamental error of supposing that a trade-mark right is a right in gross or at large, like a statutory copyright or a patent for an invention, to either of which, in truth, it has little or no analogy. *Canal Co. v. Clark*, 13 Wall. 311, 322, 20 L. Ed. 581; *McLean v. Fleming*, 96 U. S. 245, 254, 24 L. Ed. 828. There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. The law of trade-marks is but a part of the broader law of unfair competition; the

right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his; and it is not the subject of property except in connection with an existing business. *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 412-414, 36 Sup. Ct. 357, 60 L. Ed. 713.

*192 The owner of a trade-mark may not, like the proprietor *of a patented invention, make a negative and merely prohibitive use of it as a monopoly. See *United States v. Bell Telephone Co.*, 167 U. S. 224, 250, 17 Sup. Ct. 809, 42 L. Ed. 144; *Rement v. National Harrow Co.*, 186 U. S. 70, 90, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Paper Bag Patent Case*, 210 U. S. 405, 424, 28 Sup. Ct. 748, 52 L. Ed. 1122.

In truth, a trade-mark confers no monopoly whatever in a proper sense, but is merely a convenient means for facilitating the protection of one's good-will in trade by placing a distinguishing mark or symbol—a commercial signature—upon the merchandise or the package in which it is sold.

[3] It results that the adoption of a trade-mark does not, at least in the absence of some valid legislation enacted for the purpose, project the right of protection in advance of the extension of the trade, or operate as a claim of territorial rights over areas into which it thereafter may be deemed desirable to extend the trade. And the expression, sometimes met with, that a trade-mark right is not limited in its enjoyment by territorial bounds, is true only in the sense that wherever the trade goes, attended by the use of the mark, the right of the trader to be protected against the sale by others of their wares in the place of his wares will be sustained.

[4] Property in trade-marks and the right to their exclusive use rest upon the laws of the several states, and depend upon them for security and protection; the power of Congress to legislate on the subject being only such as arises from the authority to regulate commerce with foreign nations and among the several states and with the Indian tribes. *Trade-Mark Cases*, 100 U. S. 82, 93, 25 L. Ed. 550.

*53 [5] Conceding everything that is claimed in behalf of the petitioner, the entire business conducted by Mrs. Regis and her firm prior to April, 1911, when petitioner acquired it, was confined to the New England States, with inconsiderable sales in New York, New Jersey, Canada, and Nova Scotia. There was nothing in all of this to give her *any rights in Kentucky, where the principles of the common law obtain. *Hunt v. Warnicke's Heirs*, 3 Ky. (Hardin) 61, 62; *Lathrop v. Commercial Bank*, 38 Ky. (8 Dana) 114, 121, 33 Am. Dec. 481; *Ray v. Sweeney*, 77 Ky. (14 Bush) 1, 9, 29 Am. Rep. 388;

Ætna Ins. Co. v. Commonwealth, 106 Ky. 864, 881, 51 S. W. 624, 45 L. R. A. 355; *Nider v. Commonwealth*, 140 Ky. 684, 687, 131 S. W. 1024, Ann. Cas. 1913E, 1246. We are referred to no decision by the courts of that state, and have found none that lays down any peculiar doctrine upon the subject of trade-mark law. There is some meager legislation, but none that affects this case (*Kentucky Stats.* § 2572c, subsec. 7; sections 4749-4755). There was nothing to prevent the state of Kentucky (saving, of course, what Congress might do within the range of its authority) from conferring affirmative rights upon Rectanus, exclusive in that commonwealth as against others whose use of the trade-mark there began at a later time than his; but whether he had such rights, or respondent now has them, is a question not presented by the record; there being no prayer for an injunction to restrain petitioner from using the mark in the competitive field.

[6] It is not contended, nor is there ground for the contention, that registration of the Regis trade-mark under either the Massachusetts statute or the act of Congress, or both, had the effect of enlarging the rights of Mrs. Regis or of petitioner beyond what they would be under common-law principles. Manifestly the Massachusetts statute (*Acts* 1895, p. 519, c. 462) could have no extraterritorial effect. And the Act of Congress of March 3, 1881 (21 Stat. 502, c. 138), applied only to commerce with foreign nations or the Indian tribes, with either of which this case has nothing to do. See *Ryder v. Holt*, 128 U. S. 525, 9 Sup. Ct. 145, 32 L. Ed. 529. Nor is there any provision making registration equivalent to notice of rights claimed thereunder. The Act of February 20, 1905 (33 Stat. 724, c. 592 [*Comp. St.* 1916, § 9485 et seq.]), which took the place of the 1881 act, while extending protection to trade-marks used in interstate commerce, does not en-
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*large the effect of previous registrations, unless renewed under the provisions of its twelfth section, which has not been done in this case; hence we need not consider whether anything in this act would aid the petitioner's case.

[7] Undoubtedly, the general rule is that, as between conflicting claimants to the right to use the same mark, priority of appropriation determines the question. See *Canal Co. v. Clark*, 13 Wall. 311, 323, 20 L. Ed. 581; *McLean v. Fleming*, 96 U. S. 245, 251, 24 L. Ed. 828; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 53, 25 L. Ed. 933; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 463, 14 Sup. Ct. 151, 37 L. Ed. 1144. But the reason is that purchasers have come to understand the mark as indicating the origin of the wares, so that its use by a second producer amounts to an attempt to sell his goods as those of his competitor. The reason for the rule does not extend to a case where the same trade-

mark happens to be employed simultaneously by two manufacturers in different markets separate and remote from each other, so that the mark means one thing in one market, an entirely different thing in another. It would be a perversion of the rule of priority to give it such an application in our broadly extended country that an innocent party who had in good faith employed a trade-mark in one state, and by the use of it had built up a trade there, being the first appropriator in that jurisdiction, might afterwards be prevented from using it, with consequent injury to his trade and good will, at the instance of one who theretofore had employed the same mark, but only in other and remote jurisdictions, upon the ground that its first employment happened to antedate that of the first-mentioned trader.

In several cases federal courts have held that a prior use of a trade-mark in a foreign country did not entitle its owner to claim exclusive trade-mark rights in the United States as against one who in good faith had adopted a like trade-mark here prior to the entry of the foreigner into this market. *Richter v. Anchor Remedy Co.* (C. C.) 52 Fed. *455, 458; *Richter v. Reynolds*, 59 Fed. 577, 579, 8 C. C. A. 220; *Walter Baker & Co. v. Delapenha* (C. C.) 160 Fed. 746, 748; *Gorham Mfg. Co. v. Weintraub* (D. C.) 196 Fed. 957, 961.

The same point was involved in *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 415, 36 Sup. Ct. 357, 361 (60 L. Ed. 713), where we said:

"In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant, unless at least it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like."

In this case, as already remarked, there is no suggestion of a sinister purpose on the part of Rectanus or the Rectanus Company; hence the passage quoted correctly defines the status of the parties prior to the time when they came into competition in the Kentucky market. And it results, as a necessary inference from what we have said, that petitioner, being the newcomer in that market, must enter it subject to whatever rights had previously been acquired there in good faith by the Rectanus Company and its predecessor. To hold otherwise—to require Rectanus to retire from the field upon the entry of Mrs. Regis' successor—would be to establish the right of the latter as a right in gross, and to extend it to territory wholly remote from the furthest reach of the trade to which it was annexed, with the effect not merely of depriving Rectanus of the benefit of the good

will resulting from his long-continued use of the mark in Louisville and vicinity, and his substantial expenditures in building up his trade, but of enabling petitioner to reap substantial benefit from the publicity that Rectanus *has thus given to the mark in that locality, and of confusing if not misleading the public as to the origin of goods thereafter sold in Louisville under the Rex mark, for, in that market, until petitioner entered it, "Rex" meant the Rectanus product, not that of Regis.

[8] In support of its contention petitioner cites the same cases that were relied upon by the District Court, namely, *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 39, 21 Sup. Ct. 7, 45 L. Ed. 60; and *Saxlehner v. Siegel-Cooper Co.*, 179 U. S. 42, 21 Sup. Ct. 16, 45 L. Ed. 77. They exemplify the rule that, where the proof of infringement is clear, a court of equity will not ordinarily refuse an injunction for the future protection of the proprietor of a trade-mark right, even where his acquiescence and laches have been such as to disentitle him to an accounting for the past profits of the infringer. The rule finds appropriate application in cases of conscious infringement or fraudulent imitation, as is apparent from a reading of the opinions in those cases; but it has no pertinency to such a state of facts as we are now dealing with. In *McLean v. Fleming*, the only question raised in this court that affected the right of the appellee to an injunction was whether the Circuit Court had erred in finding that defendant's labels "Dr. McLean's Universal Pills," etc., infringed complainant's label "Dr. C. McLane's Celebrated Liver Pills," and this turned upon whether the similarity was sufficient to deceive ordinarily careful purchasers. The evidence showed without dispute that from the beginning of his use of the offending labels the defendant (McLean) had known of the McLane liver pills, and raised at least a serious question whether he did not adopt his labels for the purpose of palming off his goods as those of complainant. What he controverted was that his labels amounted to an infringement of complainant's, and when this was decided against him the propriety of the injunction was clear. In *Menendez v. Holt*, likewise, defendants (Menendez) admitted the existence of the brand in question—the words "La Favorita" as applied to flour—and admitted using it, but denied that Holt & Co. were the owners, alleging that one Rider was a former member of that firm and entitled to use the brand, and that under him defendants had sold their flour branded "La Favorita, S. O. Rider," There was, however, no question but that defendants adopted the brand knowing it to be already in use by others. In the *Saxlehner Cases*, the facts were peculiar, and need not be rehearsed; injunctions were allowed to

restrain the sale of certain waters in bottles and under labels in which those of complainant were intentionally imitated. In all four cases the distinguishing features of the present case were absent.

Here the essential facts are so closely parallel to those that furnished the basis of decision in the Allen & Wheeler Case, reported sub nom. Hanover Milling Co. v. Metcalf, 240 U. S. 403, 419-420, 36 Sup. Ct. 357, 60 L. Ed. 713, as to render further discussion unnecessary. Mrs. Regis and her firm, having during a long period of years confined their use of the "Rex" mark to a limited territory wholly remote from that in controversy, must be held to have taken the risk that some innocent party might in the meantime hit upon the same mark, apply it to goods of similar character, and expend money and effort in building up a trade under it; and since it appears that Rectanus in good faith, and without notice of any prior use by others, selected and used the "Rex" mark, and by the expenditure of money and effort succeeded in building up a local but valuable trade under it in Louisville and vicinity before petitioner entered that field, so that "Rex" had come to be recognized there as the "trade signature" of Rectanus and of respondent as his successor, petitioner is estopped to set up their continued use of the mark in that territory as an infringement of the Regis trademark. Whatever confusion may have arisen from conflicting use of the mark is attributable to petitioner's entry into the field with notice of the situation; and petitioner cannot complain of this. As already stated, respondent is not complaining of it.

Decree affirmed.

(248 U. S. 139)

LUCKENBACH et al. v. W. J. McCAHAN SUGAR REFINING CO. et al.

(Argued Nov. 18, 1918. Decided Dec. 9, 1918.)

No. 51.

1. COURTS ⇨382(1)—REVIEW—DECISIONS OF FACT.

Concurrent decisions of District Court and Circuit Court of Appeals on an issue of fact, as the unseaworthiness of a steamer, will be accepted by the Supreme Court, unless shown to be clearly erroneous.

2. CARRIERS ⇨125—STIPULATION AS TO INSURANCE—EFFECT OF PAYMENT BY INSURER.

A bill of lading providing that, in case of loss for which the carrier shall be liable, the carrier to that extent shall have benefit of any insurance is valid; and if the shipper effects insurance, and is paid full amount of loss, neither he nor insurer can recover against carrier.

3. INSURANCE ⇨606(3)—MARINE INSURANCE—PAYMENT OF LOSS—REIMBURSEMENT FROM CARRIER.

Where a bill of lading provided that the carrier should have the benefit of insurance, and the policies procured by the shipper contained the warranty by assured, "free from liability for merchandise in possession of any carrier, who may be liable * * * and for merchandise shipped under * * * stipulation that carrier may have benefit of insurance," the ad-

vancement as a loan from the insurer to the shipper, after loss, of amount covering damage, shipper agreeing to sue carrier, preserved to the insurer the right of reimbursement from carrier.

4. PAYMENT ⇨1(1)—INTENTION.

Whether transfer of money or other thing shall operate as a payment ordinarily is a matter determined by the intention of the parties.

5. SHIPPING ⇨137—LIABILITIES OF OWNERS—PERSONAL CONTRACT—LIMITATIONS ACTS.

Where any liability of the owners of a vessel under charter rests on their personal contract, the limitations acts (Rev. St. § 4283 [Comp. St. 1916, § 8021], and Act June 26, 1884, § 18 [Comp. St. 1916, § 8028]) do not apply, although the ship's unseaworthiness was without owner's privity or knowledge.

6. SHIPPING ⇨42—TIME CHARTER—WARRANTY OF SEAWORTHINESS.

Where time charter of steamer stated that, being on her delivery tight, staunch, and strong, owners would maintain her in a thoroughly efficient state, in hull and machinery, during service, original warranty of seaworthiness was not exhausted on delivery to charterers, and maintenance clause imported warranty of seaworthiness at commencement of each voyage.

7. SHIPPING ⇨41—TIME CHARTER—DEMISE.

A time charter, like a charter for a single voyage, is not a demise of the ship.

8. SHIPPING ⇨132(1)—LIABILITIES OF OWNERS—ACTIONS—MODIFICATION OF DECREE.

Where right to recover against all owners of vessel on shipper's libel for full amount, in case any of them was liable, was not controverted, decree of Circuit Court of Appeals that payment should be made by a certain estate, a part owner only, should be modified to render all the owners liable.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Libel by the W. J. McCahan Sugar Refining Company against the Insular Line and the Julia Luckenbach, owned by Edgar F. Luckenbach and others, who were impleaded. From decree for libelant, limiting the liability of the owners, both as against the Sugar Refining Company and as against the Insular Line, etc., the owners and the Insular Line appealed to the Circuit Court of Appeals, which modified the decree (235 Fed. 388, 148 C. C. A. 650), and the owners petition for writ of certiorari. Affirmed.

Messrs. Peter S. Carter, Charles C. Burlingham, and Roscoe H. Hupper, all of New York City, for petitioners.

Mr. J. Parker Kirlin, of New York City, for respondent Insular Line.

Mr. Lawrence Kneeland, of New York City, for respondent W. J. McCahan Sugar Refining Co.

*Mr. Justice BRANDEIS delivered the opinion of the Court.

The W. J. McCahan Sugar Refining Company shipped a cargo of sugar from Porto Rico to Philadelphia by the Julia Luckenbach which was under charter to the Insular Line, and the cargo suffered severe damage. In the District Court of the United States for the Southern District of New York, a libel

seeking damages was filed in the name of the shipper in personam against the Insular Line and in rem against the steamer. It alleged that the damages resulted from unseaworthiness of the hull, existing at the commencement of the voyage. The petitioners, owners of the ship, were impleaded. The bills of lading sued on contained a clause relieving the carrier from liability for damages arising from—

"any latent defect in hull. * * * or by unseaworthiness of the ship, even existing at the time of shipment or sailing on the voyage, but not discoverable by the exercise of due diligence by the ship owner or manager. * * *

The libel alleged that the unseaworthiness would have been discovered, had due diligence been exercised. The District Court so found and held that the libellant was entitled to recover. The damages were agreed to be \$87,526.65, with interest, and the value of the ship and pending freight was found or agreed to be \$66,600. The owners duly moved for limitation of liability. The District Court found that the damages sustained were occasioned without the privity or knowledge of the owners; held that they were entitled to limit their liability, both as against the shipper and as against the charterer, who claimed indemnity; and ordered that the owners should pay the shipper's claim to the extent of the value of the *ship and pending freight, and that the balance should be paid by the Insular Line. 235 Fed. 388, 148 C. C. A. 650. Both the owners and the Insular Line appealed to the Circuit Court of Appeals. That court modified the decree, so as to award that payment of the full amount be made to the shipper primarily by the steamer and the owners, and that the charterer should be called upon to make payment only of the deficiency, if any. 235 Fed. 388, 148 C. C. A. 650. The case comes here on writ of certiorari granted on the petition of the owners. 242 U. S. 638, 37 Sup. Ct. 111, 61 L. Ed. 540.

It is urged, on three grounds, that the decision of the Circuit Court of Appeals should be reversed and that the District Court should be directed, either to dismiss the libel or to limit the owners' liability to the value of the ship and pending freight.

[1] First. The owners contend that both lower courts erred in holding that the steamer was unseaworthy at the commencement of her voyage and that due diligence to make her seaworthy had not been exercised. The issue involved is one of fact; and no reason appears why the general rule should not apply, that concurrent decisions of the two lower courts on an issue of fact will be accepted by this court unless shown to be clearly erroneous. *The Wildcroft*, 201 U. S. 378, 387, 26 Sup. Ct. 467, 50 L. Ed. 794; *The Carib Prince*, 170 U. S. 655, 658, 18 Sup. Ct. 753, 42 L. Ed. 1181.

[2-4] Second. The owners (and also the charterer) contend that the libel should be

dismissed, because the shipper had already been compensated for the loss by insurance which it effected; and that the carrier is entitled to the full benefit of this insurance.

The shipper had effected full insurance. The bills of lading sued on contain the following clause:

"In case of any loss, detriment or damage done to or sustained by said goods or any part thereof for which the carrier shall be liable to the shipper, owner or consignee, the carrier shall to the extent of such liability have the *full benefit of any insurance that may have been effected upon or on account of said goods."

Such a clause is valid, because the carrier might himself have insured against the loss, even though occasioned by his own negligence; and if a shipper under a bill of lading containing this provision effects insurance and is paid the full amount of his loss, neither he nor the insurer can recover against the carrier. *Phoenix Insurance Co. v. Erie & Western Transportation Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 29 L. Ed. 873; *Wager v. Providence Insurance Co.*, 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013. In the case at bar, the shipper has received from the insurance companies an amount equal to the loss; but it is contended that the money was received as a loan or conditional payment merely, and that, therefore, the carrier is not relieved from liability. The essential facts are these:

The policies under which the shipper was insured contained the following, or a similar, provision:

"Warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee, who may be liable for any loss or damage thereto; and for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon."

The situation was, therefore, this: The carrier (including in this term the charterer, the ship, and the owners) would, in no event be liable to the shipper for the damages occasioned by unseaworthiness, *unless* guilty of negligence. The insurer would, in no event, be liable to the shipper, *if* the carrier was liable. In case the insurer should refuse to pay until the shipper had established that recovery against the carrier was not possible—prompt settlement for loss (which is essential to actual indemnity and demanded in the interest of commerce) would be defeated. If, on the other hand, the insurers should settle the loss, before the question of the carrier's *liability for loss had been determined, the insurer would lose the benefit of all claims against the carrier, to which it would be subrogated in the absence of a provision to the contrary in the bill of lading (*The Potomac*, 105 U. S. 630, 634, 26 L. Ed. 1194), and the carrier would be freed from liability to any one. In order that the shipper should not be deprived of the use of money which it was entitled to receive promptly after the loss, either from the carrier or from the insurers, and that the insurer should not lose the right of subroga-

tion, agreements in the following (or similar) form were entered into between the insurers and the shipper:

"New York, Aug. 15, 1912.

"Received from the Federal Insurance Company, twenty-three hundred four and $\frac{16}{100}$ dollars, as a loan and repayable only to the extent of any net recovery we may make from any carrier, bailee or others on account of loss to our property (described below) due to damage on S/S Julia Luckenbach from Porto Rico/Philadelphia, on or about ———, 19—, or from any insurance effected by any carrier, bailee or others on said property, and as security for such repayment we hereby pledge to the said Federal Insurance Company, the said recovery and deliver to them duly endorsed the bills of lading for said property and we agree to enter and prosecute suit against said railroad, carrier, bailee, or others on said claim with all due diligence at the expense and under the exclusive direction and control of the said Federal Insurance Company.

"The W. J. McCahan Sugar Refining Co.,
"\$2,304.16 R. S. Pomeroy, Treasurer.
"Description of property: Sugar."

Upon delivery of this and similar agreements, the shipper received from the insurance companies, promptly after the adjustment of the loss, amounts aggregating *the loss; and this libel was filed in the name of the shipper, but for the sole benefit of the insurers, through their proctors and counsel, and wholly at their expense. If, and to the extent (less expenses) that, recovery is had, the insurers will receive payment or be reimbursed for their so-called loans to the shipper. If nothing is recovered from the carrier, the shipper will retain the money received by it without being under obligation to make any repayment of the amounts advanced. In other words, if there is no recovery here, the amounts advanced will operate as absolute payment under the policies.

Agreements of this nature have been a common practice in business for many years. *Pennsylvania Railroad Co. v. Burr*, 130 Fed. 847, 65 C. C. A. 331; *Bradley v. Lehigh Valley Railroad Co.*, 153 Fed. 350, 82 C. C. A. 426. It is clear that if valid and enforced according to their terms, they accomplish the desired purpose. They supply the shipper promptly with money to the full extent of the indemnity or compensation to which he is entitled on account of the loss; and they preserve to the insurers the claim against the carrier to which by the general law of insurance, independently of special agreement, they would become subrogated upon payment by them of the loss. The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan, is to follow the letter of the agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying its effect. The shipper is under no obligation to the carrier to take out insurance on the cargo; and the freight rate is the same

whether he does or does not insure. The general law does not give the carrier, upon payment of the shipper's claim, a right by subrogation against the insurers. The insurer has, on the other hand, by the general law, a right of subrogation against the carrier. Such claims, like tangible *salvage, are elements which enter into the calculations of actuaries in fixing insurance rates; and, at least in the mutual companies, the insured gets some benefit from amounts realized therefrom. It is essential to the performance of the insurer's service, that the insured be promptly put in funds, so that his business may be continued without embarrassment. Unless this is provided for, credits which are commonly issued against drafts or notes with bills of lading attached, would not be granted. Whether the transfer of money or other thing shall operate as a payment, is ordinarily a matter which is determined by the intention of the parties to the transaction. Compare *The Kimball*, 3 Wall. 37, 44, 18 L. Ed. 50. The insurer could not have been obliged to pay until the condition of their liability—i. e., nonliability of the carrier—had been established. The shipper could not have been obliged to surrender to the insurers the conduct of the litigation against the carrier, until the insurers had paid. In consideration of securing then the right to conduct the litigation, the insurers made the advances. It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice.

[5] Third. The owners contend that, under section 4283 of the Revised Statutes (Comp. St. 1916, § 8021) and section 18 of the Act of June 26, 1884, c. 121 (23 Stat. 57 [Comp. St. 1916, § 8028]), their liability should have been limited to the value of the ship and her pending freight; because the District Court found that her unseaworthiness was without their privity or knowledge; and this finding was not disturbed by the Circuit Court of Appeals. But the liability of the owners sought to be enforced here is one resting upon their personal contract; and to such liabilities the limitations acts do not apply. *Pendleton v. Benner Line*, 246 U. S. 353, 38 Sup. Ct. 330, 62 L. Ed. 770.

[6, 7] It is also urged that, as between the owners and the Insular Line, the original warranty of seaworthiness was *exhausted upon delivery of the ship to the charterers and that the maintenance clause relied upon does not import a warranty of seaworthiness at the commencement of each voyage under a time charter, but merely an obligation to pay the expense of keeping her hull and machinery in repair throughout the service. Neither the language of the clause nor the character of time charters afford support for this contention. The charter of the vessel states clearly that, the vessel "being, on her deliv-

ery, tight, staunch [and] strong," the owners will "maintain her in a thoroughly efficient state in hull and machinery for and during the service"—*not pay the expense of maintaining her*. This duty to maintain the vessel in an efficient state is imposed by the contract, because a time charter, like a charter for a single voyage, is not a demise of the ship. In both, the charterer is without control over her repair and maintenance. In operations under each the charterer becomes liable to shippers without limitation for losses due to unseaworthiness discoverable by the exercise of due diligence on the part of the owners; and in each case he requires for his protection a warranty, without limitation, of seaworthiness at the commencement of every voyage. Compare *The Burma*, 187 Fed. 94, 110 C. C. A. 330; *Whipple v. Mississippi & Yazoo Packet Co.* (D. C.) 34 Fed. 54; *McIver & Co., Ltd., v. Tate Steamers, Ltd.*, [1903] 1 K. B. 362; *Park v. Duncan & Sons*, 35 Scottish Law Reporter, 378. If *Giertsen v. Turnbull & Co.*, 45 Scottish Law Reporter, 916, strongly relied upon by the owners, is inconsistent with this view, it should be disregarded.

[8] Fourth. The vessel was owned $\frac{54}{80}$ ths by Edgar F. Luckenbach, as sole trustee of the estate of Lewis Luckenbach; $\frac{10}{80}$ ths by Edgar F. Luckenbach individually; and $\frac{16}{80}$ ths by John W. Weber and Hattie W. Luckenbach, executors of the estate of Edward Luckenbach. All of these parties were impleaded as owners. The charter party was signed only by "Estate of Lewis Luckenbach, *per Edgar F. Luckenbach, Trustee"; but it was admitted by all the petitioners that Edgar F. Luckenbach, Trustee, in so signing the charter party, acted for all the owners and intended to bind all. The decree in the District Court declares that libellant was entitled to recovery "from the respondents Edgar F. Luckenbach et al., her owners." The decree in the Circuit Court of Appeals adjudged (presumably through inadvertence) that the payment should be made by "the estate of Luckenbach." The right to recover against all the owners, for the full amount, in case any of them was so liable was not controverted.

The decree of the Circuit Court of Appeals should be modified so as to render all the owners liable. Compare *Pendleton v. Benner Line*, 246 U. S. 353, 38 Sup. Ct. 330, 62 L. Ed. 770. As so modified, the decree is affirmed.

(248 U. S. 121)

TEMPEL v. UNITED STATES.

(Argued Nov. 5, 1917. Decided Dec. 9, 1918.)

No. 29.

1. NAVIGABLE WATERS §36(2)—LANDS UNDER STREAM—OWNERSHIP.

Under law of Illinois, neither the United States nor the state owns lands under a naviga-

ble river, but riparian owners own fee to middle of stream, subject to government's paramount right to use it and to make improvements for navigation without compensation, including deepening of channel.

2. UNITED STATES §95—CLAIMS AGAINST—IMPLIED CONTRACT—CLAIM OF RIPARIAN PROPRIETOR FOR DREDGING.

Consent of United States to be sued under Tucker Act (Comp. St. 1916, § 991), being limited to claims founded upon contract, express or implied, if riparian proprietor on North branch of Chicago river can recover against government for dredging in front of his property to improve navigation, it must be on implied contract.

3. UNITED STATES §95—CLAIMS AGAINST—IMPLIED CONTRACT.

Law will imply promise by United States to make compensation required by Tucker Act (Comp. St. 1916, § 991), where property to which government asserts no title, conceding ownership in an individual, is taken pursuant to act of Congress as private property to be applied for public uses.

4. EVIDENCE §48—JUDICIAL NOTICE—REPORTS OF SECRETARY OF WAR.

The Supreme Court takes judicial notice of the reports of the Secretary of War.

5. UNITED STATES §96—CLAIMS AGAINST—WRONGFUL DREDGING OF SUBMERGED LANDS—TUCKER ACT.

If claim of United States of right to dredge North branch of Chicago river to improve navigation was unfounded, property right of riparian proprietor, whose submerged land was dredged, was violated; but his cause of action, if any, sounds in tort, for which Tucker Act (Comp. St. 1916, § 991), limiting consent of United States to be sued to claims founded on contract, affords no remedy.

6. UNITED STATES §95—CLAIMS AGAINST—IMPLIED PROMISE—TUCKER ACT.

Where it does not appear that at time of taking property there was any claim by United States of right to invade it without payment of compensation, it must be assumed government intended to make compensation for any property taken, so as to afford basis for implied promise, enforceable by action under Tucker Act (Comp. St. 1916, § 991).

7. UNITED STATES §96—CLAIMS AGAINST—NONCONVERSION OF ACT INTO TORT.

When implied promise of United States to pay for property taken has once arisen, later denial by government, at time of suit against it under Tucker Act (Comp. St. 1916, § 991), or otherwise, of its liability to make compensation, does not destroy injured party's right in contract, and convert act of taking into a tort.

In Error to the District Court of the United States for the Northern District of Illinois.

Suit by Franz Tempel against the United States. To review judgment of the District Court for defendant, plaintiff brings error. Judgment reversed and rendered, with directions to dismiss it for want of jurisdiction.

Messrs. Timothy F. Mullen and Thomas B. Lantry, both of Chicago, Ill., for plaintiff in error.

Mr. Solicitor General Davis, for the United States.

*Mr. Justice BRANDEIS delivered the opinion of the Court.

The Chicago river, its branches and forks

lie wholly within the state of Illinois.¹ Their aggregate length is about 35 miles. Originally the stream was a sluggish creek, nearly stagnant during much of the year and, in part, navigable only for rowboats and canoes or for *floating of logs. The United States surveyed the river in 1837, but made no improvement above its mouth until 1896. Before the latter date, however, extensive improvements had been made from time to time by the city and by riparian owners. The river had become the inner harbor of Chicago and, measured by its tonnage, was one of the most important waterways of the globe. In number of arrivals and departures of vessels it led all the harbors of the United States. In tonnage it was second only to New York.²

In 1896 Congress made an appropriation "for improving the Chicago river, in Illinois, from its mouth to the stock yards on the South branch and to Belmont avenue on the North branch, as far as may be permitted by existing docks and wharves, to be dredged to admit passage by vessels drawing sixteen feet of water." Act of June 3, 1896, c. 314 (29 Stat. 202, 228). This act was amended by the Act of June 4, 1897, c. 2 (30 Stat. 11, 47), which, as interpreted by the War Department, permitted a slight widening of the stream in certain places. The General Assembly of Illinois by resolution of April 22-23, 1897, gave assent to the United States acquiring by purchase or condemnation "all lands necessary for widening the Chicago river and its branches." In 1899 Congress directed a survey with a view to creating a deeper channel and adopting 21 feet "as the project depth for the improvement in lieu of that fixed by the Act of June third, eighteen hundred and ninety-six." Act of March 3, 1899, c. 425 (30 Stat. 1121, 1156). No widening beyond the banks of the de jure stream was specifically authorized by this act, nor by any subsequent act. From time to time other appropriations were made by Congress for these improvements of the river, and work *was carried on thereunder.³

About 12.5 miles of the river was improved by the government; and of this about 5 miles consisted of that part of the North branch which lies between the main river and Belmont avenue.

Early in 1889 Tempel became the owner of certain land on the bank of the North branch below Belmont avenue. He leased his land for a brickyard; and by the terms of the lease the lessee was permitted to dredge the bottom of the river in front of the premises for the purpose of making brick from the clay thereunder. But the lessee was directed not to interfere with the upland; and he covenanted to deliver up the premises in the condition in which they were demised. Nevertheless, from time to time during a period of five years between 1889 and 1899, the lessee dug away, to a depth of from 6 to 14 feet, a large strip of the upland, extending in some places to a considerable width. In its natural state the stream opposite the plaintiff's property varied in width from probably 50 to 150 feet, and could be used only for floating logs and for travel by rowboats or canoes; but before 1889 riparian owners had dug a channel and possibly greatly widened the stream, and schooners navigated to a point beyond Belmont avenue. Between 1890 and 1899 boats drawing 5 to 8 feet of water were navigating the North branch up to Belmont avenue. In 1896 the river in front of Tempel's property was in varying depths of from 6 to 14 or 15 feet.

The United States did not do any dredging in front of *Tempel's property until 1899.⁴ Then it dredged a channel to the depth of 17 feet, about 30 feet wide—the excavation being made wholly in the then bed of the stream as submerged. Its next dredging there was in 1909 when this channel was deepened to 21 feet and widened to 60 feet, the excavation being again made wholly in the then bed of the stream as submerged. All of the dredging, both in 1899 and in 1909, which was not within the bed of the river in its natural state, was done within the limits of the strip of upland which had been submerged through the dredging done by the lessee prior to 1899. During the period from 1889 to 1899, the stream in front of Tempel's premises was in constant and increasing use for the purpose of public navigation. The government does not appear to have had knowledge of the fact that dredging had been done before 1899 by the lessee without the consent of Tempel or that the river had been widened by excavation. The reports of the Secretary of War show that he never specifically authorized, for the purpose of widening the river, the appropriation of any of the property herein involved and that the government believed, when it dredged in front of Tempel's property in 1899 and again in 1909, that the submerged land, in which the dredging was done, was either a part of the natural bed of the river, or that it had been dedicated by the owner for

¹ The character of the river and rights incidental thereto have been frequently considered by this court. *Transportation Company v. Chicago*, 99 U. S. 635, 25 L. Ed. 336; *Escanaba Company v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; *Illinois Central Railroad v. Illinois*, 146 U. S. 387, 437, 13 Sup. Ct. 110, 36 L. Ed. 1018; *Harman v. Chicago*, 147 U. S. 396, 13 Sup. Ct. 306, 37 L. Ed. 216; *West Chicago Railroad v. Chicago*, 201 U. S. 506, 520, 26 Sup. Ct. 518, 50 L. Ed. 845.

² Reports, War Department, Engineers, for 1893, pp. 2794-2804; for 1897, pp. 2793-2801; for 1900, pp. 3865-3871; for 1914, pp. 1157-1160; for 1916, pp. 1350-1354.

³ Act of July 1, 1898, c. 546, 30 Stat. 597, 632; June 6, 1900, c. 791, 31 Stat. 588, 626; June 13, 1902, c. 1079, 32 Stat. 331, 363, which authorized the construction of turning basins, but the one in the North Branch was constructed at a point considerably below the land in controversy; March 2, 1907, c. 2509, 34 Stat. 1073, 1102; May 23, 1908, c. 213, 35 Stat. 429.

Reports, War Department, Engineers, for 1899, pp. 2826-2833; for 1900, pp. 3784-3788.

purposes of navigation, or that it had in some other manner become a part of the de jure stream.⁴ No objection was made by Tempel, until 1910, to the use, for navigation, of the river in front of his property; and he did not file any complaint as to the dredging of 1899. He had no knowledge, until 1910, of the dredging which had been done by his lessee, nor of that done by the government.

Promptly after learning of the dredging, Tempel demanded of the government possession of that part of the land submerged which had formerly constituted a part of his upland. The demand was refused; and in 1911 he brought, in the District Court of the United States for the Northern District of Illinois, this suit, under the Tucker Act (Judicial Code, § 24, par. 20; Comp. St. 1916, § 991 [20]), to recover the value of property which he claimed had been taken by the government. The complaint alleged that the river in front of his premises was, at the time he acquired the same and therefore, a creek used only for surface drainage and was "not a navigable stream either in law or in fact"; that the government "in the latter part of the year 1909 completely excavated a channel through the same" for the purpose of making said North branch navigable; and that it holds possession thereof by virtue of the resolution of the General Assembly of Illinois above referred to; and that the reasonable value of the property taken was \$10,000. The complaint did not refer either to the dredging done before 1889, when Tempel acquired the property, or to that done between 1889 and 1899 by Tempel's lessee, or to that done in 1899 by the government. The answer denied that the stream in front of Tempel's land was nonnavigable when he purchased it or theretofore; asserted that all excavations by the government were made in the center of the stream and were for the purpose of improving navigation; and denied that it had taken any of Tempel's property under the resolution of the Illinois Assembly or otherwise.

The trial court found as a fact:

"That by reason of the changes in said river as aforesaid, the difference between the value of the premises of the petitioner at the time when he purchased the same as aforesaid, and the value of the same at the time that the demand as hereinbefore set forth was made, less the cost of reclaiming the same, were he entitled to make reclamation thereof, is \$7,547.00."

As conclusions of law the trial court found that the North branch was navigable in its natural state; that it was navigable in fact as early as 1889; that Tempel, having failed to complain of the use by the public of the stream in front of his property for a period of at least ten years prior to the first dredging by the United States, was estopped from thereafter disputing the navigability of the river; and that the river being then a navigable stream, the dredging of the bed in 1899 and in 1909 did not constitute a taking of Tempel's property within the meaning of the Fifth Amendment. Judgment was entered for the United States; and the case comes here on writ of error.

[1] First. This is a suit, like *United States v. Lynah*, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539, and *United States v. Cress*, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746, to recover the value of property taken by the government in making a river improvement. The property alleged to have been taken is land, part of which lies within the 30-foot channel first dredged by the government in 1899; the balance within the additional 30 feet dredged by it in 1909, when the channel was widened to 60 feet; and all of which formed part of the river bed and was submerged when the government commenced its improvement and has been since. But the property of Tempel, *if any, which the government has taken is only the right to keep his land submerged, to navigate over it, and to improve it further for purposes of navigation. This right in the land the government claimed and claims that it already possessed at the time when it dredged on the property in question; and it is the same right which the government possesses in that portion of the present river bed lying within the original meander lines and which originally constituted the whole river bed. Under the law of Illinois, neither the United States nor the state owns the lands under a navigable river. Riparian owners own the fee to the middle of the stream (*St. Louis v. Rutz*, 138 U. S. 226, 242, 11 Sup. Ct. 337, 34 L. Ed. 941), subject to the paramount right of the government to use the same and to make improvements therein for purposes of navigation, without the payment of compensation (*West Chicago Railroad v. Chicago*, 201 U. S. 506, 520, 26 Sup. Ct. 518, 50 L. Ed. 845; *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 62, 33 Sup. Ct. 667, 57 L. Ed. 1063; *Willink v. United States*, 240 U. S. 572, 580, 36 Sup. Ct. 422, 60 L. Ed. 808). Included in such permissible improvement is dredging for the

⁴ Reports, War Department, Engineers, for 1899, pp. 2828-2833; for 1900, pp. 3785-3788; for 1901, pp. 2993, 2995; for 1905, p. 545, show that, in the dredging under the project of 1896, the effort had been to secure title to all property necessary for the proposed development and that it was believed that (with exceptions not here material) this had been done. The property here involved was not included in the land which it was proposed to acquire. The reports also show that the government was not aware that there was any property of a private owner which it was necessary to acquire in order to make the further improvement according to the 21-foot project; and in the accounting of the division of funds between different objects, none were assigned to the securing of land for widening the river. Reports, War Department, Engineers, for 1907, p. 627; for 1908, p. 672; for 1909, p. 709; for 1910, pp. 784-785; for 1911, p. 842; for 1912, p. 1009; for 1913, p. 1119; for 1914, pp. 1157-1160. Nowhere does it appear that the Secretary of War ever authorized the taking of the property involved in this suit.

purpose of deepening the channel. *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82, 33 Sup. Ct. 679, 57 L. Ed. 1083, Ann. Cas. 1915A, 232. It is only this right to use and improve for purposes of navigation that the government claims here, a right which the government undoubtedly possessed, if the land in question had been a part of the bed of the de jure stream, as was supposed.

[2, 3] If the plaintiff can recover, it must be upon an implied contract. For, under the Tucker Act, the consent of the United States to be sued is (so far as here material) limited to claims founded "upon any contract, express or implied"; and a remedy for claims sounding in tort is expressly denied. *Bigby v. United States*, 188 U. S. 400, 23 Sup. Ct. 468, 47 L. Ed. 519; *Hijo v. United States*, 194 U. S. 315, 323, 24 Sup. Ct. 727, 48 L. Ed. 994. As stated in *United States v. Lynah*, 188 U. S. 445, 462, 465, 23 Sup. Ct. 349, 354 (47 L. Ed. 539):

*130 "The law will imply a promise to make the required compensation, where property to which the government asserts no title, *is taken, pursuant to an act of Congress, as private property to be applied for public uses."

Or in other words:

"Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor."

But in the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay. For the property applied to the public use is not and was not conceded to be in the plaintiff.

[4-7] Second. The answer, specifically denying that the United States has taken plaintiff's land, excavated a channel through it, and claims possession thereof under the resolution of the Illinois Assembly or otherwise, asserts that in 1909 it did "excavate a channel in the Chicago river in the center of the stream and now claims possession thereof for the purpose of making more navigable the North branch." The findings of fact made by the trial court (amplified by the reports of the Secretary of War, of which we take judicial notice) show that the government claimed at the time of the alleged taking and now claims that it already possessed, when it made its excavation in 1909, the property right actually in question. It is unnecessary to determine whether this claim of the government is well founded. The mere fact that the government then claimed and now claims title in itself and that it denies title in the plaintiff, prevents the court from assuming jurisdiction of the controversy. The law cannot imply a promise by the government to pay for a right over, or interest in, land, which right or interest the government claimed and claims it possessed before it utilized the same. If the government's claim is unfounded, a property right of plaintiff was violated; but the cause of action

therefor, if any, is one sounding in tort; and for such, the Tucker Act affords no remedy. *Hill v. United States*, 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862, which both in its pleadings and its facts bears a strong resemblance to the case at bar, is conclusive on this point. See, also, *Schillinger v. United States*, 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108. The case at bar is entirely unlike both the *Lynah* Case and the *Cress* Case. In neither of those cases does it appear that, at the time of taking, there was any claim by the government of a right to invade the property in question without the payment of compensation. Under such circumstances it must be assumed that the government intended to take and to make compensation for any property taken, so as to afford the basis for an implied promise. And when the implied promise to pay has once arisen, a later denial by the government (whether at the time of suit or otherwise) of its liability to make compensation does not destroy the right in contract and convert the act into a tort. In both of those cases the facts required the implication of a promise to pay. But here the government has contended since the beginning of the improvement that, at the time of the dredging in 1899 and in 1909, it possessed the right of navigation over the land in question; which right of navigation, if it existed, gave it the right to dredge further in order to improve navigation. The facts preclude implying a promise to pay. If the government is wrong in its contention, it has committed a tort. The United States has not conferred upon the District Court jurisdiction to determine such a controversy. See *Cramp & Sons v. Curtis Turbine Co.*, 246 U. S. 28, 40, 41, 38 Sup. Ct. 271, 62 L. Ed. 560.

The District Court, instead of rendering judgment for the United States, should have dismissed the suit for want of jurisdiction.

Judgment reversed and case remanded to the District Court, with directions to dismiss it for want of jurisdiction.

Mr. Justice McREYNOLDS took no part in the consideration and decision of this case.

(248 U. S. 132)

UNITED STATES v. SPEARIN.

SPEARIN v. UNITED STATES.

(Argued Nov. 14 and 15, 1918. Decided Dec. 9, 1918.)

Nos. 44, 45.

1. CONTRACTS §232(1)—UNFORESEEN DIFFICULTIES.

Where one agrees to do for a fixed sum a thing possible to be performed, he will not be excused or become entitled to additional compensation on account of unforeseen difficulties.

2. CONTRACTS §280(3)—BUILDING TO PLANS AND SPECIFICATIONS.

If contractor is bound to build according to owner's plans and specifications, owner will be

responsible for consequences of defects in plans and specifications, despite clauses requiring checking of plans, etc.

3. UNITED STATES $\S$ 73—CONTRACT—UNFORESEEN DIFFICULTY — RISK OF ADEQUACY OF RELOCATED SEWER.

Where dry dock was to be built in accordance with plans furnished by the United States, and contract provided for necessary relocation of sewer, articles prescribing its character, dimensions, and location imported warranty that if complied with sewer would be adequate, and, despite general clauses requiring contractor to examine site, etc., he could refuse to resume work where he relocated sewer as provided, and it was not sufficient, and, when government annulled contract without justification, it became liable in damages.

4. UNITED STATES $\S$ 70(1)—CONTRACTS—REDUCTION TO WRITING—IMPLIED WARRANTY—STATUTE.

Rev. St. $\S$ 3744 (Comp. St. 1916, $\S$ 6895), providing that contracts of the Navy Department shall be reduced to writing, did not preclude contractor to build dry dock from relying on government's warranty, implied by law from provisions of contract, that if he made necessary relocation of sewer as prescribed it would be adequate to permit erection of dry dock.

5. EVIDENCE $\S$ 441(7)—PAROL EVIDENCE AFFECTING WRITING—IMPLIED WARRANTY.

The parol evidence rule did not preclude a dry dock contractor from relying on the government's warranty, implied by law from provisions of contract, that if he made necessary relocation of sewer as prescribed it would be adequate to permit erection of dry dock.

6. CONTRACTS $\S$ 319(1) — PARTIAL PERFORMANCE—DAMAGES—PERFORMANCE PREVENTED BY DEFENDANT.

A contractor, who, after partially performing his contract, is wrongfully prevented by the other contracting party from completing it, may recover actual expenditures made by him on account of the contract, and also damages for loss of profits.

Appeals from the Court of Claims.

Suit by George B. Spearin against the United States. From judgment for plaintiff (51 Ct. Cl. 155), both parties appeal. Affirmed.

Messrs. Frank W. Hackett, of Washington, D. C., and Charles E. Hughes, of New York City, for Spearin. Mr. Assistant Attorney General Thompson, for the United States.

*Mr. Justice BRANDEIS delivered the opinion of the Court.

Spearin brought this suit in the Court of Claims demanding a balance alleged to be due for work done under a contract to construct a dry dock and also damages for its annulment. Judgment was entered for him in the sum of \$141,180.86 (51 Ct. Cl. 155), and both parties appealed to this court. The government contends that Spearin is entitled to recover only \$7,907.98. Spearin claims the additional sum of \$63,658.70.

First. The decision to be made on the government's appeal depends upon whether or not it was entitled to annul the contract. The facts essential to a determination of the question are these:

Spearin contracted to build for \$757,800 a dry dock at the Brooklyn Navy Yard in accordance with plans and specifications which had been prepared by the government. The site selected by it was intersected by a 6-foot brick sewer; and it was necessary to divert

and relocate a section thereof before the work of constructing the dry dock could begin. The plans and specifications provided that the contractor should do the work and prescribed the dimensions, material and location of the section to be *substituted. All the prescribed requirements were fully complied with by Spearin; and the substituted section was accepted by the government as satisfactory. It was located about 37 to 50 feet from the proposed excavation for the dry dock; but a large part of the new section was within the area set aside as space within which the contractor's operations were to be carried on. Both before and after the diversion of the 6-foot sewer, it connected, within the Navy Yard but outside the space reserved for work on the dry dock, with a 7-foot sewer which emptied into Walabout Basin.

About a year after this relocation of the 6-foot sewer there occurred a sudden and heavy downpour of rain coincident with a high tide. This forced the water up the sewer for a considerable distance to a depth of 2 feet or more. Internal pressure broke the 6-foot sewer as so relocated, at several places; and the excavation of the dry dock was flooded. Upon investigation, it was discovered that there was a dam from 5 to 5½ feet high in the 7-foot sewer; and that dam, by diverting to the 6-foot sewer the greater part of the water, had caused the internal pressure which broke it. Both sewers were a part of the city sewerage system; but the dam was not shown either on the city's plan, nor on the government's plans and blueprints, which were submitted to Spearin. On them the 7-foot sewer appeared as unobstructed. The government officials concerned with the letting of the contract and construction of the dry dock did not know of the existence of the dam. The site selected for the dry dock was low ground; and during some years prior to making the contract sued on, the sewers had, from time to time, overflowed to the knowledge of these government officials and others. But the fact had not been communicated to Spearin by any one. He had, before entering into the contract, made a superficial examination of the premises and sought from the civil engineer's office at the Navy *Yard information concerning the conditions and probable cost of the work; but he had made no special examination of the sewers nor special inquiry into the possibility of the work being flooded thereby, and had no information on the subject.

Promptly after the breaking of the sewer Spearin notified the government that he considered the sewers under existing plans a menace to the work and that he would not resume operations unless the government either made good or assumed responsibility for the damage that had already occurred and either made such changes in the sewer system as would remove the danger or assumed

responsibility for the damage which might thereafter be occasioned by the insufficient capacity and the location and design of the existing sewers. The estimated cost of restoring the sewer was \$3,875. But it was unsafe to both Spearin and the government's property to proceed with the work with the 6-foot sewer in its then condition. The government insisted that the responsibility for remedying existing conditions rested with the contractor. After 15 months spent in investigation and fruitless correspondence, the Secretary of the Navy annulled the contract and took possession of the plant and materials on the site. Later the dry dock, under radically changed and enlarged plans, was completed by other contractors, the government having first discontinued the use of the 6-foot intersecting sewer and then reconstructed it by modifying size, shape and material so as to remove all danger of its breaking from internal pressure. Up to that time \$210,939.18 had been expended by Spearin on the work; and he had received from the government on account thereof \$129,758.32. The court found that if he had been allowed to complete the contract he would have earned a profit of \$60,000 and its judgment included that sum.

*136 [1, 2] The general rules of law applicable to these facts are well *settled. Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. *Day v. United States*, 245 U. S. 159, 38 Sup. Ct. 57, 62 L. Ed. 219; *Phoenix Bridge Co. v. United States*, 211 U. S. 188, 29 Sup. Ct. 81, 53 L. Ed. 141. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. *Simpson v. United States*, 172 U. S. 372, 19 Sup. Ct. 222, 43 L. Ed. 482; *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. *MacKnight Flintic Stone Co. v. The Mayor*, 160 N. Y. 72, 54 N. E. 661; *Filbert v. Philadelphia*, 181 Pa. 530; *Bentley v. State*, 73 Wis. 416, 41 N. W. 338. See *Sundstrom v. State of New York*, 213 N. Y. 68, 106 N. E. 924. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work, as is shown by *Christie v. United States*, 237 U. S. 234, 35 Sup. Ct. 565, 59 L. Ed. 933; *Hollerbach v. United States*, 233 U. S. 165, 34 Sup. Ct. 553, 58 L. Ed. 898, and *United States v. Stage Co.*, 199 U. S. 414, 424, 26 Sup. Ct. 69, 50 L. Ed. 251, where it was held that the contractor should be relieved, if he was misled by erroneous statements in the specifications.

†37 Atl. 545.

[3] In the case at bar, the sewer, as well as the other structures, was to be built in accordance with the plans and specifications furnished by the government. The construction of the sewer constituted as much an integral part of the contract as did the construction of any part of the dry dock proper. It was as necessary as any other work in the preparation for the foundation. It involved no separate contract and no separate consideration. The contention of the government that the present case is to be distinguished from the *Bentley Case*, supra, and other similar cases on the ground that the contract with reference to the sewer is purely collateral is clearly without *merit. The risk of the existing system proving adequate might have rested upon Spearin, if the contract for the dry dock had not contained the provision for relocation of the 6-foot sewer. But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor to examine the site,¹ to check up the plans,² and to assume responsibility for the work until completion and acceptance.³ The obligation to examine the site did not impose upon him the duty of making a diligent inquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.

[4, 5] Neither section 3744 of the Revised Statutes (Comp. St. 1916, § 6895) which provides that contracts of the Navy Department shall be reduced to writing, nor the parol evidence rule, precludes reliance upon a warranty implied by law. See *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup.

¹ "271. *Examination of Site*.—Intending bidders are expected to examine the site of the proposed dry dock and inform themselves thoroughly of the actual conditions and requirements before submitting proposals."

² "25. *Checking Plans and Dimensions; Lines and Levels*.—The contractor shall check all plans furnished him immediately upon their receipt and promptly notify the civil engineer in charge of any discrepancies discovered therein. * * * The contractor will be held responsible for the lines and levels of his work, and he must combine all materials properly, so that the completed structure shall conform to the true intent and meaning of the plans and specifications."

³ "21. *Contractor's Responsibility*.—The contractor shall be responsible for the entire work and every part thereof, until completion and final acceptance by the Chief of Bureau of Yards and Docks, and for all tools, appliances, and property of every description used in connection therewith. * * *

Ct. 537, 28 L. Ed. 86. The breach of warranty, followed by the government's repudiation of all responsibility for the past and for making working conditions safe in the future, justified Spearin in refusing to resume the work. He was not obliged to restore the sewer and to proceed, at his peril, with the construction of the dry dock. When the government refused to assume the responsibility, he might have terminated the contract himself, *Anvil Mining Co. v. Humble*, 153 U. S. 540, 551, 552, 14 Sup. Ct. 876, 38 L. Ed. 814; but he did not. When the government annulled the contract without justification, it became liable for all damages resulting from its breach.

[6] Second. Both the main and the cross appeal raise questions as to the amount recoverable.

The government contends that Spearin should, as requested, have repaired the sewer and proceeded with the work; and that having declined to do so, he should be denied all recovery except \$7,907.98, which represents the proceeds of that part of the plant which the government sold plus the value of that retained by it. But Spearin was under no obligation to repair the sewer and proceed with the work, while the government denied responsibility for providing and refused to provide sewer conditions safe for the work. When it wrongfully annulled the contract, Spearin became entitled to compensation for all losses resulting from its breach.

Spearin insists that he should be allowed the additional sum of \$63,658.70, because, as he alleges, the lower court awarded him (in addition to \$60,000 for profits) not the difference between his proper expenditures and his receipts from the government, but the difference between such receipts and the value of the work, materials, and plant (as reported by a naval board appointed by the defendant). Language in the findings of fact concerning damages lends possibly some warrant for that contention; but the discussion of the subject in the opinion makes it clear that the rule enunciated in *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, which claimant invokes, was adopted and correctly applied by the court.

The judgment of the Court of Claims is, therefore, affirmed.

Mr. Justice McREYNOLDS took no part in the consideration and decision of these cases.

(218 U. S. 165)

WELLS FARGO & CO. v. STATE OF NEVADA.

(Argued Nov. 14, 1918. Decided Dec. 16, 1918.)
No. 40.

1. COMMERCE §72—INTERSTATE COMMERCE—TAXATION OF PROPERTY.

While, under the commerce clause of the federal Constitution, a state may not tax the

privilege or act of engaging in interstate commerce, it can tax the carrier's property within the state, though chiefly employed in such commerce.

2. COURTS §366(6)—STATE DECISIONS—CONCLUSIVENESS.

In so far as ruling of state court, that the state is not concluded by assessor's entry as to whether tax was on property or privilege, turns on the authority of the state board and the assessor under the state statute, and the relative effect to be given their acts, it is not reviewable by the national court.

3. CONSTITUTIONAL LAW §284(2)—DUE PROCESS—TAXATION—ASSESSMENT—NOTICE.

There is no want of due process within the Fourteenth Amendment because of valuation by board for taxation being without notice to property owner; the mode of enforcing the tax (Rev. Laws Nev. §§ 3659-3665) being by a judicial proceeding wherein process issues and an opportunity is afforded for a full hearing, and payment being enforced only after there is a judgment sustaining the tax.

In Error to the Supreme Court of the State of Nevada.

Action by the State of Nevada against Wells Fargo & Co. Judgment for plaintiff was affirmed by the Supreme Court of Nevada (38 Nev. 505, 150 Pac. 836), and defendant brings error. Affirmed.

Messrs. Charles W. Stockton, of New York City, Henry M. Hoyt, of San Francisco, Cal., and Harry S. Marx, of New York City, for plaintiff in error.

Mr. William C. Prentiss, of Washington, D. C., for the State of Nevada.

*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This was an action to enforce a tax levied in Humboldt county, Nevada, against the express company. Several objections were interposed, some presenting local and others federal questions, but all were overruled and payment of the tax directed. 38 Nev. 505, 150 Pac. 836. This writ of error was allowed prior to the Act of September 6, 1916, c. 448, 39 Stat. 726.

The federal questions are all that we can consider, and they are: Whether the tax was laid on the privilege or act of engaging in interstate commerce, whether the tax proceedings were without due process of law and whether they otherwise were such as to make the tax a burden on interstate commerce.

The company is a Colorado corporation engaged in the express business in this and other countries. One of its lines extends through Humboldt and other counties in Nevada, over the Southern Pacific Railroad, and is used in both intrastate and interstate commerce, but principally the latter. The tax was for the year 1910.

As construed by the state court, the statute under which the tax was imposed does not provide for a privilege or franchise tax, but only for an ad valorem property tax. Acting under the statute, a state board valued the company's personal property, tangi-

ble and intangible, used in its express business within the state at \$300 per mile of line; and it then became the duty of the assessor of Humboldt county to enter or list on the assessment roll at that valuation so much of the line as was in his county. In making the entry he accurately gave the length of the line in the county, the railroad over which the same was operated and the valuation fixed by the state board, but ^{*167} inaccurately described the property as consisting of the right to carry on an express business there.

[1] Looking only at that entry there is strong ground for saying that the tax was laid on the privilege or act of doing an express business which was principally interstate. On the other hand, the action of the state board, on which the assessment concededly was predicated, indicates that what was taxed was the company's property in Humboldt county. The difference is vital, for, consistently with the commerce clause of the federal Constitution, the state could not tax the privilege or act of engaging in interstate commerce, but could tax the company's property within the state, although chiefly employed in such commerce. *Adams Express Co. v. Ohio*, 165 U. S. 194, 220, 17 Sup. Ct. 305, 41 L. Ed. 683; *s. c.*, 166 U. S. 185, 218, 17 Sup. Ct. 604, 41 L. Ed. 965; *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 225-227, 28 Sup. Ct. 638, 52 L. Ed. 1031; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 453, 38 Sup. Ct. 373, 62 L. Ed. 827.

[2] The company insists that the state is concluded by the entry on the assessment roll. But the state court, as shown in its opinion, rejects that view and holds, in effect, that the entry must be construed in the light of the statute and the action of the state board, and that when this is done it is apparent that the tax was not laid on the privilege or act of engaging in interstate commerce, but on the company's property within the county. We perceive no ground for disturbing that ruling. In so far as it turns on the authority of the state board and the assessor under the statute and the relative effect to be given to their acts it is not reviewable here, and in so far as it relates to what really was the subject of the tax we think it was right. See *Cudahy Packing Co. v. Minnesota*, *supra*, 246 U. S. 454, 38 Sup. Ct. 373, 62 L. Ed. 827. Evidently the company at one time took this view of the tax, for in an amendment to its answer we find an allegation that the state board ^{*168} valued the property used by this defendant at the rate or sum of \$300 for every mile of railroad over which this defendant transacted business and apportioned said assessment or tax to the various counties of the state in accordance with the number of miles of such railroad so situated within said

county, and that the tax herein sued for was not otherwise levied or assessed."

[3] A want of due process of law in the sense of the Fourteenth Amendment is asserted because the valuation by the state board was made without notice to the company or according it an opportunity to be heard. Assuming that the premise is correct (as to which the record is not entirely clear), we are unable to accept the conclusion. In Nevada the mode of enforcing a tax such as this is by a judicial proceeding wherein process issues and an opportunity is afforded for a full hearing. Only after there is a judgment sustaining the tax is payment enforced. *Rev. Laws 1912, §§ 3659-3665*. This, as repeatedly has been held, satisfies the requirements of due process of law. *Hagar v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526, 537, 16 Sup. Ct. 83, 40 L. Ed. 247; *Gallup v. Schmidt*, 183 U. S. 300, 307, 22 Sup. Ct. 162, 46 L. Ed. 207.

It also is asserted that the state board in valuing the property acted on inaccurate data and applied erroneous standards which resulted in a valuation so excessive as to make the tax a burden on interstate commerce. It is true that some inaccurate data and some computations following erroneous standards were presented to the board by a state officer in support of a suggestion that the property be valued at \$500 or more per mile of line. But the suggestion was not adopted, and it is not shown that the board's valuation was based on the data and computations so presented. Besides, if the valuation was excessive, the company was entitled in the present suit to show the true value and to have the tax reduced accordingly. *Rev. Laws 1912, § 3664*. An attempt at such a showing was made, but the state court concluded ^{*169} therefrom that a valuation of \$300 per mile, as fixed by the board, was not excessive. It may be that the showing was not complete, but, even if so, it was the company's showing and was all that was before the court. After examining it we think it discloses no ground for condemning the tax as a burden on interstate commerce. Judgment affirmed.

(248 U. S. 169)

CAMPBELL v. WADSWORTH et al.

(Argued and Submitted Nov. 21, 1918. Decided Dec. 16, 1918.)

No. 72.

1. INDIANS  18—SEMINOLE LANDS—DESCENT TO CREEK MOTHER AND DAUGHTERS.

Under agreement between United States and Seminoles of October 7, 1899, ratified by Act Cong. June 2, 1900, providing that, if any member of tribe shall die, property "shall descend to his heirs who are Seminole citizens," Creek widow of one finally enrolled as Seminole, and her two daughters by him, Creeks by Creek

custom, were not entitled to land allotted after Seminole's death as his share of Seminole tribal lands.

2. INDIANS — 13—ROLLS OF SEMINOLE TRIBE — ATTACK FOR FRAUD AND MISTAKE.

The rolls of the Seminole Tribe, compiled by the Commission to the Five Civilized Tribes, a quasi judicial tribunal, approved by the Secretary of the Interior, and made final by statute, are, like the judgments of courts, subject to attack only for fraud and mistake.

In Error to the Supreme Court of the State of Oklahoma.

Action by Annie Wadsworth and others against D. Campbell and others. To review judgment for defendants, plaintiffs brought error in the Supreme Court of Oklahoma, which reversed (154 Pac. 60), and defendant Campbell brings error. Judgment reversed, and case remanded.

Mr. C. Dale Wolfe, of Wewoka, Okl., for plaintiff in error.

Mr. Samuel Herrick, of Washington, D. C., for defendants in error.

*Mr. Justice CLARKE delivered the opinion of the Court.

The defendants in error brought suit to quiet title to the lands in controversy in this case, the facts involved being agreed upon as follows:

Louis Cox, whose name appears in the final rolls of the Seminole Tribe of Indians, died intestate, on July 4, 1901, and left surviving him the defendants in error, Annie Cox, his widow, now Annie Wadsworth, and two daughters, Maggie Cox, now Maggie Beamore, and Nancy Cox, now Nancy Alexander. These three women were all duly enrolled on the Creek tribal roll in 1890, and in July, 1901, after the death of Cox, upon an application made in May, 1901, they were enrolled as citizens of the Creek Nation by the Commission to the Five Civilized Tribes, but neither of the three appears on the Seminole rolls. Certified copies of the "final" Seminole roll bearing the name of Louis Cox and of the Creek roll bearing the names of his wife and daughters are in the record. On the former is the notation "Wife and family Creeks," and in the latter Louis Cox is described as an enrolled Seminole.

No allotment of land had been made to Cox at the time of his death, but subsequently the land in controversy was allotted by the United States as his distributive share of the Seminole tribal lands.

The plaintiff in error claims title through one Lucy Wildcat, the only surviving relative of Cox whose name appears on the approved Seminole roll. The widow and daughters claim as heirs of Louis Cox.

[1] The decision of the case depends upon the application to the facts thus stated of the second paragraph of the *agreement between the government of the United States and the Seminole Tribe of Indians, dated Oc-

tober 7, 1899, and ratified by Act of Congress June 2, 1900 (31 Stat. 250, c. 610), the essential parts of which are as follows:

"First. That the Commission to the Five Civilized Tribes, in making the rolls of Seminole citizens, pursuant to the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, shall place on said rolls the names of all children born to Seminole citizens up to and including the thirty-first day of December, eighteen hundred and ninety-nine, and the names of all Seminole citizens then living; and the rolls so made, when approved by the Secretary of the Interior, as provided by said Act of Congress, shall constitute the final rolls of Seminole citizens, upon which the allotment of lands and distribution of money and other property belonging to the Seminole Indians shall be made, and to no other persons.

"Second. If any member of the Seminole tribe of Indians shall die after the thirty-first day of December, eighteen hundred and ninety-nine, the lands, money, and other property to which he would be entitled if living, shall descend to his heirs who are Seminole citizens, according to the laws of descent and distribution of the state of Arkansas, and be allotted and distributed to them accordingly: Provided, that in all cases where such property would descend to the parents under said laws the same shall first go to the mother instead of the father, and then to the brothers and sisters, and their heirs, instead of the father."

Plainly the facts agreed upon bring the case within the scope of the second paragraph thus quoted, and whether Lucy Wildcat, the only surviving Seminole relative of the deceased, or the wife and daughters of Cox, inherited the land in controversy depends upon the effect to be given to the phrase, "shall descend to his heirs who are Seminole Indians."

*The Supreme Court of Oklahoma seemingly had little difficulty in concluding that this expression excluded "heirs" who were not Seminoles and it adopted unanimously as its own the opinion by the Commission (154 Pac. 60), which found in favor of the plaintiff in error, containing the following:

"The act under consideration says that such property 'shall descend to his heirs who are Seminole citizens.' Who are Seminole citizens as here designated? Section 1 of the act set out above provides for the enrollment of the Seminole citizens and says that in making out this roll the names of all citizens living on the 31st day of December, 1889, and all the children born to Seminole citizens up to that date, shall constitute the final rolls of Seminole citizens. In section 21 of the Original Curtis Act (Act Cong. June 28, 1898, c. 517, 30 Stat. 502), which provided for the enrollment of the citizens of the Five Civilized Tribes, which included the Seminole Nation, there is a provision which reads as follows:

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to the tribal laws, shall alone constitute the several tribes which they represent."

"From the reading of these two sections last above set out it plainly appears that neither the widow of decedent, Louis Cox, nor their two children, can be denominated 'Seminole citizens.' The widow undoubtedly is not so included because she is of the Creek blood and a citizen of that tribe, and the two children are

excluded because they were born before December 31, 1890, and were not enrolled as Seminole citizens, and thus do not come within the provisions defining Seminole citizens."

173 But upon a rehearing of the case the court "withdrew" its former opinion and held that Congress intended that *the words "Seminole citizens" in the second paragraph of the act should have a more elastic meaning than was in terms given to them in the first paragraph and, by interpreting them so as to include the wife and daughters of the deceased, it found the title to the lands to be in the latter subject to the dower estate of the former.

This judgment, being within the provisions of section 2 of the Act approved September 6, 1916 (39 Stat. 726, c. 448), amending section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156 [Comp. St. 1916, § 1214]), is properly before us for review on writ of error.

The first paragraph of the argeement, which we have quoted, prescribes the persons whose names shall go upon the Seminole roll and it declares that the rolls so made, when approved by the Secretary of the Interior, "shall constitute the final rolls" of "Seminole citizens" and that to these "and to no other persons" shall allotment of property be made. This definition of "Seminole citizens" is followed in the second paragraph with the provision that the property of an intestate, such as we have in this case, shall descend to his heirs who are "Seminole citizens."

There is nothing in the act to indicate an intention on the part of Congress or of the tribe that the words, "Seminole citizens," as used in the second, shall have any other meaning than that specifically given to them in the first paragraph but, on the contrary, both the natural and the legal inference from their being used in such juxtaposition is that the same meaning shall be given them and that if a different or more comprehensive meaning had been intended it would have been expressed.

But there are other cogent reasons why courts should not modify these final rolls by liberal interpretation of this statutory provision.

174 [2] The rolls of the Seminole Tribe were compiled by the Commission to the Five Civilized Tribes, a quasi judicial tribunal, to which large powers were given by statute for *that specific purpose, and the action of the Commission, when approved by the Secretary of the Interior, made "final" by the statute, so conclusively settles all questions within its jurisdiction as to membership in the tribe and as to the rights of the Indians to tribal property, that they are subject to attack, as the judgments of courts are, only for fraud and mistake—of which there is no suggestion in this record. United States v. Wildcat, 244 U. S. 111, 37 Sup. Ct. 561, 61 L. Ed. 1024.

The principal reason given by the Okla-

homa Supreme Court for its second conclusion is that, the daughters of Cox being children born to a Seminole citizen prior to the 31st day of December, 1890, were entitled to enrollment as Seminole Indians under the first paragraph of the agreement and if so enrolled would be strictly within the terms of the act and would inherit the land.

We think it very clear that this reason is not sound.

The Seminole Tribe was derived from the Creek, and the tribal customs and traditions of the two had much in common. While this record does not show specifically what the tribal custom of the Seminoles was with respect to tribal recognition of children born of mixed marriages, it does show definitely that by the Creek Indians, and it is with enrolled Creek Indians that we are dealing, the children of mixed marriages were treated and enrolled as members of the tribe of their mother, for the names of the daughters of Cox are found on the tribal roll of the Creek Indians of 1890, when they were very young children, and again in 1901, when Maggie was 20 years of age and Nancy was 17, apparently on their own application, they and their mother, were placed by the Commission on the final roll of the Creek Tribe. This Creek roll also shows that the father of the children, Louis Cox, was a Seminole, and the Seminole roll on which Cox's name appears bears the notation, "Wife and family Creeks." 175 Thus it is plain that it was not through any mistake or *oversight that the children of Cox were omitted by the Commission from the Seminole roll and were placed upon the Creek roll, but that this was done for the sufficient reason that tribal custom and tradition required their enrollment as Creeks, and the law nowhere provided for their enrollment in more than one tribe. The final rolls, alike of the Seminoles and of the Creeks, thus made up by the Commission, were placed by the Act of Congress, as we have seen, beyond amendment by the courts on such a record as we have here, and it is impossible for us to conclude that the daughters of Cox were entitled to enrollment as members of the Seminole Tribe, or that having been enrolled as Creeks they may now be given the rights of enrolled "Seminole citizens."

The Supreme Court also says that "only the most powerful and impelling reasons" could induce it to hold that it was the intention of the Indians to exclude their own children from participation in the distribution of their property after death.

While it is true that it seems unnatural for the Indians to have preferred more distant relatives to their own children in providing for the descent and distribution of their property, yet from the terms of the act before us, and also from the provisions of the Supplemental Creek Agreement that "only citizens of the Creek Nation, male and female, and their Creek descendants shall in-

herit the lands of the Creek Nation" (Act June 30, 1902, c. 1323, 32 Stat. 500), it is clear that with the Indians the interests of the tribe were paramount to those of the family and it was with a knowledge of the mode of life of their primitive people, better and more intimate than the courts can now command, that they determined that this paramount purpose would best be served by giving to children born of mixed marriages the tribal status of their mother.

As we have said, this record does not show affirmatively that the Seminoles had a custom similar to this one of the Creeks, but such is believed to have been the fact. The Supreme Court of Oklahoma, in its first opinion (154 Pac. 60), said:

"The defendants have presented the additional proposition here that, according to the custom of the Seminole Nation, the blood of the mother determined the tribe to which her offspring belonged, and the fact that the children, plaintiffs here, were not enrolled as Seminole citizens was not due to any neglect of the parents of the said children or of the Commission to have said children enrolled on the Seminole roll, but the law and the custom of the Seminole Tribe were that the children were of the blood of the mother and members of that tribe to which the mother belonged. While we do not find it necessary to pass upon this proposition, and will leave it, as far as this opinion is concerned, an open question, yet we will say that as far as our investigation has led us, we are of the opinion that this last proposition is a correct statement of the law so far as it applies to the facts as presented in the case at bar."

In *Hughes Land Co. v. Bailey*, 30 Okl. 194, 196, 120 Pac. 290, the same court, in discussing the rights of two daughters born of the marriage of a Creek man to a Seminole woman, said:

"By virtue of the citizenship of their mother, they [the daughters] were enrolled as citizens of the Seminole Nation."

And it may be noted that this custom prevails with the Seminole Indians of Florida, from whom those of Oklahoma are derived. Annual Report, Bureau of American Ethnology, 1883-84, p. 508. But the most persuasive evidence of this custom is, that the federal Commissioners, with, as we have seen, all of the facts as to parentage before them and considered, enrolled the daughters of Cox in the Creek Tribe of their mother and not in the Seminole Tribe of their father. The Commissioners, in making up the rolls which were to be "final," were given authority to consult tribal records and rolls "and to adopt any other means deemed necessary to enable them to make up the rolls" (30 Stat. 495, § 21), and in their conclusion, arrived at after many years of experience and painstaking investigation, may well be found a cogent and impelling reason for accepting the terms of the statutory agreement as they are plainly written and for refusing to enlarge them by interpretation.

On its surface this case is typical of those hard cases which proverbially make bad law, but in reality, since the widow and children of Cox, as enrolled Creeks, were entitled each to an allotment in the Creek lands and property (30 Stat. 495, § 21; Act March 1, 1901, c. 676, 31 Stat. 861, §§ 3, 28; and 32 Stat. 500, §§ 7, 8 and 9) their being excluded from an inheritance which they did not attempt to claim for a dozen years after the death of Cox, does not present a degree of hardship calling for a strained interpretation of a plain statutory provision limiting inheritances to enrolled Seminole citizens, so that it may include not only persons not so enrolled, but persons who were actually enrolled as Creek citizens.

The conclusion we are announcing is consonant with prior holdings of this court under similar statutes. Thus, in *Washington v. Miller*, 235 U. S. 422, 35 Sup. Ct. 119, 59 L. Ed. 295, under the proviso in the Supplemental Creek Agreement of June 30, 1902 (32 Stat. 500), that "only citizens of the Creek Nation, male and female, shall inherit lands of the Creek Nation," a judgment was affirmed, holding the grantee of a Creek mother entitled, as against the claims of a Seminole father, to lands inherited from the child of their marriage enrolled as a Creek, when, if the father had been an enrolled Creek, he and the mother would have shared the land equally.

And in *McDougal v. McKay*, 237 U. S. 372, 35 Sup. Ct. 605, 59 L. Ed. 1001, again under the Supplemental Creek Agreement, it was decided that the Creek father of a child born of his marriage with a non-Creek mother, inherited the entire estate of the child, *which died intestate, although his wife would have taken equally with him had she been an enrolled Creek.

All statutes of descent and distribution are arbitrary expressions of the purpose of the lawmaking power and that the provisions of such a statute do not happen to meet the notions of justice of a court is not sufficient reason for indulging in an interpretation which modifies their plain and unambiguous terms. Especially is this true of these Indian statutes which are a progressive development, embodying concessions to tribal custom and tradition necessary to be made in order to accomplish a practical, though perhaps not an ideal, dissolution of the tribal relation and distribution of the tribal property.

The rights of this Creek mother cannot rise higher than those of her daughters.

It results that the judgment of the Supreme Court of Oklahoma must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1918

(248 U. S. 539)

No. —. Original. Ex parte In the matter of Robert WEISS, petitioner. Dec. 9, 1918. Motion for leave to file petition for writ of habeas corpus denied.

(248 U. S. 539)

No. 70. Mrs. Rose SNYDER, plaintiff in error, v. KING COUNTY, WASH., et al. Dec. 9, 1918. In error to the Supreme Court of the State of Washington. Messrs. Dallas V. Halverstadt and Ed. J. Brown, both of Seattle, Wash., for plaintiff in error. Mr. Alfred H. Lundin, of Seattle, Wash., for defendant in error. For opinion below, see In re Snyder's Petition, 93 Wash. 59, 160 Pac. 12.

PER CURIAM. Affirmed with costs upon the authority of *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Atchison, T. & S. F. Ry. Co. v. Matthews*, 174 U. S. 96, 103, 19 Sup. Ct. 609, 43 L. Ed. 909; *Clark v. Kansas City*, 176 U. S. 114, 119, 20 Sup. Ct. 284, 44 L. Ed. 392; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 51 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160.

No. 158. The DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, appellant, v. The UNITED STATES. Dec. 9, 1918. For opinion below, see 220 Fed. 944. Mr. Ben Carter, of Washington, D. C., for appellant. Mr. Attorney General, for appellee. Motion to remand for additional findings granted.

(248 U. S. 592)

No. 517. I. F. SEARLE et al., petitioners, v. MECHANICS LOAN & TRUST COMPANY et al., etc. Dec. 9, 1918. For opinion below, see 249 Fed. 942. Mr. Elmer H. Adams, of Chicago, Ill., for petitioners. Mr. F. T. Post, of Spokane, Wash., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit dismissed on motion of counsel for the petitioners.

(248 U. S. 580)

No. 545. CHESAPEAKE & OHIO RAILWAY COMPANY, petitioner, v. The UNITED STATES of America. Dec. 9, 1918. For opinion below, see 249 Fed. 805. Mr. John Calvin, of Cincinnati, Ohio, for petitioner. Mr. At-

torney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(248 U. S. 580)

No. 546. CHESAPEAKE & OHIO RAILWAY COMPANY, petitioner, v. The UNITED STATES of America. Dec. 9, 1918. For opinion below, see 249 Fed. 805. Mr. John Galvin, of Cincinnati, Ohio, for petitioner. Mr. Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(248 U. S. 538)

No. 636. John P. SCHMITT and Martin Schmitt, etc., plaintiffs in error, v. John SHADRACH, trustee, etc. Dec. 9, 1918. In error to the United States Circuit Court of Appeals for the Third Circuit. For opinion below, see 251 Fed. 874. Mr. Rush Trescott, of Wilkes Barre, Pa., for plaintiffs in error. Mr. Henry L. Stone, of Louisville, Ky., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 4 of act of Congress of January 28, 1915, c. 22, 38 Stat. 803, 804 (Comp. St. 1916, § 1120a).

(248 U. S. 580)

No. 707. Helen WELCH, petitioner, v. John A. DANIELS, guardian, etc., et al. Dec. 9, 1918. For opinion below, see 253 Fed. 39. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(248 U. S. 581)

No. 725. MONROE BUILDING COMPANY et al., petitioners, v. Frank LAWHEAD, trustee, etc. Dec. 9, 1918. For opinion below, see 252 Fed. 758. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

No. 745. STANDARD VARNISH WORKS, v. Steamship "BRIS," Rederiaktiebolaget, claimant. Dec. 9, 1918. For opinion below, see 253 Fed. 259. Motion for a writ of certiorari to bring up the entire record and cause denied.

(248 U. S. 215)

INTERNATIONAL NEWS SERVICE v. ASSOCIATED PRESS.

(Argued May 2 and 3, 1918. Decided Dec. 23, 1918.)

No. 221.

1. COURTS ⇨343—FEDERAL COURTS—PARTIES—EQUITY RULES—SUIT BY REPRESENTATIVE OF CLASS.

Under equity rule 38 (33 Sup. Ct. xxix), authorizing one or more to sue for all, where the question is one of common or general interest to a numerous class, an incorporated co-operative organization is a proper party, as representing the interest of its members, to conduct a suit in substance brought for their benefit.

2. COURTS ⇨356—FEDERAL COURTS—PARTIES—DEFECT—OBJECTION BELOW.

Under equity rules 43, 44 (33 Sup. Ct. xxx), as to objection by defendant, before or at the hearing, that suit is defective for want of parties, no specific objection of want of parties having been made below, objection because of suit for benefit of members of incorporated co-operative organization being brought by it, instead of them, will be treated as waived.

3. LITERARY PROPERTY ⇨1—PROPERTY IN NEWS.

In considering the general question of property in news matter, its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it, must be recognized.

4. COPYRIGHTS ⇨16 — CONTRIBUTION TO NEWSPAPER.

A contribution to a newspaper as a literary product, though it may also convey news, is the subject of copyright, under Act March 4, 1909, §§ 4, 5 (Comp. St. 1916, §§ 9520, 9521), authorizing copyright as to all writings of an author, and specifically mentioning periodicals, including newspapers.

5. COPYRIGHTS ⇨16 — CONTRIBUTION TO NEWSPAPER—"NEWS."

The "news" element, the information concerning current events contained in a literary production, is not subject of copyright, under Const. art. 1, § 8, par. 8, not being the creation of the writer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, News.]

6. TRADE-MARKS AND TRADE-NAMES ⇨68—UNFAIR COMPETITION—USE OF NEWS.

Whether defendant news-gathering agency may be restrained from appropriating, for sale, news taken from bulletins issued by complainant agency, or any of its members, or from newspapers published by any of them, turns on the question of unfair competition in business, which is not dependent on any general right of property analogous to the common-law right of the proprietor of an unpublished work, nor foreclosed by failure to copyright.

7. TRADE-MARKS AND TRADE-NAMES ⇨68—UNFAIR COMPETITION.

What is unfair competition in business must be determined with particular reference to the character and circumstances of the business.

8. LITERARY PROPERTY ⇨1—PROPERTY IN NEWS—"QUASI PROPERTY."

News, regarded as the material out of which rival news-gathering agencies are seeking to make profits at the same time and in the same field, when gathered by one, is "quasi property," though posted on bulletins or published in papers of some of its members.

9. TRADE-MARKS AND TRADE-NAMES ⇨67—UNFAIR COMPETITION—PROPERTY RIGHTS.

To sustain jurisdiction of equity over the controversy of appropriation by one news-gathering agency of news gathered by another such agency, as unfair competition, no general and absolute property in the news as such need be affirmed; the right to acquire property by honest labor or the conduct of a lawful business being as much entitled to protection as the right to guard property already acquired, and furnishing the basis of jurisdiction in the ordinary case of unfair competition.

10. NEWSPAPERS ⇨7—NEWS AGENCIES—EFFECT OF PUBLICATION.

News furnished by complainant news-gathering agency does not, on publication thereof in newspapers of a portion of its members, become the common possession of all, to the extent that defendant, rival in news-gathering, may take it therefrom and transmit it to papers published in competition with those of other members of complainant, allowing simultaneous publication.

11. TRADE-MARKS AND TRADE-NAMES ⇨68—UNFAIR COMPETITION—USE OF NEWS.

It is unfair competition in business for defendant news-gathering agency to take from newspapers, published by members of complainant news-gathering agency, news furnished by complainant, and transmit it to clients of defendant, enabling them to publish in competition with, and as soon as papers of, other members of complainant.

12. LITERARY PROPERTY ⇨5—NEWSPAPERS ⇨7—NEWS—ABANDONMENT TO PUBLIC.

News furnished by complainant news-gathering agency is not abandoned to the public for all purposes, including its use by a rival, on publication in the paper of a single member of complainant; abandonment being a question of intent, and the entire organization of complainant negating such a purpose.

13. TRADE-MARKS AND TRADE-NAMES ⇨68—UNFAIR COMPETITION—USE OF NEWS.

Attempt by defendant to palm off his goods as those of complainant is not essential to unfair competition, for which equity will grant relief, but it is enough for defendant to appropriate and sell as his own news gathered by complainant for sale.

14. EQUITY ⇨65(3)—UNCLEAN HANDS—UNFAIR COMPETITION—USE OF NEWS.

Under present state of pleadings and proof, the practice of complainant news-gathering agency, seeking to enjoin defendant rival from ap-

propriating outright news gathered by it, of taking news items published by defendant's subscribers as tips to be investigated, and using the news, if verified by investigation, a practice followed by defendant and by news agencies generally, held not shown to fix on complainant the taint of unclean hands.

Mr. Justice Brandeis, dissenting, and Mr. Justice Holmes and Mr. Justice McKenna, dissenting in part.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Suit in equity by the Associated Press against the International News Service. An order of the District Court, granting a preliminary injunction (240 Fed. 983), was modified by the Circuit Court of Appeals (245 Fed. 244, 157 C. C. A. 436), and defendant brings certiorari. Affirmed.

Messrs. Samuel Untermyer, of New York City, Hiram W. Johnson, of San Francisco, Cal., and Henry A. Wise and William A. De Ford, both of New York City, for petitioner.

Mr. Frederic W. Lehmann, of St. Louis, Mo., for respondent.

*Mr. Justice PITNEY delivered the opinion of the Court.

The parties are competitors in the gathering and distribution of news and its publication for profit in newspapers throughout the United States. The Associated Press, which was complainant in the District Court, is a co-operative organization, incorporated under the Membership Corporations Law of the state of New York, its members being individuals who are either proprietors or representatives of about 950 daily newspapers published in all parts of the United States. That a corporation may be organized under that act for the purpose of gathering news for the use and benefit of its members and for publication in newspapers owned or represented by them, is recognized by an amendment enacted in 1901 (Laws N. Y. 1901, c. 436). Complainant gathers in all parts of the world, by means of various instrumentalities of its own, by exchange with its members, and by other appropriate means, news and intelligence of current and recent events of interest to newspaper readers and distributes it daily to its members for publication in their newspapers. The cost of the service, amounting approximately to \$3,500,000 per annum, is assessed upon the members and becomes a part of their costs of operation, to be recouped, presumably with profit, through the publication of their several newspapers. Under complainant's by-laws each member agrees upon assuming membership that news received through complainant's service is received exclusively for publication in a particular newspaper, language, and place specified in the certificate of membership, that no other

use of it shall be permitted, and that no member shall furnish or permit any one in his employ or connected with his newspaper to furnish any of complainant's news in advance of publication to any person not a member. And each member is required to gather the local news of his district and supply it to the Associated Press and to no one else.

Defendant is a corporation organized under the laws of the state of New Jersey, whose business is the gathering and selling of news to its customers and clients, consisting of newspapers published throughout the United States, under contracts by which they pay certain amounts at stated times for defendant's service. It has widespread news-gathering agencies; the cost of its operations amounts, it is said, to more than \$2,000,000 per annum; and it serves about 400 newspapers located in the various cities of the United States and abroad, a few of which are represented, also, in the membership of the Associated Press.

The parties are in the keenest competition between themselves in the distribution of news throughout the United States; and so, as a rule, are the newspapers that they serve, in their several districts.

Complainant in its bill, defendant in its answer, have set forth in almost identical terms the rather obvious circumstances and conditions under which their business is conducted. The value of the service, and of the news furnished, depends upon the promptness of transmission, as well as upon the accuracy and impartiality of the news; it being essential that the news be transmitted to members or subscribers as early or earlier than similar information can be furnished to competing newspapers *by other news services, and that the news furnished by each agency shall not be furnished to newspapers which do not contribute to the expense of gathering it. And further, to quote from the answer:

"Prompt knowledge and publication of world-wide news is essential to the conduct of a modern newspaper, and by reason of the enormous expense incident to the gathering and distribution of such news, the only practical way in which a proprietor of a newspaper can obtain the same is, either through co-operation with a considerable number of other newspaper proprietors in the work of collecting and distributing such news, and the equitable division with them of the expenses thereof, or by the purchase of such news from some existing agency engaged in that business."

The bill was filed to restrain the pirating of complainant's news by defendant in three ways: First, by bribing employes of newspapers published by complainant's members to furnish Associated Press news to defendant before publication, for transmission by telegraph and telephone to defendant's clients for publication by them; second, by

inducing Associated Press members to violate its by-laws and permit defendant to obtain news before publication; and, third, by copying news from bulletin boards and from early editions of complainant's newspapers and selling this, either bodily or after rewriting it, to defendant's customers.

The District Court, upon consideration of the bill and answer, with voluminous affidavits on both sides, granted a preliminary injunction under the first and second heads, but refused at that stage to restrain the systematic practice admittedly pursued by defendant, of taking news bodily from the bulletin boards and early editions of complainant's newspapers and selling it as its own. The court expressed itself as satisfied that this practice amounted to unfair trade, but as the legal question was *one of first impression it considered that the allowance of an injunction should await the outcome of an appeal. 240 Fed. 983, 996. Both parties having appealed, the Circuit Court of Appeals sustained the injunction order so far as it went, and upon complainant's appeal modified it and remanded the cause, with directions to issue an injunction also against any bodily taking of the words or substance of complainant's news until its commercial value as news had passed away. 245 Fed. 244, 253, 157 C. C. A. 436. The present writ of certiorari was then allowed. 245 U. S. 644, 38 Sup. Ct. 10, 62 L. Ed. 528.

The only matter that has been argued before us is whether defendant may lawfully be restrained from appropriating news taken from bulletins issued by complainant or any of its members, or from newspapers published by them, for the purpose of selling it to defendant's clients. Complainant asserts that defendant's admitted course of conduct in this regard both violates complainant's property right in the news and constitutes unfair competition in business. And notwithstanding the case has proceeded only to the stage of a preliminary injunction, we have deemed it proper to consider the underlying questions, since they go to the very merits of the action and are presented upon facts that are not in dispute. As presented in argument, these questions are: (1) Whether there is any property in news; (2) whether, if there be property in news collected for the purpose of being published, it survives the instant of its publication in the first newspaper to which it is communicated by the news-gatherer; and (3) whether defendant's admitted course of conduct in appropriating for commercial use matter taken from bulletins or early editions of Associated Press publications constitutes unfair competition in trade.

The federal jurisdiction was invoked because of diversity of citizenship, not upon the ground that the suit arose under the copyright or other laws of the United States. Complainant's news matter is not copyright-

ed. It is said that it could not, in practice, be copyrighted, because of the large number of dispatches that are sent daily; and, according to complainant's contention, news is not within the operation of the copyright act. Defendant, while apparently conceding this, nevertheless invokes the analogies of the law of literary property and copyright, insisting as its principal contention that, assuming complainant has a right of property in its news, it can be maintained (unless the copyright act be complied with) only by being kept secret and confidential, and that upon the publication with complainant's consent of uncopyrighted news of any of complainant's members in a newspaper or upon a bulletin board, the right of property is lost, and the subsequent use of the news by the public or by defendant for any purpose whatever becomes lawful.

[1, 2] A preliminary objection to the form in which the suit is brought may be disposed of at the outset. It is said that the Circuit Court of Appeals granted relief upon considerations applicable to particular members of the Associated Press, and that this was erroneous because the suit was brought by complainant as a corporate entity, and not by its members; the argument being that their interests cannot be protected in this proceeding any more than the individual rights of a stockholder can be enforced in an action brought by the corporation. From the averments of the bill, however, it is plain that the suit in substance was brought for the benefit of complainant's members, and that they would be proper parties, and, except for their numbers, perhaps necessary parties. Complainant is a proper party to conduct the suit as representing their interest; and since no specific objection, based upon the want of parties, appears to have been made below, we will treat the objection as waived. See Equity Rules 38, 43, 44 (33 Sup. Ct. xxix, xxx).

[3] *In considering the general question of property in news matter, it is necessary to recognize its dual character, distinguishing between the substance of the information and the particular form or collocation of words in which the writer has communicated it.

[4] No doubt news articles often possess a literary quality, and are the subject of literary property at the common law; nor do we question that such an article, as a literary production, is the subject of copyright by the terms of the act as it now stands. In an early case at the circuit Mr. Justice Thompson held in effect that a newspaper was not within the protection of the copyright acts of 1790 (1 Stat. 124) and 1802 (2 Stat. 171). Clayton v. Stone, 2 Paine, 382, Fed. Cas. No. 2,872. But the present act is broader; it provides that the works for which copyright may be secured shall include "all the writings of an author," and specifically men-

tions "periodicals, including newspapers." Act of March 4, 1909, c. 320, §§ 4 and 5, 35 Stat. 1075, 1076 (Comp. St. 1916, §§ 9520, 9521). Evidently this admits to copyright a contribution to a newspaper, notwithstanding it also may convey news; and such is the practice of the copyright office, as the newspapers of the day bear witness. See Copyright Office Bulletin No. 15 (1917) pp. 7, 14, 16, 17.

[5] But the news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day. It is not to be supposed that the framers of the Constitution, when they empowered Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (Const. art. 1, § 8, par. 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.

[6] We need spend no time, however, upon the general question of property in news matter at common law, or the application of the copyright act, since it seems to us the case must turn upon the question of unfair competition in business. And, in our opinion, this does not depend upon any general right of property analogous to the common-law right of the proprietor of an unpublished work to prevent its publication without his consent; nor is it foreclosed by showing that the benefits of the copyright act have been waived. We are dealing here not with restrictions upon publication but with the very facilities and processes of publication. The peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it secret. Besides, except for matters improperly disclosed, or published in breach of trust or confidence, or in violation of law, none of which is involved in this branch of the case, the news of current events may be regarded as common property. What we are concerned with is the business of making it known to the world, in which both parties to the present suit are engaged. That business consists in maintaining a prompt, sure, steady, and reliable service designed to place the daily events of the world at the breakfast table of the millions at a price that, while of trifling moment to each reader, is sufficient in the aggregate to afford compensation for the cost of gathering and distributing it, with the added profit so necessary as an incentive to effective action in the commercial world. The service thus performed for newspaper readers is not only innocent but extremely useful in itself, and indubitably constitutes a legitimate business.

The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure *that of the other. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 254, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461.

[7, 8] Obviously, the question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business. The question here is not so much the rights of either party as against the public but their rights as between themselves. See *Morison v. Moat*, 9 Hare, 241, 258. And, although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi property, irrespective of the rights of either as against the public.

[9] In order to sustain the jurisdiction of equity over the controversy, we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right (*In re Sawyer*, 124 U. S. 200, 210, 8 Sup. Ct. 482, 31 L. Ed. 402; *In re Debs*, 158 U. S. 564, 593, 15 Sup. Ct. 900, 39 L. Ed. 1092); and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired (*Truax v. Raich*, 239 U. S. 33, 37–38, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; *Brennan v. United Hatters*, 73 N. J. Law, 729, 742, 65 Atl. 165, 9 L. R. A. [N. S.] 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698; **Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881). It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition.

The question, whether one who has gathered general information or news at pains and expense for the purpose of subsequent publication through the press has such an inter-

est in its publication as may be protected from interference, has been raised many times, although never, perhaps, in the precise form in which it is now presented.

Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 250, 25 Sup. Ct. 637, 49 L. Ed. 1031, related to the distribution of quotations of prices on dealings upon a board of trade, which were collected by plaintiff and communicated on confidential terms to numerous persons under a contract not to make them public. This court held that, apart from certain special objections that were overruled, plaintiff's collection of quotations was entitled to the protection of the law; that, like a trade secret, plaintiff might keep to itself the work done at its expense, and did not lose its right by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public; and that strangers should be restrained from getting at the knowledge by inducing a breach of trust.

In National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805, the Circuit Court of Appeals for the Seventh Circuit dealt with news matter gathered and transmitted by a telegraph company, and consisting merely of a notation of current events having but a transient value due to quick transmission and distribution; and, while declaring that this was not copyrightable although printed on a tape by tickers in the offices of the recipients, and that it was a commercial not a literary product, nevertheless held that the business of gathering and communicating the news—the service of purveying it—was a legitimate business, meeting a distinctive commercial want and adding to the facilities of the business world, and partaking of the nature of property in a sense that entitled it to the protection of a court of equity against piracy.

Other cases are cited, but none that we deem it necessary to mention.

Not only do the acquisition and transmission of news require elaborate organization and a large expenditure of money, skill, and effort; not only has it an exchange value to the gatherer, dependent chiefly upon its novelty and freshness, the regularity of the service, its reputed reliability and thoroughness, and its adaptability to the public needs; but also, as is evident, the news has an exchange value to one who can misappropriate it.

[10, 11] The peculiar features of the case arise from the fact that, while novelty and freshness form so important an element in the success of the business, the very processes of distribution and publication necessarily occupy a good deal of time. Complainant's service, as well as defendant's, is a daily service to daily newspapers; most of the foreign news reaches this country at the Atlantic seaboard, principally at the city of New York, and because of this, and of time differentials

due to the earth's rotation, the distribution of news matter throughout the country is principally from east to west; and, since in speed the telegraph and telephone easily outstrip the rotation of the earth, it is a simple matter for defendant to take complainant's news from bulletins or early editions of complainant's members in the eastern cities and at the mere cost of telegraphic transmission cause it to be published in western papers issued at least as early as those served by complainant. Besides this, and irrespective of time differentials, irregularities in telegraphic transmission on different lines, and the normal consumption of time in printing and distributing the newspaper, result in permitting pirated news to be placed in the hands of defendant's readers sometimes simultaneously with the service *of competing Associated Press papers, occasionally even earlier.

Defendant insists that when, with the sanction and approval of complainant, and as the result of the use of its news for the very purpose for which it is distributed, a portion of complainant's members communicate it to the general public by posting it upon bulletin boards so that all may read, or by issuing it to newspapers and distributing it indiscriminately, complainant no longer has the right to control the use to be made of it; that when it thus reaches the light of day it becomes the common possession of all to whom it is accessible; and that any purchaser of a newspaper has the right to communicate the intelligence which it contains to anybody and for any purpose, even for the purpose of selling it for profit to newspapers published for profit in competition with complainant's members.

The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant—which is what defendant has done and seeks to justify—is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest *of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interfer-

ence with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.

The underlying principle is much the same as that which lies at the base of the equitable theory of consideration in the law of trusts—that he who has fairly paid the price should have the beneficial use of the property. Pom. Eq. Jur. § 981. It is no answer to say that complainant spends its money for that which is too fugitive or evanescent to be the subject of property. That might, and for the purposes of the discussion we are assuming that it would furnish an answer in a common-law controversy. But in a court of equity, where the question is one of unfair competition, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience.

[12] The contention that the news is abandoned to the public for all purposes when published in the first newspaper is untenable. Abandonment is a question of intent, and the entire organization of the Associated Press negatives such a purpose. The cost of the service would be prohibited if the reward were to be so limited. No single newspaper, no small group of newspapers, could sustain the expenditure. Indeed, it is one of the most obvious results of defendant's theory that, by permitting indiscriminate publication by anybody and everybody for purposes of profit in competition with the news-gatherer, it would render publication profitless, or so little profitable as in effect to cut off the service by rendering the cost prohibitive in comparison with the return. The practical needs and requirements of the business are reflected in complainant's by-laws which have been referred to. Their effect is that publication by each member must be deemed not by any means an abandonment of the news to the world for any and all purposes, but a publication for limited purposes; for the benefit of the readers of the bulletin or the newspaper as such; not for the purpose of making merchandise of it as news, with the result of depriving complainant's other

members of their reasonable opportunity to obtain just returns for their expenditures.

It is to be observed that the view we adopt does not result in giving to complainant the right to monopolize either the gathering or the distribution of the news, or, without complying with the copyright act, to prevent the reproduction of its news articles, but only postpones participation by complainant's competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant's efforts and expenditure, to the partial exclusion of complainant, and in violation of the principle that underlies the maxim "sic utere tuo," etc.

[13] It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of the complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition. *Howe Scale Co. v. Wyckoff, Seamans, etc.*, 198 U. S. 118, 140, 25 Sup. Ct. 609, 49 L. Ed. 972. But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi property for the purposes of their business because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own.

Besides the misappropriation, there are elements of imitation, of false pretense, in defendant's practices. The device of rewriting complainant's news articles, frequently resorted to, carries its own comment. The habitual failure to give credit to complainant for that which is taken is significant. Indeed, the entire system of appropriating complainant's news and transmitting it as a commercial product to defendant's clients and patrons amounts to a false representation to them and to their newspaper readers that the news transmitted is the result of defendant's own investigation in the field. But these elements, although accentuating the wrong, are not the essence of it. It is something more than the advantage of celebrity of which complainant is being deprived.

[14] The doctrine of unclean hands is invoked as a bar to relief; it being insisted that defendant's practices against which complainant seeks an injunction are not different from the practice attributed to complainant, of utilizing defendant's news published by its subscribers. At this point it becomes

necessary to consider a distinction that is drawn by complainant, and, as we understand it, was recognized by defendant also in the submission of proofs in the District Court, between two kinds of use that may be made by one news agency of news taken from the *bulletins and newspapers of the other. The first is the bodily appropriation of a statement of fact or a news article, with or without rewriting, but without independent investigation or other expense. This form of pirating was found by both courts to have been pursued by defendant systematically with respect to complainant's news, and against it the Circuit Court of Appeals granted an injunction. This practice complainant denies having pursued and the denial was sustained by the finding of the District Court. It is not contended by defendant that the finding can be set aside, upon the proofs as they now stand. The other use is to take the news of a rival agency as a "tip" to be investigated, and if verified by independent investigation the news thus gathered is sold. This practice complainant admits that it has pursued and still is willing that defendant shall employ.

Both courts held that complainant could not be debarred on the ground of unclean hands upon the score of pirating defendant's news, because not shown to be guilty of sanctioning this practice.

As to securing "tips" from a competing news agency the District Court (240 Fed. 991, 995), while not sanctioning the practice, found that both parties had adopted it in accordance with common business usage, in the belief that their conduct was technically lawful, and hence did not find in it any sufficient ground for attributing unclean hands to complainant. The Circuit Court of Appeals (245 Fed. 247, 157 C. C. A. 436) found that the tip habit, though discouraged by complainant, was "incurably journalistic," and that there was "no difficulty in discriminating between the utilization of tips and the bodily appropriation of another's labor in accumulating and stating information."

We are inclined to think a distinction may be drawn between the utilization of tips and the bodily appropriation of news matter, either in its original form or after *rewriting and without independent investigation and verification: whatever may appear at the final hearing, the proofs as they now stand recognize such a distinction; both parties avowedly recognize the practice of taking tips, and neither party alleges it to be unlawful or to amount to unfair competition in business. In a line of English cases a somewhat analogous practice has been held not to amount to an infringement of the copyright of a directory or other book containing compiled information. In *Kelly v. Morris*, L. R. 1 Eq. 697, 701, 702, Vice Chancellor Sir William Page Wood (afterwards Lord Hatherly),

dealing with such a case, said that defendant was

"not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use that he can legitimately make of a previous publication is to verify his own calculations and results when obtained."

This was followed by Vice Chancellor Giffard in *Morris v. Ashbee*, L. R. 7 Eq. 34, where he said:

"In a case such as this no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working out and arriving at these results by some independent road."

A similar view was adopted by Lord Chancellor Hatherly and the former Vice Chancellor, then Giffard, L. J., in *Pike v. Nicholas*, L. R. 5 Ch. App. Cas. 251, and shortly afterwards by the latter judge in *Morris v. Wright*, L. R. 5 Ch. App. Cas. 279, 287, where he said, commenting upon *Pike v. Nicholas*:

"It was a perfectly legitimate course for the defendant to refer to the plaintiff's book, and if, taking that book as his guide, he went to the original authorities and compiled his book from them, he made no unfair or improper use of the plaintiff's book; and so here, if the fact be that Mr. Wright used the plaintiff's *book in order to guide himself to the persons on whom it would be worth his while to call, and for no other purpose, he made a perfectly legitimate use of the plaintiff's book."

A like distinction was recognized by the Circuit Court of Appeals for the Second Circuit in *Edward Thompson Co. v. American Law Book Co.*, 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607 and in *West Pub. Co. v. Edward Thompson Co.*, 176 Fed. 833, 838, 100 C. C. A. 303.

In the case before us, in the present state of the pleadings and proofs, we need go no further than to hold, as we do, that the admitted pursuit by complainant of the practice of taking news items published by defendant's subscribers as tips to be investigated, and, if verified, the result of the investigation to be sold—the practice having been followed by defendant also, and by news agencies generally—is not shown to be such as to constitute an unconscientious or inequitable attitude towards its adversary so as to fix upon complainant the taint of unclean hands, and debar it on this ground from the relief to which it is otherwise entitled.

There is some criticism of the injunction that was directed by the District Court upon the going down of the mandate from the Circuit Court of Appeals. In brief, it restrains any taking or gainfully using of the com-

plaintiff's news, either bodily or in substance from bulletins issued by the complainant or any of its members, or from editions of their newspapers, "*until its commercial value as news to the complainant and all of its members has passed away.*" The part complained of is the clause we have italicized; but if this be indefinite, it is no more so than the criticism. Perhaps it would be better that the terms of the injunction be made specific, and so framed as to confine the restraint to an extent consistent with the reasonable protection of complainant's newspapers, each in its own area and for a specified time after its publication, against the competitive use of pirated news by defendant's customers. But the case presents practical difficulties; and we have not the materials, either in the way of a definite suggestion of amendment, or in the way of proofs, upon which to frame a specific injunction; hence, while not expressing approval of the form adopted by the District Court, we decline to modify it at this preliminary stage of the case, and will leave that court to deal with the matter upon appropriate application made to it for the purpose.

The decree of the Circuit Court of Appeals will be

Affirmed.

Mr. Justice CLARKE took no part in the consideration or decision of this case.

Mr. Justice HOLMES, dissenting.

When an uncopyrighted combination of words is published there is no general right to forbid other people repeating them—in other words there is no property in the combination or in the thoughts or facts that the words express. Property, a creation of law, does not arise from value, although exchangeable—a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because some one has used it before, even if it took labor and genius to make it. If a given person is to be prohibited from making the use of words that his neighbors are free to make some other ground must be found. One such ground is vaguely expressed in the phrase unfair trade. This means that the words are repeated by a competitor in business in such a way as to convey a misrepresentation that materially injures the person who first used them, by appropriating credit of some kind which the first user has earned. The ordinary case is a representation by device, appearance, or other indirection that the defendant's goods come from the plaintiff. But the only reason why it is actionable to make such a representation is that it tends to give the defendant an advantage in his competition with the

plaintiff and that it is thought undesirable that an advantage should be gained in that way. Apart from that the defendant may use such unpatented devices and uncopyrighted combinations of words as he likes. The ordinary case, I say, is palming off the defendant's product as the plaintiff's but the same evil may follow from the opposite falsehood—from saying whether in words or by implication that the plaintiff's product is the defendant's, and that, it seems to me, is what has happened here.

Fresh news is got only by enterprise and expense. To produce such news as it is produced by the defendant represents by implication that it has been acquired by the defendant's enterprise and at its expense. When it comes from one of the great news collecting agencies like the Associated Press, the source generally is indicated, plainly importing that credit; and that such a representation is implied may be inferred with some confidence from the unwillingness of the defendant to give the credit and tell the truth. If the plaintiff produces the news at the same time that the defendant does, the defendant's presentation impliedly denies to the plaintiff the credit of collecting the facts and assumes that credit to the defendant. If the plaintiff is later in Western cities it naturally will be supposed to have obtained its information from the defendant. The falsehood is a little more subtle, the injury, a little more indirect, than in ordinary cases of unfair trade, but I think that the principle that condemns the one condemns the other. It is a question of how strong an infusion of fraud is necessary to turn a flavor into a poison. The dose seems to me strong enough here to need a remedy from the law. But as, in my view, the only ground of complaint that can be recognized without legislation is the implied misstatement, it can be corrected by stating the truth; and a suitable acknowledgment of the source is all that the plaintiff can require. I think that within the limits recognized by the decision of the Court the defendant should be enjoined from publishing news obtained from the Associated Press for hours after publication by the plaintiff unless it gives express credit to the Associated Press; the number of hours and the form of acknowledgment to be settled by the District Court.

Mr. Justice McKENNA concurs in this opinion.

Mr. Justice BRANDEIS, dissenting.

There are published in the United States about 2,500 daily papers.¹ More than 800 of them are supplied with domestic and foreign news of general interest by the Associated Press—a corporation without capital stock

¹ See American Newspaper Annual and Directory (1918) pp. 4, 10, 1193-1212.

which does not sell news or earn or seek to earn profits, but serves merely as an instrumentality by means of which these papers supply themselves at joint expense with such news. Papers not members of the Associated Press depend for their news of general interest largely upon agencies organized for profit.² Among these agencies is the International News Service which supplies news to about 400 subscribing papers. It has, like the Associated Press, bureaus and correspondents in this and foreign countries; and its annual expenditures in gathering and distributing news is about \$2,000,000. Ever since its organization in 1909, it has included among the sources from which it gathers news, copies (purchased in the open market) of early editions of some papers published by members of the Associated Press and the bulletins publicly posted by them. These items, which constitute but a small part of the news transmitted to its subscribers, are generally verified by the International News Service before transmission; but frequently items are transmitted without verification; and occasionally even without being re-written. In no case is the fact disclosed that such item was suggested by or taken from a paper or bulletin published by an Associated Press member.

No question of statutory copyright is involved. The sole question for our consideration is this: Was the International News Service properly enjoined from using, or causing to be used gainfully, news of which it acquired knowledge by lawful means (namely, by reading publicly posted bulletins or papers purchased by it in the open market) merely because the news had been originally gathered by the Associated Press and continued to be of value to some of its members, or because it did not reveal the source from which it was acquired?

The "ticker" cases, the cases concerning literary and artistic compositions, and cases of unfair competition were relied upon in support of the injunction. But it is admitted that none of those cases affords a complete analogy with that before us. The question presented for decision is new, and it is important.

News is a report of recent occurrences. The business of the news agency is to gather systematically knowledge of such occurrences of interest and to distribute reports thereof. The Associated Press contended that knowledge so acquired is property, because it costs

money and labor to produce and because it has value for which those who have it not are ready to pay; that it remains property and is entitled to protection as long as it has commercial value as news; and that to protect it effectively, the defendant must be enjoined from making, or causing to be made, any gainful use of it while it retains such value. An essential element of individual property is the legal right to exclude others from enjoying it. If the property is private, the right of exclusion may be absolute; if the property is affected with a public interest, the right of exclusion is qualified. But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it. These exceptions are confined to productions which, in some degree, involve creation, invention, or discovery. But by no means all such are endowed with this attribute of property. The creations which are recognized as property by the common law are literary, dramatic, musical, and other artistic creations; and these have also protection under the copyright statutes. The inventions and discoveries upon which this attribute of property is conferred only by statute, are the few comprised within the patent law. There are also many other cases in which courts interfere to prevent curtailment of plaintiff's enjoyment of incorporeal productions; and in which the right to relief is often called a property right, but is such only in a special sense. In those cases, the plaintiff has no absolute right to the protection of his production; he has merely the qualified right to be protected as against the defendant's acts, because of the special relation in which the latter stands or the wrongful method or means employed in acquiring the knowledge or the manner in which it is used. Protection of this character is afforded where the suit is based upon breach of contract or of trust or upon unfair competition.

The knowledge for which protection is sought in the case at bar is not of a kind upon which the law has heretofore conferred the attributes of property; nor is the manner of its acquisition or use nor the purpose to which it is applied, such as has heretofore been recognized as entitling a plaintiff to relief.

First. Plaintiff's principal reliance was upon the "ticker" cases; but they do not sup-

² The Associated Press, by Frank B. Noyes, Sen. Doc. No. 27, 63d Congress, First Session. In a brief filed in this court by counsel for the Associated Press the number of its members is stated to be 1030. Some members of the Associated Press are also subscribers to the International News Service.

Strictly the member is not the publishing concern, but an individual who is the sole or part owner of a newspaper, or an executive officer of a company which owns one. By-laws, article II, section 1.

port its contention. The leading cases on this subject rest the grant of relief, not upon the existence of a general property right in news, but upon the breach of a contract or trust concerning the use of news communicated; and that element is lacking here. In *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 250, 25 Sup. Ct. 637, 639 (49 L. Ed. 1031) the court said the Board—

“does not lose its rights by communicating the result [the quotations] to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach.”

And it is also stated there (198 U. S. 251, 25 Sup. Ct. 640, 49 L. Ed. 1031):

“Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward.”

* The only other case in this court which relates to this subject is *Hunt v. N. Y. Cotton Exchange*, 205 U. S. *322, 27 Sup. Ct. 529, 51 L. Ed. 821. While the opinion there refers the protection to a general property right in the quotations, the facts are substantially the same as those in the *Christie Case*, which is the chief authority on which the decision is based. Of the cases in the lower Federal courts and in the state courts it may be said, that most of them too can, on their facts, be reconciled with this principle, though much of the language of the courts cannot be.³ In spite of anything that may appear in these cases to the contrary it seems that the true principle is stated in the *Christie Case*, that the collection of quotations “stands like a trade secret.” And in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 402, 31 Sup. Ct. 376, 382 (55 L. Ed. 502), this court says of a trade secret:

“Any one may use it who fairly, by analysis and experiment, discovers it. But the com-

plainant is entitled to be protected against invasion of its right in the process by fraud or by breach of trust or contract.”

See *John D. Park & Sons Co. v. Hartman*, 153 Fed. 24, 29, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135.

The leading English case, *Exchange Telegraph Co. v. Gregory & Co.*, [1896] 1 Q. B. 147, is also rested clearly upon a breach of contract or trust, although there is some *reference to a general property right. The later English cases seem to have rightly understood the basis of the decision, and they have not sought to extend it further than was intended. Indeed, we find the positive suggestion in some cases that the only ground for relief is the manner in which knowledge of the report of the news was acquired.⁴

If the news involved in the case at bar had been posted in violation of any agreement between the Associated Press and its members, questions similar to those in the “ticker” cases might have arisen. But the plaintiff does not contend that the posting was wrongful or that any papers were wrongfully issued by its subscribers. On the contrary it is conceded that both the bulletins and the papers were issued in accordance with the regulations of the plaintiff. Under such circumstances, for a reader of the papers purchased in the open market, or a reader of the bulletins publicly posted, to procure and use gainfully, information therein contained, does not involve inducing any one to commit a breach either of contract or of trust, or committing or in any way abetting a breach of confidence.

Second. Plaintiff also relied upon the cases which hold that the common law right of the producer to prohibit copying is not lost by the private circulation of a literary composition, the delivery of a lecture, the exhibition of a painting, or the performance of a dramatic or musical composition.⁵ These

³ *Board of Trade of City of Chicago v. Tucker*, 221 Fed. 305, 137 C. C. A. 255; *Board of Trade of City of Chicago v. Price*, 213 Fed. 336, 130 C. C. A. 302; *McDearmott Commission Co. v. Board of Trade of City of Chicago*, 146 Fed. 961, 77 C. C. A. 479, 7 L. R. A. (N. S.) 889, 8 Ann. Cas. 759; *Board of Trade v. Cella Commission Co.*, 145 Fed. 28, 76 C. C. A. 23; *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805; *Illinois Commission Co. v. Cleveland Tel. Co.*, 119 Fed. 301, 56 C. C. A. 205; *Board of Trade v. Hadden-Krull Co. (C. C.)* 109 Fed. 705; *Cleveland Tel. Co. v. Stone (C. C.)* 105 Fed. 794; *Board of Trade v. C. B. Thomson Commission Co. (C. C.)* 103 Fed. 902; *Kiernan v. Manhattan Quotation Telegraph Co.*, 50 How. Prac. (N. Y.) 194. The bill in *F. W. Dodge Co. v. Construction Information Co.*, 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412, was expressly based on breach of contract or of trust. It has been suggested that a Board of Trade has a right of property in its quotations because the facts reported originated in its exchange. The point has been mentioned several times in the cases, but no great importance seems to have been attached to it.

⁴ In *Exchange Telegraph Co., Ltd., v. Howard*, 22 Times Law Rep. 375, 377, it is intimated that it would be perfectly permissible for the defendant to take the score from a newspaper supplied by the plaintiff and publish it. And it is suggested in *Exchange Telegraph Co., Ltd., v. Central News, Ltd.*, [1897] 2 Ch. 48, 54, that there are sources from which the defendant might be able to get the information collected by the plaintiff and publish it without committing any wrong. *Copinger, Law of Copyright (6th Ed.)* p. 35, explains the *Gregory Case* on the basis of the breach of confidence involved. *Richardson, Law of Copyright*, p. 39, also inclines to put the case “on the footing of implied confidence.”

⁵ *Ferris v. Frohman*, 223 U. S. 424, 32 Sup. Ct. 263, 56 L. Ed. 492; *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 299, 28 Sup. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595; *Universal Film Mfg. Co. v. Copperman*, 218 Fed. 577, 134 C. C. A. 305; *Werckmeister v. American Lithographic Co.*, 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591; *Drummond v. Altamus (C. C.)* 60 Fed. 338; *Boucicault v. Hart*, 13 Blatchf. 47, Fed. Cas. No. 1692; *Crowe v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3441; *Boucicault v. Fox*, 5 Blatchf. 87, Fed. Cas. No. 1691; *Bartlett v. Crittenden*, 5 McLean, 32, Fed. Cas. No. 1,076; *Bartlett*

cases rest upon the ground that the common law recognizes such productions as property which, despite restricted communication, continues until there is a dedication to the public under the copyright statutes or otherwise. But they are inapplicable for two reasons: (1) At common law, as under the copyright acts, intellectual productions are entitled to such protection only if there is underneath something evincing the mind of a creator or originator, however modest the requirement. The mere record of isolated happenings, whether in words or by photographs not involving artistic skill, are denied such protection.⁶ (2) At common law, as under the copyright acts, the element in intellectual productions which secures such protection, is not the knowledge, truths, ideas, or emotions which the composition expresses, but the form or sequence in which they are expressed; that is, "some new collocation of visible or audible points—of lines, colors, sounds, or *words." See *White-Smith Music Co. v. Apollo Co.*, 209 U. S. 1, 19, 28 Sup. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628; *Kalem Co. v. Harper Bros.*, 222 U. S. 55, 63, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285. An author's theories, suggestions, and speculations, or the systems, plans, methods, and arrangements of an originator, derive no such protection from the statutory copyright of the book in which they are set forth;⁷ and they are likewise denied such protection at common law.⁸

That news is not property in the strict sense is illustrated by the case of *Sports and General Press Agency, Ltd., v. "Our Dogs" Publishing Co., Ltd.*, [1916] 2 K. B. 880, where the plaintiff, the assignee of the right to photograph the exhibits at a dog show, was refused an injunction against defendant who

had also taken pictures of the show and was publishing them. The court said that, except in so far as the possession of the land occupied by the show enabled the proprietors to exclude people or permit them on condition that they agree not to take photographs (which condition was not imposed in that case), the proprietors had no exclusive right to photograph the show and could therefore grant no such right. And it was further stated that, at any rate, no matter what conditions might be imposed upon those entering the grounds, if the defendant had been on top of a house or in some position where he could photograph the show without interfering with the physical property of the plaintiff, the plaintiff would have no right to stop him. If, when the plaintiff creates the event recorded, he is not entitled to the exclusive first publication of the *news (in that case a photograph) of the event, no reason can be shown why he should be accorded such protection as to events which he simply records and transmits to other parts of the world, though with great expenditure of time and money.

Third. If news be treated as possessing the characteristics not of a trade secret, but of literary property, then the earliest issue of a paper of general circulation or the earliest public posting of a bulletin which embodies such news would, under the established rules governing literary property, operate as a publication, and all property in the news would then cease. Resisting this conclusion, plaintiff relied upon the cases which hold that uncopyrighted intellectual and artistic property survives private circulation or a restricted publication; and it contended that in each issue of each paper, a restriction is to be implied, that the news shall not be used gainfully in competition with the Associated Press or any of its members. There is no basis for such an implication. But it is, also, well settled that where the publication is in fact a general one—even express words of restriction upon use are inoperative. In other words, a general publication is effective to dedicate literary property to the public, regardless of the actual intent of its owner.⁹ In the cases dealing with lectures, dramatic and musical performances, and art exhibitions,¹⁰ upon which plaintiff relied, there was no general publication in print comparable to the issue of daily newspapers or the unrestricted public posting of bulletins. The principles governing those cases differ more or less in application, if not in theory, from the principles governing the issue of printed copies; *and in so far as they

v. Crittenden, 4 McLean, 300, Fed. Cas. No. 1082; *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480; *Aronson v. Baker*, 43 N. J. Eq. 365, 12 Atl. 177; *Caird v. Sime*, L. R. 12 App. Cas. 326; *Nicols v. Pitman*, L. R. 26 Ch. D. 374; *Abernethy v. Hutchinson*, 3 L. J. (O. S.) Ch. 209; *Turner v. Robinson*, 10 Ir. Eq. Rep. 121.

⁶ Compare *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 250, 23 Sup. Ct. 298, 47 L. Ed. 460; *Higgins v. Keuffel*, 140 U. S. 428, 432, 11 Sup. Ct. 731, 35 L. Ed. 470; *Burrow-Giles Lithographic Co. v. Sazony*, 111 U. S. 53, 58-60, 4 Sup. Ct. 279, 28 L. Ed. 349; *Baker v. Selden*, 101 U. S. 99, 105, 106, 25 L. Ed. 841; *Clayton v. Stone*, 2 Paine, 382, Fed. Cas. No. 2,872; *National Tel. News Co. v. Western Union Tel. Co.*, 119 Fed. 294, 296-298, 56 C. C. A. 198, 60 L. R. A. 805; *Banks Law Pub. Co. v. Lawyers' Co-operative Pub. Co.*, 169 Fed. 386, 391, 94 C. C. A. 642, 17 Ann. Cas. 967.

⁷ *Baker v. Selden*, 101 U. S. 99, 25 L. Ed. 841; *Perris v. Hexamer*, 99 U. S. 674, 25 L. Ed. 308; *Barnes v. Miner* (C. C.) 122 Fed. 450, 491; *Burnell v. Chown* (C. C.) 69 Fed. 993; *Tate v. Fullbrook*, [1908] 1 K. B. 821; *Chilton v. Progress Printing & Publishing Co.*, [1895] 2 Ch. 29, 34; *Kenrick & Co. v. Lawrence & Co.*, L. R. 25 Q. B. D. 99; *Pike v. Nicholas*, L. R. 5 Ch. App. 251.

⁸ *Bristol v. Equitable Life Assurance Society*, 132 N. Y. 264, 30 N. E. 506, 28 Am. St. Rep. 568; *Haskins v. Ryan*, 71 N. J. Eq. 575, 64 Atl. 436.

⁹ *Jewelers' Mercantile Agency v. Jewelers' Publishing Co.*, 155 N. Y. 241, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666; *Wagner v. Conried* (C. C.) 125 Fed. 798, 801; *Larrowe-Loisette v. O'Loughlin* (C. C.) 88 Fed. 896.

¹⁰ See cases in note 5, *supra*; *Richardson, Law of Copyright*, p. 128.

do differ, they have no application to the case at bar.

Fourth, Plaintiff further contended that defendant's practice constitutes unfair competition, because there is "appropriation without cost to itself of values created by" the plaintiff; and it is upon this ground that the decision of this court appears to be based. To appropriate and use for profit, knowledge and ideas produced by other men, without making compensation or even acknowledgment, may be inconsistent with a finer sense of propriety; but, with the exceptions indicated above, the law has heretofore sanctioned the practice. Thus it was held that one may ordinarily make and sell anything in any form, may copy with exactness that which another has produced, or may otherwise use his ideas without his consent and without the payment of compensation, and yet not inflict a legal injury;¹¹ and that ordinarily one is at perfect liberty to find out, if he can by lawful means, trade secrets of another, however valuable, and then use the knowledge so acquired gainfully, although it cost the original owner much in effort and in money to collect or produce.¹²

*Such taking and gainful use of a product of another which, for reasons of public policy, the law has refused to endow with the attributes of property, does not become unlawful because the product happens to have been taken from a rival and is used in competition with him. The unfairness in competition which hitherto has been recognized by the law as a basis for relief, lay in the manner or means of conducting the business; and the manner or means held legally unfair, involves either fraud or force or the doing of acts otherwise prohibited by law. In the "passing off" cases (the typical and most common case of unfair competition), the wrong consists in fraudulently representing by word or act that defendant's goods are those of plaintiff. See *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 412, 413, 36 Sup. Ct. 357, 60 L. Ed. 713. In the other cases, the

diversion of trade was effected through physical or moral coercion, or by inducing breaches of contract or of trust or by enticing away employes. In some others, called cases of simulated competition, relief was granted because defendant's purpose was unlawful; namely, not competition but deliberate and wanton destruction of plaintiff's business.¹³

*That competition is not unfair in a legal sense, merely because the profits gained are unearned, even if made at the expense of a rival, is shown by many cases besides those referred to above. He who follows the pioneer into a new market, or who engages in the manufacture of an article newly introduced by another, seeks profits due largely to the labor and expense of the first adventurer; but the law sanctions, indeed encourages, the pursuit.¹⁴ He who makes a city known through his product, must submit to sharing the resultant trade with others who, perhaps for that reason, locate there later. *Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581; *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 673, 21 Sup. Ct. 270, 45 L. Ed. 365. He who has made his name a guaranty of quality, protests in vain when another with the same name engages, perhaps for that reason, in the same lines of business; provided, precaution is taken to prevent the public from being deceived into the belief that what he is selling, was made by his competitor. One bearing a name made famous by another is permitted to enjoy the unearned benefit which necessarily flows from such use, even though the use proves harmful to him who gave the name value. *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 544, 11 Sup. Ct. 625, 35 L. Ed. 247; *Howe*

¹¹ *Flagg Manufacturing Co. v. Holway*, 178 Mass. 83, 59 N. E. 667; *Bristol v. Equitable Life Assurance Society*, 132 N. Y. 264, 30 N. E. 506, 28 Am. St. Rep. 568; *Keystone Type Foundry v. Portland Publishing Co.*, 136 Fed. 690, 108 C. C. A. 508.

¹² *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442; *Tabor v. Hoffman*, 118 N. Y. 30, 36, 23 N. E. 12, 16 Am. St. Rep. 740; *James v. James*, L. R. 13 Eq. 421. Even when knowledge is compiled, as in a dictionary, and copyrighted, the suggestions and sources therein may be freely used by a later compiler. The copyright protection merely prevents his taking the ultimate data while avoiding the labor and expense involved in compiling them. *Pike v. Nicholas*, L. R. 5 Ch. App. 251; *Morris v. Wright*, L. R. 5 Ch. App. 279; *Edward Thompson Co. v. American Law Book Co.*, 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607; *West Pub. Co. v. Edward Thompson Co.*, 176 Fed. 833, 100 C. C. A. 303. It is assumed that in the absence of copyright, the data compiled could be freely used. See *Morris v. Ashbee*, L. R. 7 Eq. 34, 40. Compare also *Chilton v. Progress Printing & Publishing Co.*, [1895] 2 Ch. 29.

¹³ "Trust Laws & Unfair Competition" (U. S. Bureau of Corporations, March 15, 1915) pp. 301-331, 332-461; *Nims, Unfair Competition and Trade-Marks*, c. XIX; *Sperry & Hutchinson Co. v. Pommer* (D. C.) 199 Fed. 309, 314; *Racine Paper Goods Co. v. Dittgen*, 171 Fed. 631, 96 C. C. A. 433; *Schönwald v. Ragains*, 32 Okl. 223, 122 Pac. 203, 39 L. R. A. (N. S.) 854; *Attorney General v. National Cash Register Co.*, 132 Mich. 99, 143 N. W. 420, Ann. Cas. 1916D, 638; *Witkop & Holmes Co. v. Great Atlantic & Pacific Tea Co.*, 69 Misc. Rep. 90, 124 N. Y. Supp. 956, 958; *Dunshee v. Standard Oil Co.*, 152 Iowa, 618, 132 N. W. 371, 36 L. R. A. (N. S.) 263; *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946, 22 L. R. A. (N. S.) 599, 131 Am. St. Rep. 446, 16 Ann. Cas. 807.

The cases of *Fonotipia Limited v. Bradley* (C. C.) 171 Fed. 951, and *Prest-O-Lite Co. v. Davis* (D. C.) 209 Fed. 917, which were strongly relied upon by the plaintiff, contain expressions indicating rights possibly broad enough to sustain the injunction in the case at bar; but both cases involve elements of "passing off." See also *Prest-O-Lite Co. v. Davis*, 215 Fed. 349, 131 C. C. A. 491; *Searchlight Gas Co. v. Prest-O-Lite Co.*, 215 Fed. 692, 131 C. C. A. 626; *Prest-O-Lite Co. v. H. W. Bogen* (C. C.) 209 Fed. 915; *Prest-O-Lite Co. v. Avery Lighting Co.* (C. C.) 161 Fed. 648. In *Prest-O-Lite Co. v. Auto Acetylene Light Co.* (C. C.) 191 Fed. 90, the bill was dismissed on the ground that no deception was shown.

¹⁴ *Magee Furnace Co. v. Le Barron*, 127 Mass. 115; *Ricker v. Railway*, 90 Me. 395, 403, 33 Atl. 338.

Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 28 Sup. Ct. 288, 52 L. Ed. 481; Waterman Co. v. Modern Pen Co., 235 U. S. 88, 35 Sup. Ct. 91, 59 L. Ed. 142. See Saxlehner v. Wagner, 216 U. S. 375, 30 Sup. Ct. 298, 54 L. Ed. 525.

The means by which the International News Service obtains news gathered by the Associated Press is also clearly unobjectionable. It is taken from papers bought in the open market or from bulletins publicly posted. *No breach of contract such as the court considered to exist in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 254, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461; or of trust such as was present in *Morison v. Moat*, 9 Hare, 241; and neither fraud nor force is involved. The manner of use is likewise unobjectionable. No reference is made by word or by act to the Associated Press, either in transmitting the news to subscribers or by them in publishing it in their papers. Neither the International News Service nor its subscribers is gaining or seeking to gain in its business a benefit from the reputation of the Associated Press. They are merely using its product without making compensation. See *Bamforth v. Douglass Post Card & Machine Co.* (C. C.) 158 Fed. 355; *Tribune Co. of Chicago v. Associated Press* (C. C.) 116 Fed. 126. That they have a legal right to do, because the product is not property, and they do not stand in any relation to the Associated Press, either of contract or of trust, which otherwise precludes such use. The argument is not advanced by characterizing such taking and use a misappropriation.

It is also suggested that the fact that defendant does not refer to the Associated Press as the source of the news may furnish a basis for the relief. But the defendant and its subscribers, unlike members of the Associated Press, were under no contractual obligation to disclose the source of the news; and there is no rule of law requiring acknowledgment to be made where uncopied matter is reproduced. The International News Service is said to mislead its subscribers into believing that the news transmitted was originally gathered by it and that they in turn mislead their readers. There is, in fact, no representation by either of any kind. Sources of information are sometimes given because required by contract; sometimes because naming the source gives authority to an otherwise incredible statement; and sometimes the source is named because the agency does not wish to take the *responsibility itself of giving currency to the news. But no representation can properly be implied from omission to mention the source of information except that the International News Service is trans-

mitting news which it believes to be credible.

Nor is the use made by the International News Service of the information taken from papers or bulletins of Associated Press members legally objectionable by reason of the purpose for which it was employed. The acts here complained of were not done for the purpose of injuring the business of the Associated Press. Their purpose was not even to divert its trade, or to put it at a disadvantage by lessening defendant's necessary expenses. The purpose was merely to supply subscribers of the International News Service promptly with all available news. The suit is, as this court declares, in substance one brought for the benefit of the members of the Associated Press, who would be proper, and except for their number perhaps necessary, parties; and the plaintiff conducts the suit as representing their interests. It thus appears that the protection given by the injunction is not actually to the business of the complainant news agency; for this agency does not sell news nor seek to earn profits, but is a mere instrumentality by which 800 or more newspapers collect and distribute news. It is these papers severally which are protected; and the protection afforded is not from competition of the defendant, but from possible competition of one or more of the 400 other papers which receive the defendant's service. Furthermore, the protection to these Associated Press members consists merely in denying to other papers the right to use as news, information which by authority of all concerned, had theretofore been given to the public by some of those who joined in gathering it; and to which the law denies the attributes of property. There is in defendant's purpose nothing on which to base a claim for relief.

*It is further said that, while that for which the Associated Press spends its money is too fugitive to be recognized as property in the common-law courts, the defendant cannot be heard to say so in a court of equity, where the question is one of unfair competition. The case presents no elements of equitable title or of breach of trust. The only possible reason for resort to a court of equity in a case like this is that the remedy which the law gives is inadequate. If the plaintiff has no legal cause of action, the suit necessarily fails. *Levy v. Walker*, L. R. 10 Ch. D. 436, 449. There is nothing in the situation of the parties which can estop the defendant from saying so.

Fifth. The great development of agencies now furnishing country-wide distribution of news, the vastness of our territory, and improvements in the means of transmitting intelligence, have made it possible for a news agency or newspapers to obtain, without paying compensation, the fruit of another's efforts and to use news so obtained

gainfully in competition with the original collector. The injustice of such action is obvious. But to give relief against it would involve more than the application of existing rules of law to new facts. It would require the making of a new rule in analogy to existing ones. The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate. But with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the *boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency.

The rule for which the plaintiff contends would effect an important extension of property rights and a corresponding curtailment of the free use of knowledge and of ideas; and the facts of this case admonish us of the danger involved in recognizing such a property right in news, without imposing upon news-gatherers corresponding obligations. A large majority of the newspapers and perhaps half the newspaper readers of the United States are dependent for their news of general interest upon agencies other than the Associated Press. The channel through which about 400 of these papers received, as the plaintiff alleges, "a large amount of news relating to the European war of the greatest importance and of intense interest to the newspaper reading public" was suddenly closed. The closing to the International News Service of these channels for foreign news (if they were closed) was due not to unwillingness on its part to pay the cost of collecting the news, but to the prohibitions imposed by foreign governments upon its securing news from their respective countries and from using cable or telegraph lines running therefrom. For aught that appears, this prohibition may have been wholly undeserved; and at all events the 400 papers and their readers may be assumed to have been innocent. For aught that appears, the International News Service may have sought then to secure tem-

porarily by arrangement with the Associated Press the latter's foreign news service. For aught that *appears, all of the 400 subscribers of the International News Service would gladly have then become members of the Associated Press, if they could have secured election thereto.¹⁵ It is possible, also, that a large part of the readers of these papers were so situated that they could not secure prompt access to papers served by the Associated Press. The prohibition of the foreign governments might as well have been extended to the channels through which news was supplied to the more than a thousand other daily papers in the United States not served by the Associated Press; and a large part of their readers may also be so located that they cannot procure prompt access to papers served by the Associated Press.

A Legislature, urged to enact a law by which one news agency or newspaper may prevent appropriation of the fruits of its labors by another, would consider such facts and possibilities and others which appropriate inquiry might disclose. Legislators might conclude that it was impossible to put an end to the obvious injustice involved in such appropriation of news, without opening the door to other evils, greater than that sought to be remedied. Such appears to have been the opinion of our Senate which reported unfavorably a bill to give news a few *hours' protection;¹⁶ and which ratified, on Febru-

¹⁵ According to the by-laws of the Associated Press no one can be elected a member without the affirmative vote of at least four-fifths of all the members of the corporation or the vote of the directors. Furthermore, the power of the directors to admit anyone to membership may be limited by a right of protest to be conferred upon individual members. See By-Laws, article III, section 6. "The members of this corporation may, by an affirmative vote of seven-eighths of all the members, confer upon a member (with such limitations as may be at the time prescribed) a right of protest against the admission of new members by the board of directors. The right of protest, within the limits specified at the time it is conferred, shall empower the member holding it to demand a vote of the members of the corporation on all applications for the admission of new members within the district for which it is conferred except as provided in section 2 of this article."

¹⁶ Senate Bill No. 1723, 48th Congress, First Session. The bill provides:

"That any daily or weekly newspaper, or any association of daily or weekly newspapers, published in the United States or any of the territories thereof, shall have the sole right to print, issue, and sell, for the term of eight hours, dating from the hour of going to press, the contents of said daily or weekly newspaper, or the collected news of said newspaper association, exceeding one hundred words.

"Sec. 2. That for any infringement of the copyright granted by the first section of this act the party injured may sue in any court of competent jurisdiction and recover in any proper action the damages sustained by him from the person making such infringement, together with the costs of suit."

It was reported on April 18, 1884, by the Committee on the Library without amendment, and that it ought not to pass. Journal of the Senate,

ary 15, 1911, the convention adopted at the Fourth International American Conference;¹⁷ and such was evidently the view also of the signatories to the International Copyright Union of November 13, 1908,¹⁸ as both these conventions expressly exclude news from copyright protection.

*Or legislators dealing with the subject might conclude, that the right to news values should be protected to the extent of permitting recovery of damages for any unauthorized use, but that protection by injunction should be denied, just as courts of equity ordinarily refuse (perhaps in the interest of free speech) to restrain actionable libels,¹⁹ and for other reasons decline to protect by injunction mere political rights;²⁰ and as Congress has prohibited courts from enjoining the illegal assessment or collection of federal taxes.²¹ If a Legislature concluded to recognize property in published news to the extent of permitting recovery at law, it

might, with a view to making the remedy more certain and adequate, provide a fixed measure of damages, as in the case of copyright infringement.²²

Or again, a Legislature might conclude that it was unwise to recognize even so limited a property right in published news as that above indicated; but that a news agency should, on some conditions, be given full protection of its business; and to that end a remedy by injunction as well as one for damages should be granted, where news collected by it is gainfully used without permission. If a Legislature concluded (as at least one court has held, *New York and Chicago Grain and Stock Exchange v. Board of Trade*, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411, 11 Am. St. Rep. 107) that under certain circumstances news-gathering is a business affected with a public interest; it might declare that, in such cases, news should be protected against appropriation, only if the gatherer assumed the obligation of supplying it at reasonable rates and without discrimination, to all papers which applied therefor. If legislators reached that conclusion, they would probably go further, and prescribe the conditions under which and the extent to which the protection should be afforded; and they might also provide the administrative machinery necessary for insuring to the public, the press, and the news agencies, full enjoyment of the rights so conferred.

Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly disclosed wrong, although the propriety of some remedy appears to be clear.

43rd Congress, First Session, p. 548. No further action was apparently taken on the bill.

When the copyright legislation of 1909, finally enacted as Act of March 4, 1909, c. 320 (35 Stat. 1075), was under consideration, there was apparently no attempt to include news among the subjects of copyright. Arguments before the Committees on Patents of the Senate and House of Representatives on Senate Bill No. 6330 and H. R. Bill No. 19853, 59th Congress, First Session, June 6, 7, 8, and 9, and December 7, 8, 10, and 11, 1906; Hearings on Pending Bills to Amend and Consolidate Acts Respecting Copyright, March 26, 27 and 28, 1903.

¹⁷ 38 Stat. 1785, 1789, Article 11.

¹⁸ Bowker, *Copyright: Its History and Its Law*, pp. 330, 612, 613. See the similar provisions in the Berne Convention (1886) and the Paris Convention (1896). *Id.* pp. 612, 613.

In 1898 Lord Herschell introduced in Parliament a bill, section 11 of which provides: "Copyright in respect of a newspaper shall apply only to such parts of the newspaper as are compositions of an original literary character, to original illustrations therein, and to such news and information as have been specially and independently obtained." (*Italics ours.*) House of Lords, Sessional Papers, 1898, Vol. 3, Bill No. 21. Birrell, *Copyright in Books*, p. 210. But the bill was not enacted, and in the English law as it now stands there is no provision giving even a limited copyright in news as such. Act of December 16, 1911, 1 and 2 Geo. 5, c. 46.

¹⁹ *Boston Dlatite Co. v. Florence Mfg. Co.*, 114 Mass. 69, 19 Am. Rep. 310; *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. App. 142.

²⁰ *Giles v. Harris*, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909. Compare *Swafford v. Templeton*, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005; *Green v. Mills*, 69 Fed. 852, 859, 16 C. C. A. 516, 30 L. R. A. 90.

²¹ Revised Statutes, § 3224 (Comp. St. 1916, § 5947); *Snyder v. Marks*, 109 U. S. 189, 3 Sup. Ct. 157, 27 L. Ed. 901; *Dodge v. Osborn*, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. Ed. 557.

²² Act of March 4, 1909, § 25, c. 320 (35 Stat. 1075, 1081) provides, as to the liability for the infringement of a copyright, that "in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars," and that in the case of infringement of a copyrighted newspaper the damages recoverable shall be one dollar for every infringing copy, but shall not be less than \$250 nor more than \$5,000.

(248 U. S. 182)

DILLON v. STRATHEARN S. S. CO.

THE STRATHEARN.

(Argued and Submitted Nov. 5, 1918. Decided Dec. 23, 1918.)

No. 361.

1. COURTS ⇐384—CERTIFIED QUESTIONS—
CERTIFICATE—STATEMENT OF FACTS.

Under Judicial Code, § 239 (Comp. St. 1916, § 1216), providing for certification of questions of law from Circuit Court of Appeals, and that Supreme Court may give instruction on the questions certified, or order whole record sent up for consideration and decision, and Supreme Court Rule 37, providing that the certificate shall contain a proper statement of the facts on which the certified questions arise, the certificate by itself, and without reference to transcript, must state the pertinent facts necessary for answering the questions.

2. COURTS ⇐384—QUESTIONS CERTIFIED—
DISMISSAL OF CERTIFICATE.

The certificate, on certification of questions under Judicial Code, § 239 (Comp. St. 1916, § 1216), not sufficiently stating the pertinent facts, will be dismissed.

On a Certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

Suit in admiralty by John Dillon against the steamship Strathearn; the Strathearn Steamship Company, claimant. On appeal from the District Court, the Circuit Court of Appeals certified questions. Certificate dismissed.

Messrs. William J. Waguespack, of New Orleans, La., and Silas Blake Axtell, of New York City, for Dillon.

Mr. Assistant Attorney General Brown, for the United States.

Mr. Ralph James M. Bullova, of New York City, for Strathearn S. S. Co.

Mr. Justice DAY delivered the opinion of the court.

John Dillon, a British subject, filed a libel in admiralty in the United States District Court for the Northern District of Florida in which he claimed the sum of \$125 alleged to be due him for wages as a carpenter on the steamship Strathearn. The District Court dismissed the libel (239 Fed. 583). An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit. The libel was filed under the provisions, of section 4 of the Seaman's Act March 4, 1915, c. 153, 38 Stat. 1165, 1168 (Comp. St. 1916, § 8322).¹

¹"Sec. 4. That section forty-five hundred and thirty of the Revised Statutes of the United States be, and is hereby, amended to read as follows:

"Sec. 4530. Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs

The Circuit Court of Appeals certifies two questions to this court:

First. Is section 4530 of the Revised Statutes of the United States, as the same was amended by section 4 of the act of Congress, approved March 4, 1915, entitled "An act to promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea"—violative of the Constitution of the United States?

Second. Is section 4530 of the Revised Statutes of the United States, as the same was amended by the last-mentioned act of Congress approved March 4, 1915, violative of the Constitution of the United States in so far as it provides:

"That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

[1] The certificate is made under section 239 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 (Comp. St. 1916, § 1216)), which makes provision for the certification of questions of law to this court from a Circuit Court of Appeals. The section provides that this court may give instruction on the questions certified, or it may order the whole record sent up for consideration and decision. Rule 37 of this court (32 Sup. Ct. xiv) provides that in such cases the certificate shall contain a proper statement of the facts on which the questions of law arise. The certificate in this case fails to comply with this rule of court. It contains a partial statement of Dillon's contract with the ship. It states that no part of the sum sued for was due under the shipping articles signed by Dillon. It does not state the terms of payment agreed upon, when or where payments were to be made under the contract, or what advancements, if any, were to be made during the voyage. The certificate concludes:

"For information as to the facts of the case copies of the transcripts and briefs are herewith transmitted."

one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section forty-five hundred and twenty-nine of the Revised Statutes: . . . And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

Counsel argue the case by reference to the transcript of the record in the Circuit Court of Appeals, and it is apparent that a proper consideration of the case requires such reference. This transcript is no part of our record. This court alone has authority to have it sent up. The briefs in the Circuit Court of Appeals are no part of the record here. The certificate is required to state the pertinent facts in order that this court may answer the questions of law certified with reference to such facts, and not by searching the records and briefs of the Circuit Court of Appeals itself.

[2] The certificate therefore fails to comply with our rule, *and in accordance with the established practice must be dismissed. *Cincinnati, Hamilton & Dayton R. R. Co. v. McKeen*, 149 U. S. 259, 261, 13 Sup. Ct. 840, 37 L. Ed. 725; *Stratton's Independence v. Howbert*, 231 U. S. 399, 422, 34 Sup. Ct. 136, 58 L. Ed. 285, and cases cited.

Dismissed.

(248 U. S. 185)

SANDBERG et al. v. McDONALD.
THE TALUS.

(Argued Nov. 5, 1918. Decided Dec. 23, 1918.)
No. 392.

1. SEAMEN ⇐23—WAGES—ADVANCE PAYMENT—FOREIGN SHIPS IN FOREIGN PORTS.

Seamen's Act March 4, 1915, § 11 (Comp. St. 1916, § 8323), declaring it unlawful to pay a seaman wages in advance, that such an advancement shall in no case except as herein provided absolve from full payment of wages when actually earned, and that this section shall apply to foreign vessels "while in the waters of the United States," does not apply to advancements by foreign vessels in foreign ports.

2. STATUTES ⇐212—APPLICATION—INTENT—PRESUMPTION.

Legislation is presumptively territorial and confined to the limits over which the lawmaking power has jurisdiction.

3. SEAMEN ⇐23—WAGES—ADVANCE PAYMENT—APPLICABILITY OF SEAMEN'S ACT.

That Seamen's Act March 4, 1915, § 11 (Comp. St. 1916, § 8323), prohibiting payment of wages in advance to seamen, and declaring that an advancement shall not absolve from payment of wages when earned and shall subject the offender to criminal liability, declares the master and owner of any foreign ship violating the section liable to the same penalty that the master or owner of a vessel of the United States would be, strengthens the presumption that it was intended to deal only with acts committed within the jurisdiction of the United States.

4. SEAMEN ⇐4—SEAMEN'S ACT—ABROGATION OF INCONSISTENT TREATIES.

The provisions of Seamen's Act March 4, 1915, abolishing the right of arrest for deser-

tion and giving civil courts of the United States jurisdiction over wage controversies arising within its jurisdiction, amply account for the provision for abrogation of inconsistent treaty provisions.

Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Brandeis, and Mr. Justice Clarke, dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Suit in admiralty by Erik Sandberg and others against the British ship *Talus*; John McDonald, claimant. Decree for libelants (242 Fed. 954) was reversed by the Circuit Court of Appeals (248 Fed. 670, 160 C. C. A. 570), and libelants bring certiorari. Affirmed.

Messrs. Alexander T. Howard, of Mobile, Ala., and W. J. Waguespack, of New Orleans, La., for petitioners.

Mr. Palmer Pillans, of Mobile, Ala., for respondent.

Mr. Assistant Attorney General Brown, for the United States.

*Mr. Justice DAY delivered the opinion of the Court.

This case brings before us for consideration certain features of the so-called "Seaman's Act." Act March 4, 1915, c. 153, 38 Stat. 1165. The act is entitled:

"An act to promote the welfare of American seamen in the merchant marine of *the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea."

It contains numerous provisions intended to secure better treatment of seamen, and to secure for them better conditions of service.

The libel charges a demand in Mobile, Alabama, for one-half part of the wages then earned by the seamen, and the refusal of the master to pay the amount which the libelants claimed to be due. The master paid each of them what he conceived to be due, deducting certain advances made to the men at Liverpool, England, where the seamen were signed.

The facts are:

The *Talus* is a British ship and the libelants and petitioners citizens or subjects of nations other than the United States and at the time of employment by the ship and before boarding her they received certain advances at Liverpool by the ship or its agents, a practice usual and customary and not forbidden by the laws of Great Britain. The advance did not, as to any libellant, exceed the amount of a month's wages.

The libelants boarded the ship at Dublin, Ireland, December 1, 1916, and remained in

her service until they left her at Mobile, Alabama.

The ship arrived in American waters on February 11, 1917, off Port Morgan, from whence she proceeded immediately to Mobile, where she remained until after February 24th, and unloaded and loaded cargoes. During the voyage and at Mobile prior to February 22d, libelants received certain payments from the ship in cash and in articles purchased from it.

On February 22d libelants demanded of the master of the ship payment of one-half of the wages earned by them to that date. The master then paid to them a sum which, with the cash paid them and the price of the articles *purchased as stated above, together with the advances made in Liverpool, equalled or exceeded the one-half of the wages then earned by each of them from the commencement of his service for the ship. It was less, however, than such one-half wages if the advances at Liverpool had not been included in the credits. The master claimed that those advances should be deducted from the one-half wages, and did deduct them, and the sum or sums paid by the master to the libelants exceeded the amount of wages earned by them for the eleven days the ship had been in American waters. The libelants quit the ship February 24, 1917, and were logged as deserters on the same day.

Under the foregoing statement of facts the question for decision is: Was the master entitled to make deduction from the seamen's pay in the amount of the advancements made at Liverpool? The District Court held that these advancements could not be deducted. 242 Fed. 954. The Circuit Court of Appeals reached the opposite conclusion. 248 Fed. 670, 160 C. C. A. 570. The pertinent section of the act for consideration reads:

"Sec. 10. (a) That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$25 nor more than \$100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment shall in no case except as herein provided absolve the vessel or the master or the *owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment, as seaman, or from any person on his behalf, any remuneration whatever for

providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than \$500.

"(e) That this section shall apply as well to foreign vessels while in the waters of the United States, as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation.

"The master, owner, consignee, or agent of any vessel of the United States, or of any foreign vessel seeking clearance from a port of the United States, shall present his shipping articles at the office of clearance, and no clearance shall be granted any such vessel unless the provisions of this section have been complied with."

The genesis and history of this legislation is found in U. S. Compiled Statutes 1916, volume 7, section 8323, annotated.

The Dingley Act of June 26, 1884 (c. 121, 23 Stat. 55, 56), which is the origin of this section, contains terms much like those found in this act. That statute, as the present one, in the aspect now before us, was intended to prevent the evils arising from advanced payments to seamen, and to protect them against a class of persons who took advantage of their necessities and through whom vessels were obliged to provide themselves with seamen. These persons obtained assignments of the advanced wages of sailors. In many instances this was accomplished with *little or no service to the men who were obliged to obtain employment through such agencies. In the Dingley Act it was made unlawful to pay seamen's wages before leaving the port at which he was engaged. In the present act it is made unlawful to pay seamen's wages in advance of the time when he has actually earned the same. The Act of 1884 by its terms applied as well to foreign vessels as to the vessels of the United States, and masters of foreign vessels violating the law were refused clearance from any port of the United States. The present statute is made to apply as well to foreign vessels while in the waters of the United States as to vessels of the United States.

In the present statute, in the section from which we have just quoted, masters, owners, consignees, or owners of foreign vessels are made liable to the same penalties as are the like persons in case of vessels of the United States. Such persons in case the vessels are those of the United States or foreign vessels, seeking clearance in ports of the United States, are required to present their shipping articles at the office of clearance, and no clearance is permitted unless the provisions of the statute are complied with.

The Act of 1884 came before the United States District Court for the Southern District of New York in the case of The State of Maine, 22 Fed. 734. In a clear and well-

reasoned opinion by Judge Addison Brown the law was held not to apply to the shipment of seamen on American vessels in foreign ports. After some amendments in 1893, not important to consider in this connection, the matter came before this court in the case of *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, and it was held to apply to a British vessel shipping seamen at an American port, and, furthermore, that the act, as thus applied to a foreign vessel in United States waters, was constitutional.

[1] *While the Seaman's Act of 1915 contains many provisions for the amelioration of conditions as to employment and care of seamen, in the aspect now involved we have called attention to the state of legislation and judicial decision when that act was passed. Did Congress intend to make invalid the contracts of foreign seamen so far as advance payments of wages is concerned, when the contract and payment was made in a foreign country where the law sanctioned such contract and payment? Conceding for the present purpose that Congress might have legislated to annul such contracts as a condition upon which foreign vessels might enter the ports of the United States, it is to be noted, that such sweeping and important requirement is not found specifically made in the statute. Had Congress intended to make void such contracts and payments a few words would have stated that intention, not leaving such an important regulation to be gathered from implication. There is nothing to indicate an intention, so far as the language of the statute is concerned, to control such matters otherwise than in the ports of the United States. The statute makes the payment of advance wages unlawful and affixes penalties for its violation, and provides that such advancements shall in no cases except as in the act provided, absolve the master from full payment after the wages are earned, and shall be no defense to a libel or suit for wages. How far was this intended to apply to foreign vessels? We find the answer if we look to the language of the act itself. It reads that this section shall apply to foreign vessels "while in the waters of the United States."

[2] Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction. *American Banana Company v. United Fruit Co.*, 213 U. S. 347, 357, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047. In *Patterson v. Bark Eudora*, supra, this court declared such legislation as to foreign vessels in United States ports to be constitutional. We think that *there is nothing in this section to show that Congress intended to take over the control of such contracts and payments as to foreign vessels except while they were in our ports. Congress could not prevent the making of such contracts in other jurisdictions. If

they saw fit to do so, foreign countries would continue to permit such contracts and advance payments no matter what our declared law or policy in regard to them might be as to vessels coming to our ports.

[3] In the same section, which thus applies the law to foreign vessels while in waters of the United States, it is provided that the master, owner, consignee, or agent of any such vessel, who violates the provision of the act, shall be liable to the same penalty as would be persons of like character in respect to a vessel of the United States. This provision seems to us of great importance as evidencing the legislative intent to deal civilly and criminally with matters in our own jurisdiction. Congress certainly did not intend to punish criminally acts done within a foreign jurisdiction, a purpose so wholly futile is not to be attributed to Congress. *United States v. Freeman*, 239 U. S. 117, 120, 36 Sup. Ct. 32, 60 L. Ed. 172. The criminal provision strengthens the presumption that Congress intended to deal only with acts committed within the jurisdiction of the United States.

[4] It is true the act provides for the abrogation of inconsistent treaty provisions, but this provision has ample application treating the statute to mean what we have here held to be its proper construction. It abolishes the right of arrest for desertion. It gives to the civil courts of the United States jurisdiction over wage controversies arising within our jurisdiction. These considerations amply account for the treaty provision. See *Treaties in Force*, Ed. 1904, index p. 969.

It is said that the advances in foreign ports are against the policy of the United States and, therefore, not to be *sanctioned here. As we have construed this section of the statute, no such policy as to foreign contracts legal where made, is declared.

We have examined the references in the briefs of counsel to the reports and proceedings in Congress during the progress of this legislation so far as the same may have weight in determining the construction of this section of the act. We find nothing in them, so far as entitled to consideration, which requires a different meaning to be given the statute. We may add that the construction now given has the sanction of the Executive Department as shown in Instructions to Consular Officers, promulgated through the medium of the State Department.

We are of opinion that the Circuit Court of Appeals reached the right conclusion as to the meaning and interpretation of this section of the act, and its judgment is

Affirmed.

Mr. Justice McKENNA, with whom concur Mr. Justice HOLMES, Mr. Justice BRANDEIS, and Mr. Justice CLARKE, dissenting. This is a libel in admiralty under the Sea-

men's Act of 1915 (38 Stat. 1165-1168), especially involving section 11 (Comp. St. 1916, § 8392a).

The libel was filed by petitioners here and others. It was dismissed as to the latter and they have acquiesced in the judgment. The facts are set out in the opinion of the court.

With this case were submitted others that present the act of Congress in different aspects. Among these was No. 361. *Dillon v. Strathearn S. S. Co.*, 248 U. S. 182, 39 Sup. Ct. 83, 63 L. Ed. 199. It was a libel by a seaman who had shipped on a British vessel and was based on a demand for wages not due at the time of the demand under the terms of the shipping articles signed by him. Section 4 (section 8322) of the act, *infra*, was especially involved in consideration and its constitutionality was attacked by the ship. The Circuit Court of Appeals for the Fifth Circuit, to which the case had gone, presented the question to this court in two aspects, first generally, and, second, more particularly that provision which makes the section "apply to seamen on foreign vessels while in the harbors of the United States."

In the present case the ship is also British and the libelants and petitioners citizens or subjects of nations other than the United States, and the controversy is as to the right of the master to deduct from the wages, of which the law authorizes the demand, advances made to the seamen in Liverpool, England. To make such advances was a practice usual and customary and not forbidden by English law. It would seem, therefore, that the constitutional question is as much involved in one case as in the other. But under the court's construction of the act that question can be pretermitted. Under our construction it would seem to be not only of ultimate but of first insistence. The court, however, is of opinion that the question of the constitutionality of the act was not certified in such manner as to be subject to its consideration. From that conclusion we are not disposed to dissent and shall assume, as the court does, that the legislation is valid and pass to its consideration.

The instant case, the facts not being in dispute, is brought to the question of the right of the master to deduct the Liverpool advances, the ship asserting the right and the libelants denying it. The solution of the question necessarily depends upon the construction of the act, or, more precisely, its application. It is conceded, yielding to the authority of *Patterson v. The Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, that the act applies to American seamen shipping in an American port upon foreign vessels, but it is contended from that case and other cases that it ought "to seem plain on principle and authority that the advancement statute has no effect except upon ad-

vancements *made to seamen within the territorial jurisdiction of the United States." And, indeed, it is insisted that Congress "ex industria in terms confined the application to the waters of the United States." The conclusions are deduced from the cases which are reviewed and the language of the act is quoted. We give the quotation as it amplifies the contentions:

"That this section shall apply as well to foreign vessels *while in waters of the United States* [counsel's emphasis], as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation.

"The master, owner, consignee, or agent of any vessel of the United States, or of any foreign vessel seeking clearance from a port of the United States, shall present his shipping articles at the office of clearance, and no clearance shall be granted any such vessel unless the provisions of this section have been complied with."

The quotation is but a part of section 11.¹ It is preceded by *the explicit declaration that it is "unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same or to pay such advance wages." There is no limitation of place or circumstances and the universality of the declaration is given emphasis and any implication of exception is precluded with tautological care by the provision that "the payment of such advance wages or allotment shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or ac-

¹ Section 11 was an amendment of section 24 of the Act of December 21, 1898, and section 24 was an amendment of section 10 of the laws of 1884 as amended in 1886, and, as it now stands as far as pertinent, is as follows:

"Sec. 10. (a) That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$25 nor more than \$100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman * * * or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than \$500."

tion for the recovery of such wages." To qualify these provisions or not to take them for what they say, would, in our opinion, ascribe to the act an unusual improvidence of expression. And section 4 should be considered in connection. It is hence important that we give it in full. And it may be said that it is an amendment to section 4530, R. S. (Comp. St. 1916, § 8322). It is as follows:

"Sec. 4530. Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and *he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section forty-five hundred and twenty-nine of the Revised Statutes: * * * And provided further, that this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

This section and the others we have quoted express something more than particular relations of ship and seaman, they express the policy of the United States which no private conventions, no matter where their locality of execution, can be adduced to contravene. *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190; *United States v. Chavez*, 228 U. S. 525, 33 Sup. Ct. 595, 57 L. Ed. 950; *United States v. Freeman*, 239 U. S. 117, 36 Sup. Ct. 32, 60 L. Ed. 172. Nor are we called upon to assign the genesis of the policy or trace the evolution of its remedy to the act in controversy; and besides it has been done elsewhere. It is enough to say that the act itself demonstrates that it is intended as a means in the development of the merchant marine and it hardly needs to be added, to quote counsel for the government, "that the welfare of the seaman is remarkably interrelated with that of the merchant marine." This certainly was the conception of Congress and answers the contentions based on contrary opinion and deductions. It is manifest also from the title of the act, which declares its purpose to be "to promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion, and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea." Its efficacy as a means or the policy of the means is not submitted to our judgment. Ours is the simple service of interpretation, and there is no

reason to hesitate in its exercise because of supposed consequences. The policy *of the act was so insistent that Congress did not hesitate to abrogate opposing treaties. Certainly, therefore, we cannot give a controlling force to the suggestion that to construe the act as the ship construes it and others, supporting the ship, construe it, is to "impose our conception of the rights of seamen upon the whole world in violation of the comity of nations." The reply is immediate: It was for Congress to estimate this and other results and to consider how far they were counterpoised or overcome by other considerations. If the section was ambiguous the asserted results might be invoked to resolve its meaning; but we do not think it is ambiguous.

It must be conceded, indeed, it is conceded, that the words of the sections are grammatically broad enough to include all seamen, foreign as well as American, and advances and contracts, wherever made, and to the contention that Congress had in mind and was only solicitous for American seamen, the answer is again immediate: The contention would take us from the certainty of language to the uncertainties of construction dependent upon the conjecture of consequences; take us from the deck to the sea, if we may use a metaphor suggested by our subject. Language is the safer guide, for it may be defined; consequences brought forward to modify its meaning may be in fact and effect disputed—foreseen, it may be, and accepted as necessary to the achievement of the purpose of the law. And the purpose is resolute, has been maintained for many years with increasing care, and the ship, being in the waters of the United States, not the nationality of the seamen, selected as its test. And lest there might be impediment in treaties, they are declared, so far as they impede, to be abrogated.

But authority may be adduced against the contentions. In *Patterson v. Bark Eudora*, supra, the Seamen's Act came under consideration, and it was contended, as it is contended now, that the title determined against the body *of the act and that therefore the act did not apply to foreign vessels notwithstanding its explicit words. The contention was declared untenable and the reasoning of the court exhausts discussion on that and the other contentions as to the purpose and power of Congress. Of the first it was said that it was to protect sailors against certain wrongs practiced upon them, one of the most common being the advancement of wages; of the second it was said, quoting Chief Justice Marshall:

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute; it is susceptible of no limitation not imposed by itself." *The Exchange*, 7 Cranch, 116, 3 L. Ed. 287.

The nationality of the seamen does not appear, but the vessel was foreign, and the application of the statute to the latter constituted the ground of controversy.

Of course, the language of an act, though universal, may find limitation in the jurisdiction of the Legislature; but certainly a ship within the harbors of the United States is within the jurisdiction of the United States, and making its exercise "apply to seamen on foreign vessels," and "the courts of the United States * * * open to such seamen for its enforcement" was the judgment of Congress of the way to promote its purpose.

These considerations, we think, answer as well other contentions; that is, that the act "should be construed as applicable only to seamen shipping in an American port on vessels which remain for a time in or afterwards return to an American port to load or deliver cargo" or "to seamen of American nationality upon foreign or domestic vessels, irrespective of the port of shipment."

It is enough to say of the contentions, in addition to what has been said, that they impose on the statute qualifications and limitations precluded by its words and the purpose they express. There is a great deal said, and ably said, upon these contentions and the more pretentious one that the act would violate the Constitution of the *United States unless so "construed as not to apply to foreign seamen shipped on a foreign vessel in a foreign port, under a contract, valid where made. * * *

We cannot concede the qualification nor doubt the power of Congress to impose conditions upon foreign vessels entering or remaining in the harbors of the United States. And we think that the case of *The Eudora* declares the grounds of decision. Its principle is broader than its instance and makes the vessel and its locality in the waters of the United States the test of the application of the act and not the nationality of the seamen nor their place of shipment, nor contravening conventions, and precludes deductions of advances.

Nor is there obstacle in the penal provisions of the act. They may be distributively applied and such application has many examples in legislation. It is justified by the rule of *reddendo singula singulis*. By its words and provisions are referred to their appropriate objects, resolving confusion and accomplishing the intent of the law against, it may be, a strict grammatical construction. *United States v. Simms*, 1 Cranch, 252, 2 L. Ed. 98; *Comm. v. Barber*, 143 Mass. 560, 10 N. E. 330; *Quinn v. Lowell Electric Light Co.*, 140 Mass. 106, 3 N. E. 200. The Seamen's Act especially invokes the application of the rule. The act applies to foreign vessels as explicitly and as circumstantially as

it does to domestic vessels. Let the foreign vessel be in the waters of the United States and every provision of the act applies to it as far as it can apply. In other words, it gives the right to a seaman on a foreign vessel to demand from the master one-half part of the wages which he shall have earned at every port and makes void all stipulations to the contrary. And the remedy of the seaman in such case is made explicit. If his demand be refused ("failure on the part of the master to comply" are the words of the act) the seaman is released from his contract and he is entitled to the full payment of wages earned. And he is *given a remedy in the courts of the United States. The defense of an advance payment is precluded and clearance of the foreign vessel is forbidden. And thus the act has completeness of right and remedy and, we think, precludes judicial limitation of either. Its provisions are simple and direct, there is no confusion in their command, no difficulty in their obedience. Of course, a "master, owner, consignee or agent of" any foreign vessel, to quote the words of the act again, cannot violate any provision of it if he be not in the United States. If there be provisions that cannot reach him, that with which this case is concerned can reach him.

We are, therefore, of opinion that the District Court was right in refusing to allow the Liverpool advances and the Circuit Court of Appeals was wrong in reversing the ruling.

(248 U. S. 205)

NEILSON et al. v. RHINE SHIPPING CO.

HARDY et al. v. SHEPARD & MORSE
LUMBER CO.

THE RHINE.

THE WINDRUSH.

(Argued Nov. 5, 1918. Decided Dec. 23, 1918.)

Nos. 393 and 394.

SEAMEN  23—WAGES—ADVANCE PAYMENT—
AMERICAN VESSEL IN FOREIGN PORT.

Act June 26, 1884, § 10a, as amended by Act March 4, 1915, § 11 (Comp. St. 1916, § 8323), prohibiting paying seamen wages in advance, providing such payment shall not absolve from full payment of wages when earned, and denying clearance papers to vessels violating its terms, does not apply to advances by an American ship in a foreign port in accordance with local custom to seamen there employed.

Mr. Justice McKenna, Mr. Justice Holmes, Mr. Justice Brandeis, and Mr. Justice Clarke, dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Suits in admiralty by Paul Neilson and others against the sailing ship Rhine; Rhine Shipping Company, claimant. And by John Hardy and others against the barkentine Windrush; Shepard & Morse Lumber Company, claimant. Decrees for libelants (244 Fed. 833) were reversed by the Circuit Court of Appeals (250 Fed. 180), and libelants bring certiorari. Affirmed.

Mr. Silas Blake Axtell, of New York City, for petitioners.

Mr. Roscoe H. Hupper, of New York City, for respondents.

Mr. Assistant Attorney General Brown, for the United States.

*Mr. Justice DAY delivered the opinion of the court.

These cases were considered together in the courts below and may be disposed of in like manner here.

The facts are:

In the first case Paul Neilson and nine other seamen sue for the recovery of wages claimed to be due them from the bark Rhine. It appears that they shipped on the American bark Rhine at Buenos Ayres, October 7, 1916, for a voyage to New York, at the rate of \$25 per month. It is stipulated that the shipping of seamen on sailing vessels at Buenos Ayres is controlled by certain shipping masters, to one of whom the libelants, in accordance with the usual custom and as a means of securing employment, signed a receipt or advance note for one month's wages. These advance notes were presented to the American Vice-Consul at Buenos Ayres before the libelants signed the articles, were by him noted on the articles and, in the presence of the libelants, directed to be paid on account of the wages of the respective libelants. It was further stipulated that in directing the master of the Rhine to honor such advance notes, the Consul was acting in accordance with section 237 of the Consular Regulations of the United States. When the bark arrived at New York the libelants were paid the wages earned, less the \$25 advanced. They now seek to recover the sum thus deducted, by virtue of the terms of section 10 (a), c. 121, Act June 26, 1884, 23 Stat. 55, as amended by Act March 4, 1915, c. 153, § 11, 38 Stat. 1168 (Comp. St. 1916, § 8323), entitled an "Act to promote the welfare of American seamen in the merchant marine of the United States," upon the theory that such advances are unlawful and of no effect.

The facts in relation to the case of the barkentine Windrush differ from the above only in respect of the fact that the advance notes are not in evidence, but are noted on the articles.

The District Court decided in favor of the libelants. 244 Fed. 833. The Circuit Court of Appeals reversed the decrees. 250 Fed.

180. The cases are here on writs of certiorari.

The section of the statute is the same as that involved in the case of *The Talus* (No. 392) 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200, just decided. The difference is that the advances were made by the master of an American vessel in a South American port, whereas in *The Talus* the advancements were made to foreign seamen in a British port. The same general consideration as to the interpretation of the statute which controlled in the decision of the case of *The Talus* are applicable here and need not be repeated.

That American vessels might be controlled by congressional legislation as to contracts made in foreign ports may, for present purposes at least, be conceded. It appears that only by compliance with the local custom of obtaining seamen through agents can American vessels obtain seamen in South American ports. This is greatly to be deplored, and the custom is one which works much hardship to a worthy class. But we are unable to discover that in passing this statute Congress intended to place American shipping at the great disadvantage of this inability to obtain seamen when compared with the vessels of other nations which are manned by complying with local usage.

The statute itself denies clearance papers to vessels violating its terms. This provision could only apply to domestic ports and is another evidence of the intent of Congress to legislate as to advances made in our own ports.

Affirmed.

Mr. Justice McKENNA, with whom concur Mr. Justice HOLMES, Mr. Justice BRANDEIS, and Mr. Justice CLARKE, dissenting.

These cases were submitted with Nos. 361 and 392 (248 U. S. 182, 185, 39 Sup. Ct. 83, 84, 63 L. Ed. 199, 200), and, like them, are proceedings in admiralty under the Seamen's Act of 1915, 38 Stat. 1165-1168.

The facts are set out in the opinion of the court. In these cases, as in others, we are constrained to dissent. The principle of decision should be, we think, that declared in our dissent in *The Talus*, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200. The facts of these cases put more tension upon it, that is, an adhesion to the words of the statute as determinative of its purpose rather than some of its consequences. We have here the somewhat appealing force of a picture of an American ship only able to escape practical internment in a foreign port by a violation of the law, if it be as we have declared it. And this under the sanction of the United States Consul acting under the following regulation of the Department of State:

"237. *Advances to Seamen Shipped in Foreign Ports.*—The shipment of seamen in foreign ports cannot be considered as within the intention, and hence not within the proper construction

of the act referred to in the next preceding paragraph [inserted in the margin].¹ The final clause of the act, which declares that this section shall apply as well to foreign vessels as to those of the United States, and that in case of violation a clearance shall be refused them, is a clear indication that Congress did not in this section refer to the shipment of seamen in foreign ports, but had in view acts done in the United States alone. The provision of the statute as to payment of advance wages is not intended to apply to seamen shipped in foreign ports."

* We are unable to assent. We regard the act of Congress as clear and that the theater of its injunction is the harbors of the United States. It is misleading to dwell upon the jurisdiction of other places, which is but another name for control. The jurisdiction, control, is in and by the United States and the command is that advances shall not be deducted from wages of seamen on vessels, American or foreign, while in the waters of the United States. Where they were made or under what circumstances made are not factors in judgment. They are the mere accidents of the situation and if they reach the importance and have the embarrassment depicted by counsel, the appeal must be to Congress, which no doubt will promptly correct the improvidence, if it be such, of its legislation. We have already expressed our view of the control of the language of the law and that it is a barrier against alarms and fault-finding.

It hence follows that we are of opinion the judgment of the Circuit Court of Appeals in each case should be reversed and that of the District Court affirmed.

(248 U. S. 178)

CLEVELAND-CLIFFS IRON CO. et al. v. ARCTIC IRON CO.

(Argued Nov. 22, 1918. Decided Dec. 23, 1918.)

No. 75.

1. COURTS 384 — CERTIFIED QUESTIONS — CERTIFICATE — FACTS AND QUESTIONS.

The certificate on certification of questions from Circuit Court of Appeals for instructions

¹"236. No Advance Wages.—Except in case of whaling vessels, it is not lawful to pay any seaman wages before leaving the port at which such seaman may be engaged in advance of the time when he has actually earned the same, or to pay such advance wages to any other person, or to pay to any one except an officer authorized by Act of Congress to collect fees for such service, any remuneration for the shipment of a seaman. If any such advance wages or remuneration shall have been paid or contracted for the Consul, in making up the account of wages due the seaman upon his discharge, will disregard such advance payment or agreement and award to the seaman the amount to which he would be entitled if no such payment or agreement had been made. Nor should Consuls permit the statute to be evaded indirectly, as by part payment in advance and then stating rate of wages too small. R. S. Secs. 4532, 4533; 23 Stat. L. 55, Sec. 10; 24 Id. 80, Sec. 3; 27 Fed. Rep. 764."

may not so blend facts with questions of law as to require separation for a conclusion as to either.

2. COURTS 384 — CERTIFIED QUESTIONS — CERTIFICATE — EVIDENTIAL AND ULTIMATE FACTS.

Recitals of certificate on certification of questions from Circuit Court of Appeals must distinguish between merely evidential facts and those which are ultimate, and so could furnish support for the legal propositions as to which instructions are asked.

3. COURTS 384 — CERTIFIED QUESTIONS — SENDING UP WHOLE RECORD.

Exercise of the discretion which Judicial Code, § 239 (Comp. St. 1916, § 1216), gives the Supreme Court when questions are certified from Circuit Court of Appeals, to direct the sending up of the whole record, is not called for where the certificate is of such character as not to be embraced by the statute.

Mr. Justice Clarke dissenting in part.

On Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Suit by the Arctic Iron Company against the Cleveland-Cliffs Iron Company and another. From decree for complainant, defendants appealed to the Circuit Court of appeals which certifies questions. 261 Fed. 15. Certificate dismissed.

Messrs. A. C. Dustin, Horace Andrews, and W. P. Belden, all of Cleveland, Ohio, for Cleveland-Cliffs Iron Co.

Messrs. S. W. Shaull, of Tropico, Cal., and C. C. Daniels, of New York City, for Arctic Iron Co.

*Mr. Chief Justice WHITE delivered the opinion of the Court.

The certificate upon which this case is before us contains what are denominated findings of fact grouped under eighteen paragraphs covering eight pages of the record. Upon these findings we are asked to instruct as to six propositions of law, really amounting to twelve since each is twofold, that is, stated in the alternative. But we are of opinion that we may not instruct as to these propositions for the following reasons:

[1] In the first place, because we think it is clear that the statements which are declared in the certificate to be findings of fact are in no true sense entitled to that characterization, since the statements amount but to a narrative of facts mixed with questions of law so interblended, the one with the other, as to cause it to be impossible to conclude as to either the law or the facts without a separation of the two, a duty which we may not be called upon to perform in giving instructions upon questions of law propounded under the statute controlling that subject.

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[2] In the second place, because even if the admixture of law and fact which inheres in the recitals in the certificate be overlooked, the recitals nevertheless, in and of themselves, fail to distinguish between facts which are merely evidential and those which are ultimate and which for that reason would be susceptible of furnishing support for the legal propositions as to which instructions are asked.

[3] It is true, indeed, that the statute gives us the discretion, when a case is certified, to direct the sending up of the whole record, but obviously the exercise of that discretionary power is not called for by a case where the certificate is of such a character as not to be embraced by the statute.

It must be, therefore, that this case affords no ground for directing the sending up of the whole record since here the certificate is inadequate to sustain the right to answer the questions stated. To hold to the contrary would be to cause a mistaken exercise of the right to certify specific questions to become the instrument by which the division of powers made by the statute would be disregarded.

The views which we have stated are in accord with the settled rules concerning the power to certify which have prevailed from the beginning. See *Dillon v. Strathearn Steamship Co.*, 248 U. S. 182, 39 Sup. Ct. 83, 63 L. Ed. 199, this day decided, and the authorities therein cited. It follows that the certificate must be and is dismissed.

Mr. Justice CLARKE, dissenting.

I greatly regret that I cannot concur in the conclusion of the court just announced.

That the certificate of the Circuit Court of Appeals is longer and more detailed than is usual is sufficiently explained by the unusual character of the facts in the case and

of the questions of law involved. The certificate concludes with this statement:

"However, we consider that No. 5 presents a question of law which is, in the view most favorable to plaintiff, the ultimate one; and we desire that this question be answered, without prejudice from the inclusion of others in this certificate, if it shall be thought that the inclusion of the *others is not in accordance with the practice of the supreme court in this respect."

*181

Question No. 5 is in the alternative, viz.:

"5a. When it appeared that the Cliffs had interests and desires pertaining to the new lease which might conflict with the course Kaufman and Breitung desired the Arctic to take, did the Cliffs and Mather perform every duty which by law rested upon him as director of the Arctic and through him upon the Cliffs when Mather withdrew from any further participation in the matter and notified Kaufman and Breitung that they could go ahead and make for the Arctic a contract satisfactory to them, and that the Cliffs and Mather would acquiesce therein? or

"5b. Was it the duty of Mather as director in the Arctic, either to disclose to Kaufman and Breitung what he had done and the knowledge he had acquired as an officer of the Cliffs and on behalf of the Cliffs, or else to resign as a director in the Arctic?"

While these two questions run into each other and could, perhaps, have been written as one, nevertheless, in my judgment, each presents a question of law, arising upon recited facts, and each is stated with sufficient precision to bring it within the terms of section 239 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. 1916, § 1216]) and Rule 37 of this court (32 Sup. Ct. xiv), and I therefore think that these two questions, at least, should have been answered, or that this court should have required that the whole record of the case be sent up for its consideration.

(248 U. S. 276)

MISSOURI PAC. RY. CO. v. STATE OF KANSAS.

(Submitted, Nov. 13, 1918. Decided Jan. 7, 1919.)

No. 14.

STATUTES 35—PASSING OVER VETO—TWO-THIRDS OF "HOUSE."

"House," within Const. art. 1, § 7, cl. 2, requiring a two-thirds vote of each house to pass a bill over a veto, means not the entire membership, but the quorum by section 5 given legislative power.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, House.]

In Error to the Supreme Court of the State of Kansas.

The Missouri Pacific Railway Company was prosecuted by the State of Kansas for violation of a liquor statute. Judgment of conviction was affirmed by the State Supreme Court (96 Kan. 609, 152 Pac. 777, Ann. Cas. 1917A, 612), and defendant brings error. Affirmed.

Messrs. William P. Waggener and B. P. Waggener, both of Atchison, Kan., for plaintiff in error.

Messrs. James P. Coleman, of Topeka, Kan., and Wayne B. Wheeler, of Washington, D. C., for the State of Kansas.

*Mr. Chief Justice WHITE delivered the opinion of the Court.

To avoid penalties sought to be imposed upon it for illegally carrying intoxicating liquors from another state into Kansas, the defendant railroad, plaintiff in error, asserted as follows: (1) That the state law was void as an attempt by the state to regulate commerce and thus usurp the authority alone possessed by Congress; (2) that if such result was sought to be avoided because of power seemingly conferred upon the state by the act of Congress known as the Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699 [Comp. St. 1916, § 8739]), such act was void for repugnancy to the Constitution of the United States because in excess of the power of Congress to regulate commerce and as a usurpation of rights reserved by the Constitution to the states; (3) because, even if the Webb-Kenyon Law was held not to be repugnant to the Constitution for the reasons stated, nevertheless, that assumed law afforded no basis for the exertion of the state power in question, because it had never been enacted by Congress conformably to the Constitution, and therefore, in legal intentment, must be treated as nonexistent.

It is conceded that the ruling of this court, sustaining the Webb-Kenyon Law as a valid exercise by Congress of its power to regu-

late commerce (Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, 325, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845), disposes of the first two contentions and leaves only the third for consideration. In fact, in argument it is admitted that such question alone is relied upon. The proposition is this, that as the provision of the Constitution exacting a two-thirds vote of each house to pass a bill over a veto means a two-thirds vote, not of a quorum of each house, but of all the members of the body, the Webb-Kenyon Act was never enacted into law, because after its veto by the President it received in the Senate only a two-thirds vote of the Senators present (a quorum), which was less than two-thirds of all the members elected to and entitled to sit in that body.

Granting the premise of fact as to what the face of the journal discloses, and assuming for the sake of the argument (Flint v. Stone Tracy Co., 220 U. S. 107, 143, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Rainey v. United States, 232 U. S. 310, 317, 34 Sup. Ct. 429, 58 L. Ed. 617) that the resulting question would be justiciable, we might adversely dispose of it by merely referring to the practice to the contrary which has prevailed from the beginning. In view, however, of the importance of the subject, and with the purpose not to leave unnoticed the grave misconceptions involved in the arguments by which the proposition relied upon is sought to be supported, we come briefly to dispose of the subject.

The proposition concerns clause 2 of section 7 of article 1 of the Constitution, providing that in case a bill passed by Congress is disapproved by the President—

"* * * he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. * * *

The extent of the vote exacted being certain, the question depends upon the significance of the words "that house"; that is, whether those words relate to the two houses by which the bill was passed and upon which full legislative power is conferred by the Constitution in case of the presence of a quorum (a majority of the members of each house; section 5, art. 1); or whether they refer to a body which must be assumed to embrace, not a majority, but all its members for the purpose of estimating the two-thirds vote required. As the context leaves no doubt that the provision was dealing with the two houses as organized and enti-

tioned to exert legislative power, it follows that to state the contention is to adversely dispose of it.

But, in addition, the erroneous assumption upon which the contention proceeds is plainly demonstrated by a consideration of the course of proceedings in the convention which framed the Constitution, since, as pointed out by Curtis (History of the Constitution, vol. 2, p. 267 note), it appears from those proceedings that the veto provision as originally offered was changed into the form in which it now stands after the adoption of the article fixing the quorum of the two houses for the purpose of exerting legislative power and with the object of giving the power to override a veto to the bodies as thus organized. A further confirmation of this view is afforded by the fact that there is no indication in the Constitutions and laws *of the several states existing before the Constitution of the United States was framed that it was deemed that the legislative body which had power to pass a bill over a veto was any other than the legislative body organized conformably to law for the purpose of enacting legislation, and hence that the majority fixed as necessary to override a veto was the required majority of the body in whom the power to legislate was lodged. Indeed, the absolute identity between the body having authority to pass legislation and the body having the power in case of a veto to override it was clearly shown by the Constitution of New York, since that Constitution, in providing for the exercise of the right to veto by the council, directed that the objections to the bill be transmitted for reconsideration to the Senate or House in which it originated. "but if, after such reconsideration, two-thirds of the Senate or House of Assembly shall, notwithstanding such objections, agree to pass the same, it shall be * * * sent to the other branch of the Legislature, where it shall also be reconsidered, and if approved by two-thirds of the members, present, shall be a law," thus identifying the bodies embraced by the words "Senate" and "House" and definitely fixing the two-thirds majority required in each as two-thirds of the members present.

The identity between the provision of article 5 of the Constitution, giving the power by a two-thirds vote to submit amendments, and the requirements we are considering as to the two-thirds vote necessary to override a veto makes the practice as to the one applicable to the other.

At the first session of the first Congress in 1789 a consideration of the provision authorizing the submission of amendments necessarily arose in the submission by Congress of the first ten amendments to the Constitution embodying a bill of rights. They were all adopted and submitted by each house organized as a legislative body *pursuant to the

Constitution, by less than the vote which would have been necessary had the constitutional provision been given the significance now attributed to it. Indeed, the resolutions by which the action of the two houses was recorded demonstrate that they were formulated with the purpose of refuting the contention now made. The Senate Record was as follows:

"Resolved: That the Senate do concur in the resolve of the House of Representatives on 'articles to be proposed to the Legislatures of the states as amendments to the Constitution of the United States,' with amendments; two-thirds of the Senators present concurring therein." 1st Cong. (1st Sess.) September 9, 1789, Senate Journal, 77.

And the course of action in the House and the record made in that body is shown by a message from the House to the Senate which was spread on the Senate Journal as follows:

"A message from the House of Representatives. Mr. Beckley, their clerk, brought up a resolve of the House of this date, to agree to the * * * amendments proposed by the Senate to 'Articles of amendment to be proposed to the Legislatures of the several states as amendments to the Constitution of the United States,' * * * ; two-thirds of the members present concurring on each vote. * * *" 1st Cong. (1st Sess.) Sept. 21, 1789, Senate Journal, 83.

When it is considered that the chairman of the committee in charge of the amendments for the House was Mr. Madison, and that both branches of Congress contained many members who had participated in the deliberations of the convention or in the proceedings which led to the ratification of the Constitution, and that the whole subject was necessarily vividly present in the minds of those who dealt with it, the convincing effect of the action cannot be overstated.

*But this is not all, for the Journal of the Senate contains further evidence that the character of the two-thirds vote exacted by the Constitution (that is, two-thirds of a quorum) could not have been overlooked, since that Journal shows that at the very time the amendments just referred to were under consideration there were also pending other proposed amendments, dealing with the treaty and lawmaking power. Those concerning the treaty-making power provided that a two-thirds vote of all the members (instead of that proportion of a quorum) should be necessary to ratify a treaty dealing with enumerated subjects, and exacted even a larger proportionate vote of all the members in order to ratify a treaty dealing with other mentioned subjects; and those dealing with the lawmaking power required that a two-thirds (instead of a majority) vote of a quorum should be necessary to pass a law concerning specified subjects.

The construction which was thus given to

the Constitution in dealing with a matter of such vast importance, and which was necessarily sanctioned by the states and all the people, has governed as to every amendment to the Constitution submitted from that day to this. This is not disputed, and we need not stop to refer to the precedents demonstrating its accuracy. The settled rule, however, was so clearly and aptly stated by the Speaker, Mr. Reed, in the House, on the passage in 1898 of the amendment to the Constitution providing for the election of Senators by vote of the people, that we quote it. The ruling was made under these circumstances: When the vote was announced, yeas, 184, and nays, 11, in reply to an inquiry from the floor as to whether such vote was a compliance with the two-thirds rule fixed by the Constitution, as it did not constitute a two-thirds vote of all the members elected, the speaker said:

"The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision *of the Constitution says 'two-thirds of both houses.' What constitutes a house? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a house to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted, and two-thirds of those voting are sufficient in order to accomplish the object. * * * 5 Hinds' Precedents of the House of Representatives, pp. 1009-1010.

This occurrence demonstrates that there is no ground for saying that the adherence to the practice settled in both houses in 1789 resulted from a mere blind application of an existing rule, a conclusion which is also clearly manifested, as to the Senate, by proceedings in that body in 1861 where, on the passage of a pending amendment to the Constitution, as the result of an inquiry made by Mr. Trumbull relative to the vote required to pass it, it was determined by the Senate by a vote of 33 to 1 that two-thirds of a quorum only was essential. 36 Cong. (2d Sess.) March 2, 1861, Senate Journal, 383.

In consequence of the identity in principle between the rule applicable to amendments to the Constitution and that controlling in passing a bill over a veto, the rule of two-thirds of a quorum has been universally applied as to the two-thirds vote essential to pass a bill over a veto. In passing from the subject, however, we again direct attention to the fact that in both cases the continued application of the rule was the result of no mere formal following of what had gone before but came from conviction expressed,

after deliberation, as to its correctness by many illustrious men.

While there is no decision of this court covering the sub*ject, in the state courts of last resort the question has arisen and been passed upon, resulting in every case in the recognition of the principle that, in the absence of an express command to the contrary, the two-thirds vote of the house required to pass a bill over a veto is the two-thirds of a quorum of the body as empowered to perform other legislative duties. *Warehouse v. McIntoch*, 1 Ala. App. 407, 56 South. 102; *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636; *Southworth v. Railroad*, 2 Mich. 287; *Smith v. Jennings*, 67 S. C. 324, 45 S. E. 821; *Green v. Weller*, 32 Miss. 650. We say that the decisions have been without difference, for the insistence that the ruling in *Minnesota ex rel. Eastland v. Gould*, 31 Minn. 189, 17 N. W. 276, is to the contrary is a wholly mistaken one, since the decision in that case was that, as the state Constitution required a vote of the majority of all the members elected to the house to pass a law, the two-thirds vote necessary to override a veto was a two-thirds vote of the same body.

Any further consideration of the subject is unnecessary, and our order must be, and is,

Judgment affirmed.

(248 U. S. 369)

ERIE R. CO. v. HAMILTON, County Treasurer.

(Argued Dec. 19, 1918. Decided Jan. 7, 1919.)

No. 112.

COURTS  391(1)—STATE COURTS—MODE OF REVIEW—WRIT OF ERROR—VALIDITY OF TREATY.

Validity of treaty is not drawn in question, so as to allow, under Judicial Code, § 237, as amended by Act Sept. 6, 1916, § 2 (Comp. St. 1916, § 1214), review of decision of state court by writ of error, but the remedy is by certiorari, decision being merely as to special construction of treaty as giving a consul certain power, under which a right is claimed.

In Error to the Supreme Court of the State of New York.

Action by Walter G. Hamilton, County Treasurer, etc., against the Erie Railroad Company. Judgment for plaintiff (170 App. Div. 901, 154 N. Y. Supp. 1125) was affirmed by the Court of Appeals of New York (219 N. Y. 343, 114 N. E. 399, Ann. Cas. 1918A, 928), and defendant brings error. Writ dismissed.

Mr. William C. Cannon, of New York City for plaintiff in error.

Messrs. Herbert C. Smyth and Frederic C. Scofield, both of New York City, for defendant in error.

Mr. Justice CLARKE delivered the opinion of the Court.

*370 The Erie Railroad Company was sued in the state of New York by the defendant in error to recover damages *for the claimed negligent causing of the death of Stephen Mistschook, who was a subject of the Emperor of Russia and who left surviving him a wife and three children resident in Russia.

After denying negligence and liability, the company averred that it had settled the claim with the Russian consul resident at New York, who, acting under authority of the treaties between the United States and the Emperor of Russia, and in behalf of the widow and next of kin of the deceased, had executed in due form of law and, for the consideration of \$400, had delivered a release of all claims and demands arising from the death complained of.

The claim at the trial was not, and it is not now, that the Russian treaty of 1832 (8 Stat. 444, 448, art. 8) in terms gave the consul the power to make the settlement relied upon, but that under the treaty of the United States with Spain, invoked through the "favored nation" paragraph of the Russian treaty, he had power to make it.

The trial court held that the Russian consul had no authority to make the settlement pleaded or to give a valid release and the judgment recovered by the plaintiff (the defendant in error), affirmed by the proper Appellate Division of the Supreme Court (Hamilton v. Erie R. Co., 170 App. Div. 901, 154 N. Y. Supp. 1125) and by the Court of Appeals (219 N. Y. 343, 114 N. E. 399, Ann. Cas. 1918A, 928) is argued as if properly before us for review on writ of error.

Since the judgment which the plaintiff in error seeks to review was entered on December 12, 1916, the record presents the question whether writ of error or writ of certiorari was the appropriate remedy for bringing the case into this court under section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087), as amended by act of Congress, approved September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. 1916, § 1214).

*371 From the statement of the case which we have made it is clear that the railroad company has relied throughout the litigation upon the validity of the treaty of the United States with Russia and that it has claimed rights under a *construction of that treaty which were denied by the defendant in error

and by the New York courts. What the proper construction of the treaty is, is the only question argued in this court.

The only provisions of the act of September 6, 1916, applicable to the review of such a case as we have here are these:

"A final judgment * * * in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty * * * of * * * the United States, and the decision is against their (its) validity * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. * * *

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there [shall] be certified to it for review and determination * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where any title, right, privilege, or immunity is claimed under * * * any treaty * * * and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by either party, under such * * * treaty. * * *

Since, as we have seen, the plaintiff in error has not assailed the validity of the Russian treaty but on the contrary has claimed under an asserted construction of it, which was denied, it is clear that the case cannot come into this court by writ of error, under the statute quoted. At most the railroad company asserted a right under the treaty which was denied to it by the state courts and this under the plain reading of the statute could give it a right to review here only by writ of certiorari.

The distinction between assailing the validity of a treaty or of a statute and relying upon a special construction of either is patent and has been the subject of such full discussion by this court that it should not now be considered either doubtful or obscure. Baltimore & Potomac R. R. Co. v. Hopkins, 130 U. S. 210, 9 Sup. Ct. 503, 32 L. Ed. 908; District of Columbia v. Gannon, 130 U. S. 227, 9 Sup. Ct. 508, 32 L. Ed. 922; Louisville & Nashville R. R. Co. v. Louisville, 166 U. S. 709, 715, 17 Sup. Ct. 725, 41 L. Ed. 1173; United States v. Lynch, 137 U. S. 280, 285, 11 Sup. Ct. 114, 34 L. Ed. 700; South Carolina v. Seymour, 153 U. S. 353, 358, 14 Sup. Ct. 871, 38 L. Ed. 742; United States ex rel. Taylor v. Taft, 203 U. S. 461, 464, 27 Sup. Ct. 148, 51 L. Ed. 269; Stadelman et al. v. Miner et al., 246 U. S. 544, 38 Sup. Ct. 359, 62 L. Ed. 875.

For want of jurisdiction the writ of error is

Dismissed.

(248 U. S. 363)

MISSOURI, K. & T. RY. CO. v. SEALY et al.

(Argued and Submitted Dec. 18, 1918. Decided Jan. 7, 1919.)

No. 90.

1. COURTS ⇨396(4)—ERROR TO STATE COURT—FEDERAL QUESTION—TIME TO RAISE.

Claim that the case is governed by federal law, raised after the case had twice been passed on by state Supreme Court, is too late to allow of error to such court.

2. COMMERCE ⇨10—CARRIERS—STATE LAWS.

Prior to the Carmack Amendment (Comp. St. 1916, §§ 8604a, 8604aa), rights of parties, where carrier, without goods being delivered to it for shipment, issued bills of lading to shipper's order, on which another made advances, were governed by state law.

3. CARRIERS ⇨23—CARMACK AMENDMENT—RETROACTIVE OPERATION.

The Carmack Amendment (Comp. St. 1916, §§ 8604a, 8604aa) does not apply to any cause of action arising long before its passage.

In Error to the Supreme Court of the State of Kansas.

Action by John Sealy and others, partners as Hutchings, Sealy & Co., against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiffs was affirmed by the Supreme Court of Kansas (98 Kan. 225, 158 Pac. 62), and defendant brings error. Dismissed.

Mr. Joseph M. Bryson, of St. Louis, Mo., for plaintiff in error.

Messrs. Maurice H. Winger and Arthur Miller, both of Kansas City, Mo., for defendants in error.

*Mr. Justice BRANDEIS delivered the opinion of the Court.

In June, 1900, the Missouri, Kansas & Texas Railway Company issued bills of lading to shipper's order covering 27 carloads of grain to be shipped from Kansas City, Missouri, to Galveston, Texas. No grain was in fact delivered to it for shipment; but before the fraud was discovered, the alleged shipper transferred the bills of lading to Hutchings, Sealy & Co., who made advances thereon. The advances were not fully repaid, and in 1905 they brought suit against the railroad in a state district court of Kansas. The railroad defended on the ground that since the bills of lading had been delivered in Missouri, the transaction was governed by the Missouri law and that under the law of that state, the railroad was not liable. For more than eight years the record contained no suggestion of a federal question, the case having meanwhile been passed upon twice by the Supreme Court of Kansas. *Railway Co. v. Hutchings*, 78 Kan. 758, 99 Pac. 230; *Hutch-*

ings v. Railway Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A. (N. S.) 500. Thereafter, in 1913, the railroad presented the claim that the transaction was governed by the federal law, and that, by it, the defendant was not liable. The Supreme Court of Kansas, apparently as a matter of state practice, declared that the contention came too late to be considered, and entered judgment for the plaintiff. *Hutchings, Sealy & Co. v. Missouri, K. & T. R. Co.*, 98 Kan. 225, 158 Pac. 62. The case comes here on writ of error under section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156 [Comp. St. 1916, § 1214]).

[1-3] *The federal question was not seasonably raised. *Bonner v. Gorman*, 213 U. S. 86, 91, 29 Sup. Ct. 483, 53 L. Ed. 709; *Louisville & Nashville Railroad Co. v. Woodford*, 234 U. S. 46, 51, 34 Sup. Ct. 739, 58 L. Ed. 1202. But it is also unsubstantial. Prior to the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 584, 595 [Comp. St. 1916, §§ 8604a, 8604aa]) the rights of the parties were governed by state law (*Boston & Maine Railroad v. Hooker*, 233 U. S. 97, 109-110, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; *Chicago, Milwaukee & St. Paul Ry. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688), and the Carmack Amendment does not apply, as the cause of action, if any, arose six years before the passage of that act.

The writ of error is dismissed.

(248 U. S. 289)

FLEXNER v. FARSON et al.

(Submitted Dec. 18, 1918. Decided Jan. 7, 1919.)

No. 101.

CONSTITUTIONAL LAW ⇨309(3)—JUDGMENT ⇨818(2)—PARTNERSHIP ⇨204—DUE PROCESS—SERVICE ON AGENT OF NONRESIDENT PARTNER—LIEN.

A judgment against nonresident individuals, though members of a partnership, doing business in the state, on service under Civ. Code Prac. Ky. § 51, authorizing summons on their agent in charge of the business, is void for want of due process; as citizens of one state cannot, like a foreign corporation, be prohibited from doing business in another state, and so do not impliedly consent to be bound by the prescribed service.

In Error to the Supreme Court of the State of Illinois.

Action by Bernard Flexner against John Farson, Jr., and others, partners as Farson,

Son & Co. Judgment for defendants was affirmed by the Supreme Court of Illinois (268 Ill. 435, 109 N. E. 327, Ann. Cas. 1916D, 810), and plaintiff brings error. Affirmed.

Mr. J. S. Laurent, of Louisville, Ky., for plaintiff in error.

Messrs. Harry P. Weber and George W. Miller, both of Chicago, Ill., for defendants in error.

*Mr. Justice HOLMES delivered the opinion of the Court.

This is an action brought by the plaintiff in error upon a judgment for money rendered by a Kentucky Court. The declaration alleges that the transaction in respect of which the judgment was rendered took place at Louisville, Kentucky, and that at that time the defendants were doing business there as partners through Washington Flexner, who was and continued to be their agent until the time of this suit. It further alleges that the defendants were non-residents and that the service of summons of the Kentucky suit was made upon Washington Flexner in accordance with a Kentucky statute (Civ. Code Prac. § 51) authorizing it to be made in that way. The defendant William Farson was the only one served with process in the present action and he pleaded that the defendants in the former suit did not reside in Kentucky, were not served with process and did not appear; that Washington Flexner was not their agent at the time of service upon him; that the Kentucky statute relied upon was unconstitutional; that the Kentucky Court had no jurisdiction, and that its judgment was void under the Constitution of the United States. The plaintiff demurred to the pleas, and stood upon his demurrer when it was overruled, whereupon judgment was entered for the defendants. There was an appeal to the Supreme Court of the State on the ground that the Court below did not give full faith and credit to the Kentucky judgment and erred in holding the Kentucky statute as to service unconstitutional. The Supreme Court affirmed the judgment below. 268 Ill. 435, 109 N. E. 327, Ann. Cas. 1916D, 810. The same errors are alleged here.

It is argued that the pleas tacitly admit that Washington Flexner was agent of the firms at the time of the transaction sued upon in Kentucky, and the Kentucky statute is construed as purporting to make him agent to receive service in suits arising out of the business done in that State. On this construction it is said that the defendants by doing business in the State consented to be bound by the service prescribed. The analogy of suits against insurance companies based upon such service is invoked. Mutual Reserve Fund Life As-

sociation v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451; Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U. S. 93, 96, 37 Sup. Ct. 344, 61 L. Ed. 610. The State had no power to exclude the defendants and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void. If the Kentucky statute purports to have the effect attributed to it, it cannot have that effect in the present case. New York Life Ins. Co. v. Dunlevy, 241 U. S. 518, 522, 523, 36 Sup. Ct. 613, 60 L. Ed. 1140.

Judgment affirmed.

(248 U. S. 349)

UNITED STATES v. COMYNS et al.

(Argued Nov. 4 and 5, 1918. Decided Jan. 7, 1919.)

No. 235.

1. COURTS $\S$ 385(1½)—REVIEW IN CRIMINAL CASE—CONSTRUCTION OF STATUTE.

Decision sustaining demurrer to indictment held based on a construction of Criminal Code, § 215 (Comp. St. 1916, § 10385), as to using mails to execute a scheme to defraud, and so to allow review under Criminal Appeals Act (Comp. St. 1916, § 1704) by error to District Court.

2. INDICTMENT AND INFORMATION $\S$ 121(5)—DEMURRER—BILL OF PARTICULARS.

In reviewing judgment sustaining demurrer to indictment, bill of particulars is to be disregarded; it forming no part of the record for the purpose of the demurrer.

3. POST OFFICE $\S$ 35—USE OF MAILS—"SCHEME TO DEFRAUD BY FRAUDULENT PROMISES."

A scheme to get money by making promises which there is no intention to perform is one to defraud by fraudulent promises, within Criminal Code, § 215 (Comp. St. 1916, § 10385), as to using the mails to execute the scheme.

In Error to the District Court of the United States for the Western District of Washington.

Edward M. Comyns and another were indicted for violation of Criminal Code, § 215. Demurrer to the indictment was sustained, and the United States brings error. Reversed.

Mr. Assistant Attorney General Kearful, for the United States.

Messrs. C. A. Keigwin and William R. Andrews, both of Washington, D. C., for defendants in error.

*Mr. Justice PITNEY delivered the opinion of the Court.

This is a review under Criminal Appeals Act March 2, 1907, 34 Stat. 1246, c. 2564 (Comp. St. 1916, § 1704), of a judgment of the District Court sustaining a demurrer to an indictment found under section 215 of the Criminal Code (Act March 4, 1909, 35 Stat. 1088, 1130, c. 321 [Comp. St. 1916, § 10385]).

That section provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be placed, any letter * * * in any post office, or station thereof, * * * to be sent or delivered by the post-office establishment of the United States * * * shall be fined, * * *" etc.

The indictment contains four counts, but a recital of the first will suffice, since the others adopt by reference that part of its averments upon which is raised the question we have to determine. Omitting formal matters, that count recites that Comyns and Byron had devised a scheme and artifice to defraud nine persons named and *divers other persons to the grand jurors unknown, that is to say, to obtain from them and each of them their moneys and property by means of divers false and fraudulent pretenses and representations and to induce the victims to give to the defendants and each of them such moneys and property, with the intent on the part of the defendants and each of them to convert the same to their own use, which scheme was as follows: That defendants should represent that Comyns was a lawyer, admitted to practice before the United States Land Office, and that Byron was a locator, "and that they could locate said parties and secure for them the preference right to purchase from the United States of America under the Timber and Stone Act of June 3, 1878 [20 Stat. 89, c. 151], certain land within the Western district of Washington for the sum of \$2.50 per acre, by filing an application to purchase under said act, and that the said property was worth more than that sum," and that they would agree with the parties to be defrauded that they would charge each of them a fee for locating them and securing for them the title to said land, a part of the fee, called the initial fee, to be paid at the time of making the agreement, and the balance when title to the land was secured, "and that if said parties to be defrauded failed to get title to said land, then the said defendants and each of them would refund to said parties to be defrauded the amount of the fee already so paid to said defendants";

whereas, as defendants and each of them knew, defendants could not locate said parties and could not secure for them the preference right to purchase the land mentioned for \$2.50 per acre by filing said application, "and the agreement, as to the land, to be performed in consideration of the payment of said fee was for the purpose of securing the payment of said initial fee and for the purpose of delaying the said parties to be defrauded from demanding the repayment of said initial fee and for the purpose of preventing said *parties to be defrauded from discovering the fact that they had been defrauded and disclosing said fact to others, and said defendants and each of them intended to appropriate to their own use and the use of each of said defendants said initial fee, and did not intend to refund said initial fee or any part thereof if said parties to be defrauded failed to get title to said land in accordance with said agreement." Then follows an averment that defendants made use of the mails for the purpose of executing the scheme by causing a letter inclosing a timber and stone application to be sent by mail to the Register of the Land Office.

At first the demurrer was overruled by the District Court, but at the same time it was ordered that the government should furnish a bill of particulars "stating the reason why the land in question could not be secured by the applicants." A bill of particulars was filed setting up, in brief, that the lands could not be secured under the Timber and Stone Act (a) because they were covered by a list of selections made by the state of Washington in lieu of school sections 16 and 36; and (b) because the statements to be made in the application as to the character of the land were to be made on information and belief, and not from the applicant's personal knowledge after examination of the land as required by the rules of the general land office. The defendants moved to strike out the bill of particulars, and this was treated by the District Court as a petition for a rehearing of the demurrer to the indictment as amplified by the bill of particulars; and thereupon the demurrer was sustained.

[1] Notwithstanding a contention to the contrary, it seems to us that the decision was based upon a construction of section 215 of the Criminal Code, and hence that we have jurisdiction under the Criminal Appeals Act. *United States v. Putten*, 226 U. S. 525, 535, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325; *United States v. Nixon*, 235 U. S. 231, 235, 35 Sup. Ct. 49, 59 L. Ed. 207.

[2] *In reviewing the judgment we shall disregard the bill of particulars, since this forms no part of the record for the purposes of the demurrer. *Dunlop v. United States*, 165 U. S. 486, 491, 17 Sup. Ct. 375, 41 L. Ed. 799.

[3] In brief, the indictment avers that

the scheme of defendants was to induce their intended victims to part with their money by representing to them that certain land (not described except generally as being located in the Western district of Washington) could be purchased from the United States under the Timber and Stone Act for less than its real value if the victims would employ defendants to secure such land and would pay a part of the proposed fee in advance; the defendants agreeing at the same time that in case of nonsuccess the money thus prepaid would be refunded; whereas in truth, as defendants well knew, for some reason not specified they could not carry out the agreement, and the purpose of making it was to secure the payment of the initial fee by the intended victims, which defendants intended to appropriate to their own use and did not intend to refund in case of a failure to secure title in accordance with the agreement.

In our opinion such a scheme is a "scheme or artifice to defraud by means of false or fraudulent pretenses, representations, or promises" within the meaning of section 215 of the Criminal Code. To use the mails in order to carry out a scheme for getting money by the making of promises or agreements which, whether known to be impossible of performance or not, there is no intention to perform, is a forbidden use of the facilities of the post office department. *Durland v. United States*, 161 U. S. 306, 313, 16 Sup. Ct. 508, 40 L. Ed. 709. The District Court erred in holding otherwise, and its judgment is Reversed.

(248 U. S. 294)

CITY OF ENGLEWOOD v. DENVER & S. P. RY. CO.

(Submitted Dec. 19, 1918. Decided Jan. 7, 1919.)

No. 106.

CARRIERS — 12(9) — CONSTITUTIONAL LAW — 135 — IMPAIRING OBLIGATION OF CONTRACT — CARRIER'S FRANCHISE.

Though a town ordinance, granting, under a law of Colorado, a street railway franchise, allowed certain fares on condition that transfers were given to the line of another company, held, the state, without impairing the obligation of contract, could empower the Public Utilities Commission to regulate the matter of fares.

In Error to the Supreme Court of the State of Colorado.

Suit by the City of Englewood against the Denver & South Platte Railway Company. Judgment for plaintiff was reversed by the Supreme Court of Colorado (62 Colo. 229, 161 Pac. 151), and plaintiff brings error. Dismissed.

Mr. L. F. Twitchell, of Denver, Colo., for plaintiff in error.

Mr. Fred Farrar, of Denver, Colo., for defendant in error.

*Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill to compel the defendant to arrange for passengers on its road to be transported without extra fare over the line of the Denver City Tramway Company from a point of connection and in like manner for *passengers on that company's line to be carried over the defendant's line without additional charge. The defendant operates a street railway under a franchise granted by the plaintiff while a town. By section 6 of the ordinance making the grant the grantees were allowed to charge certain fares provided that they should make the arrangement stated above. The defence pleaded against being required to comply with these terms is that the Denver City Tramway Company charges five cents, the maximum fare allowed, for its part of the service, so that the defendant gets nothing, and that the defendant filed a schedule of rates with the State Public Utilities Commission which now are the defendant's established rates and charges. On demurrer the Supreme Court of the State held that this town, at least, deriving its powers from legislative grant, could make no contract of this sort that was not subject to control by the legislature, that the Public Utilities Commission had been authorized by the legislature to regulate the matter in controversy, that it had done so, and that this proceeding should be dismissed.

Of course we do not go behind the decision of the Court that the matter in controversy was subject to regulation by the Commission and was regulated by it in due form if the State could confer that power. The plaintiff says that the State could not confer it since to do so would impair the obligation of a contract. Upon that point we agree with the Court below that clearer language than can be found in the State laws and this ordinance must be used before a public service is withdrawn from public control. *Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin*, 238 U. S. 174, 180, 35 Sup. Ct. 820, 59 L. Ed. 1254. The cases generally are cases where the railroad or other company sets up contract rights against the city. Whether when the railroad consents a legislature would not have all the power that the city could have to modify even a constitutionally protected contract need not be considered *here. If we deal with the present case on the merits there seems to be no sufficient reason why the writ of error should not be dismissed. It is giving the plaintiff the benefit of a very great doubt if we assume that the question on the merits was saved.

Writ of error dismissed.

(248 U. S. 272)

ANDREWS v. VIRGINIAN RY. CO.

(Argued Dec. 16 and 17, 1918. Decided Jan. 7, 1919.)

No. 82.

COURTS ⇐394(1)—REVIEW OF STATE COURT—
MODE OF REVIEW — CHANGE — EXCEPTION
—JUDGMENT RENDERED BEFORE ACT.

A judgment of a state trial court within a class as to which power of national Supreme Court to review by writ of error was taken away, and authority to certiorari was substituted, by Act Sept. 6, 1916, § 2 (Comp. St. § 1214), was not within the exception of a judgment rendered before the act became operative; it not being till thereafter that the state Court of Appeals refused to exercise its discretionary power of review, rendering the trial court's judgment a final judgment of the court of last resort of the state, which alone can be reviewed.

In Error to the Roanoke County Circuit Court, State of Virginia.

Action by Maude L. Andrews, administratrix of A. W. Andrews, deceased, against the Virginian Railway Company. The Court of Appeals of Virginia refused to review a judgment for defendant (118 Va. 482, 87 S. E. 577), and plaintiff brings error. Dismissed.

*To recover for the wrongful death of Andrews, a locomotive engineer in the employ of the defendant in error, the plaintiff in error, the representative of his estate, commenced this suit in April, 1914. Both the Employers' Liability Act and the act of Congress providing for the inspection of boilers of locomotives were alleged. Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. §§ 8657-8665); Act Feb. 17, 1911, c. 103, 36 Stat. 913 (Comp. St. §§ 8630-8639). On October 12, 1914, there was a judgment on a verdict in favor of the plaintiff. A writ of error having been allowed by the Court of Appeals of Virginia, the judgment was, on January 13, 1916, reversed and the case remanded for a new trial. Virginian Ry. Co. v. Andrews, Adm'x, 118 Va. 482, 87 S. E. 577. The circuit court of Montgomery county, in which the case was tried, thereupon, by consent of the parties, transmitted it for trial to the circuit court of Roanoke county, in which court, on the 16th day of June, 1916, there was judgment in favor of the defendant. Thereupon a petition for writ of error to review this judgment was separately and out of term presented to the judges of the Court of Appeals and was denied, and on the opening of the term was, in accordance with the Virginia law, presented to the court, and was there finally denied on November 13, 1916. Then, on the 27th of November, 1916, a petition was presented to the presiding judge of the circuit court of Roanoke county for the

allowance of a writ of error from this court, to review the judgment of that court of June 16, 1916, which was allowed, resulting in the case which is before us.

Messrs. A. P. Staples and A. B. Hunt, both of Roanoke, Va., for plaintiff in error.

Messrs. Harvey T. Hall and G. A. Wingfield, both of Roanoke, Va., for defendant in error

*Mr. Chief Justice WHITE, after making the foregoing statement of the case, delivered the opinion of the Court.

At the threshold, there arises a question of our jurisdiction which we may not overlook and which we must therefore decide. The question is, has this court power by writ of error to review the judgment below; or, in other words, is the authority of the court to review that judgment confined by the Act of September 6, 1916, c. 448, 39 Stat. 726 (Comp. St. § 1214), to the right to do so by certiorari in the mode and time provided by that act? Considering the subject only from the character of the controversy, it is indisputable that the case comes within the generic class as to which the power to review by writ of error was taken away by the act of 1916 and the authority to certiorari substituted. It results that, unless the judgment in question comes under some limitation or exception provided by the statute to the general rule which it establishes, we have no jurisdiction.

There is no room for such exception unless it results from the provision in the statute taking out of the reach of its terms judgments rendered before it became operative. The act was approved on September 6, 1916, and was made operative 30 days thereafter. In form, the judgment to which the writ of error was addressed was rendered on June 16, 1916, before the operation of the statute, and was therefore outside of its provisions. But the question remains, Was the judgment a final judgment at the date named, or did it become so only by the exercise by the Court of Appeals of its power as manifested by its declining to take jurisdiction on November 13, 1916, *after the passage of the act? Undoubtedly, before the action of the Court of Appeals, the judgment was not final and was susceptible of being reviewed and reversed by that court. Undoubtedly, also, until the Court of Appeals acted, the trial court was not the court of last resort of the state whose action could be here reviewed. The contention, therefore, that the judgment of the trial court was a final judgment susceptible of being here reviewed by writ of error must rest upon the impossible assumption that the finality of that judgment existed before the happening of the cause by

which alone finality could be attributed to it.

It is true that under the law of Virginia, in a case like this the power of the Court of Appeals to review the judgment of the trial court was gracious or discretionary, and not imperative or obligatory; but the existence of the power, and not the considerations moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date, or became so only from the date of the happening of the condition—the action of the Court of Appeals—which gave to that judgment its only possible character of finality for the purpose of review in this court. Nor is the result thus stated a technical one, since it rests upon the broadest considerations inhering in the very nature of our constitutional system of government, and material, therefore, to the exercise by this court of its rightful authority. That this is true, would seem to be demonstrated by considering that if it were not so a judgment of a state court susceptible of being reviewed by this court would, notwithstanding that duty, be open at the same time to the power of a state court to review and reverse, thus, in substance, depriving each court of its power and begetting the possibility of conflict and confusion.

From this it follows that the judgment to which the writ of error was addressed was in substance a judgment rendered after the going into effect of the act of 1916, and was only reviewable by certiorari, as provided in that act. The writ of error, therefore, must be and it is

Dismissed for want of jurisdiction.

(248 U. S. 334)

GUERINI STONE CO. v. P. J. CARLIN
CONST. CO.

(Argued Nov. 7 and 8, 1918. Decided Jan. 7, 1919.)

No. 218.

1. CONTRACTS ⚡303(4) — DISCHARGE BY BREACH.

A breach of delay clause by the general contractors, so serious as to result in a total suspension of the work, with no reasonable prospect of resumption within any reasonable time, justified the subcontractor in declining to proceed further, notwithstanding another clause extending, for subcontractor's benefit, the stipulated time of completing contract in case of delay by default of general contractors, etc.

2. DAMAGES ⚡159(6)—QUANTUM MERUIT—EVIDENCE.

The complaint of a subcontractor, who on the ground of a total breach of the contract by the principal contractor, declined to go on with the work, and sued for damages, containing a

claim in the nature of a quantum meruit for labor performed and materials furnished, evidence that when plaintiff ceased work it had left on the premises certain materials, machinery, and tools that defendant took and appropriated to its use, which item was specified in the bill of particulars, is not subject to objection of being immaterial and not within the pleadings.

3. APPEAL AND ERROR ⚡662(3) — CONFLICT BETWEEN OPINION AND RECORD.

Though the opinion of the Circuit Court of Appeals shows that counsel for plaintiff in that court stated that the quantum meruit claim had been disregarded, and that the trial proceeded solely on ground of breach of special contract, the bill of exceptions failing to bear this out, the trial court cannot, on the theory that such was the fact, be put in error in admission of evidence.

4. DAMAGES ⚡124(1)—BREACH OF BUILDING CONTRACT—MATERIALS ON HAND.

Within the rule giving a building subcontractor who declined to go on with the work, because of total breach of the contract by the principal contractor, right to recover what it had expended towards performance of the contract, subject to deduction for materials on hand when performance was stopped, materials then on hand being appropriated by the general contractor to its use should be treated as a part of subcontractor's contribution to performance of the contract.

5. ACTION ⚡28—WAIVER OF TORT.

One whose materials are appropriated may waive any tort therein, and sue on implied assumpsit.

6. DAMAGES ⚡124(1)—BREACH OF BUILDING CONTRACT—CONTRACTOR'S EXPENDITURES.

Tools and appliances brought to the premises by plaintiff building subcontractor for use in performance of the contract, and so used by it, till it declined to go on with the work, because of defendant principal contractor breaching the contract, and then left in position, being accepted and retained by defendant, are not to be considered outside the contract, but as part of plaintiff's expenditures on which damages from defendant's breach are to be computed.

7. CONTRACTS ⚡303(5) — BUILDING CONTRACTS—DEFAULT IN PARTIAL PAYMENTS.

In a building or construction contract calling for the performing of labor and furnishing of materials covering a long period of time and involving large expenditures, a stipulation for payments on account from time to time during the progress of the work is so material that a substantial failure to pay justifies the contractor in declining to proceed.

8. CONTRACTS ⚡214—BUILDING CONTRACT—PARTIAL PAYMENTS.

Where contractor's acceptance of option in subcontract to call upon subcontractor to do certain additional work did not make a separate contract, but merely added something to the work to be done under the subcontract, the subcontract provision as to partial payments, during progress of the work, of a percentage of

the estimated construction, applied to such additional work.

9. CONTRACTS ⚡346(4)—ACTION FOR BREACH—EVIDENCE ADMISSIBLE UNDER PLEADINGS.

Though a subcontractor's complaint, in alleging breach of contract provision for monthly payments of percentage of work upon subcontractor's written requisition, alleged requisitions for payment were made "in accordance with the contract," evidence of an agreement subsequent to the pleaded contract, relating to unit prices, was admissible as a basis for the requisition shown in evidence.

10. APPEAL AND ERROR ⚡889(2) — AMENDMENTS REGARDED AS MADE—PLEADINGS.

To prevent reversal for an unimportant and nonprejudicial variance, complaint may be treated on appeal as amended.

11. APPEAL AND ERROR ⚡273(5)—REVIEW—INSTRUCTIONS—EXCEPTIONS.

An exception to action of court "in giving all instructions requested by plaintiff" is too general to point any error in an instruction on damages in duplicating elements, so as to allow of review.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Action by the Guerini Stone Company against the P. J. Carlin Construction Company. Judgment for plaintiff was reversed by the Circuit Court of Appeals (241 Fed. 545, 154 C. C. A. 321), and plaintiff brings certiorari. Reversed, and District Court judgment affirmed.

Mr. Edward S. Paine, of San Juan, P. R., for petitioner.

Mr. John C. Wait, of New York City, and Charles Hartzell, of San Juan, P. R., for respondent.

*Mr. Justice PITNEY delivered the opinion of the Court.

This case is before us for the second time, our former decision being reported in 240 U. S. 264, 36 Sup. Ct. 300, 60 L. Ed. 636. It was an action for damages, brought by the present petitioner as plaintiff against the present respondent as defendant in the District Court of the United States for Porto Rico. Our first review was upon a direct writ of error sued out by plaintiff under section 244, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087, 1157 [Comp. St. § 1215]), prior to the amendment of January 28, 1915 (38 Stat. 804, c. 22, §§ 3, 6 [Comp. St. § 1704a]). Judgment was reversed and the cause remanded for further proceedings. Upon the going down of the mandate a new trial was had, resulting in a verdict in plaintiff's favor *for substantial damages. To review the judgment entered thereon, defendant, under the act of 1915, prosecuted a writ of error from the Circuit

Court of Appeals for the First Circuit, setting up assignments of error based upon rulings of the trial court in admitting and excluding evidence and in giving and refusing instructions to the jury. The Court of Appeals reversed the judgment and ordered the cause to be remanded for further proceedings (241 Fed. 545, 154 C. C. A. 321); and to review this judgment the present writ of certiorari was allowed (245 U. S. 643, 38 Sup. Ct. 9, 62 L. Ed. 528).

The controversy arose in the course of the construction of a federal post office and court building at San Juan, Porto Rico. Plaintiff had a subcontract for a part of the work under defendant, which was the general contractor under the government of the United States. Pertinent clauses of the contract and a general history of the case were set forth in our former opinion and need not be repeated at length.

The evidence at the second trial followed the general lines of the first. Defendant was to construct the foundation complete to the basement floor. Upon this, plaintiff was to construct the principal part of the building, including exterior and interior walls, floors, and roof, to be built of concrete. For this work and the necessary materials defendant agreed to pay to plaintiff the sum of \$64,750 in certain monthly installments on account and the balance on completion. The plans called for certain granite work, for which defendant was to send the cut blocks from the United States; and under an option set forth in paragraph 25, afterwards accepted by defendant, plaintiff was to set this granite for 40 cents per square foot of surface.

It appeared that after the work had been in progress for some time a disagreement arose between the parties about payments on account. Paragraph 12 of the contract provided that there should be "monthly payments on *account, not to exceed in amount 85 per cent. of the cost of the work actually erected in the building, provided that the subcontractor furnishes to the general contractors a written requisition, on a form to be supplied by the general contractors, not less than twelve days before payment is required," etc. The contract, however, did not provide how such cost of the work, other than the granite setting, should be ascertained. In December, 1911, and January, 1912, plaintiff made written requisitions which were not complied with; and, according to plaintiff's evidence, it was agreed between the parties on or about February 2, 1912, that future applications and payments should be made upon the basis of a schedule which specified, inter alia, "Exterior and interior concrete walls, arches, and cement work \$1.07 per cubic foot." On March 9, 1912, plaintiff made a requisition for payment computed on this basis, and showing a balance due of

\$11,735.95. This requisition was in effect refused, and no further payment was made except the sum of \$674, which was paid a few days later.

In the month of February, 1912, the government superintendent of construction found a serious settlement in the foundation, as a result of which work upon the building was ordered to be stopped. This order was communicated verbally by defendant's representative to plaintiff's agent at San Juan on the 9th of March, and was confirmed two days later by letter, in which, however, a request made by plaintiff's agent for instructions as to what should be done with plaintiff's force of men pending the suspension of the work was evaded. Plaintiff stopped work pursuant to defendant's notice, and did nothing more upon the building.

Thus matters remained until May 22, 1912, plaintiff in the meantime having received no payment pursuant to its requisition of March 9 beyond the small sum mentioned above, nor any instructions or permission to proceed with the work upon the building; and, according to plaintiff's evidence, it was impossible to tell when the work could proceed. On May 22 plaintiff wrote to the defendant, referring to the stoppage of the work and to "the very considerable cost and damage to us caused by your breach of contract," to the inability to get payments from defendant in accordance with the terms of the contract, and to defendant's refusal of an offer of arbitration and refusal of "an assurance that even now we would have an opportunity within any reasonable time to proceed with our work," and concluding with this notification:

"Under these circumstances and owing to your entire failure to comply with the terms of the contract, we hereby notify you that we now terminate the contract and shall proceed no further with the work, and that we shall hold you liable for the damages we have sustained by reason of your breach of contract, including your failure to provide labor and materials not included in the contract with us in such manner as not to delay the material progress of our work and your failure to make payments in accordance with the terms of the contract, and all other breaches of contract on your part."

The principal ground of action was based upon the contention that in refusing to respond to plaintiff's requisitions for payments on account, and in the complete and indefinite stoppage of plaintiff's work under the circumstances mentioned, defendant had committed breaches of the contract so material as to amount to a total breach, justifying plaintiff in declining to proceed further and in suing at once for its damages. See *Anvil Mining Co. v. Humble*, 153 U. S. 540, 552, 14 Sup. Ct. 876, 38 L. Ed. 814. But as we pointed out in 240 U. S. 283, 36 Sup. Ct. 300, 60 L. Ed. 636, plaintiff counted also upon a quantum meruit for work and labor per-

formed and materials furnished in and about the construction of the building.

The Circuit Court of Appeals attributed error to the trial court in the following respects:

[1] *1. The trial court refused defendant's request to instruct the jury that plaintiff was not justified in terminating the contract because of delays, and in instructing them on the contrary, as the court did in substance, that if it was evident to the parties on May 22, 1912, that there would be a long delay or an indefinite delay, or if it was evidently impossible to tell when the work could be begun again, plaintiff had a right to terminate the contract and was not obliged to await indefinitely the pleasure of the government as to the resumption of work. It should be noted that when plaintiff took action to terminate the contract, more than two months already had elapsed since the work was stopped. This was undisputed, and of course must be considered in dealing with the instruction referred to.

It is sufficiently obvious that a contract for the construction of a building, even in the absence of an express stipulation upon the subject, implies as an essential condition that a site shall be furnished upon which the structure may be erected. In this case the matter was not allowed to rest upon an implication, for, as we held in our former opinion, the eleventh paragraph of the subcontract, providing:

"The general contractors will provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the subcontractor, agree that they will reimburse the subcontractor for such loss"

—as applied to the facts of the case, imported an agreement by defendant to furnish the foundation in such manner that plaintiff might build upon it without delay, and was inconsistent with an implication that the parties intended that delays attributable to the action of the owner should leave plaintiff remediless; and defendant's obligation to furnish a suitable foundation was not dependent on whether it was at fault or whether the delay was attributable to a stoppage of work by the owner in the exercise of a right conferred upon it by a provision of the principal contract which was not brought into the subcontract.

The Circuit Court of Appeals, however, held (241 Fed. 549, 154 C. C. A. 321) that although under paragraph 11 defendant would be liable to respond in damages for such delays if plaintiff completed or stood ready to complete its contract, yet it did not follow that if plaintiff was delayed in completing its work within the 300 days specified in paragraph 6 it could decline to go on, since by paragraph 7 it was provided that should the subcontractor be obstructed or delayed in

the prosecution or completion of the work by neglect, delay, or default of the owner (among other causes), the time fixed for the completion of the work should be extended for a period equivalent to the time lost from such causes. The court held that this rendered it clear that delays occasioned to the plaintiff by the owner, the general contractor, etc., were not to excuse plaintiff from proceeding to complete the contract, but were to operate merely as an extension of the time within which by the terms of the contract plaintiff was required to perform its work. In our opinion there was error in holding that the provisions of the sixth and seventh paragraphs limited, thus, the provisions of the eleventh. From the fact that by paragraph 6 plaintiff was obliged to finish the work in 300 days, and by paragraph 7 this time was extended for plaintiff's benefit in the case of delays caused by the owner, the general contractor, or otherwise as specified, it does not follow that plaintiff was not entitled to finish the work more speedily if it could do so; or that a breach of paragraph 11 by defendant, so serious as to result in a total suspension of the work, with no reasonable prospect that it could be resumed within any reasonable time, left plaintiff still under an obligation to hold itself in readiness to proceed, and without remedy except an action for damages under that paragraph.

[2] *2. The court found error in the admission of evidence tending to show that at the time plaintiff ceased work it had on hand and left upon the premises certain materials, machinery and tools of the value of \$3,500, which defendant took and appropriated to its own use. As pointed out above, the complaint contained a general claim in the nature of a quantum meruit for labor performed and materials furnished. The particular item in question was specified in the bill of particulars. This clearly justified the trial court in admitting the evidence over the only substantial objection made, which was that it was immaterial and not within the pleadings. There is nothing to show that it was admitted only for its bearing upon the question of damages for breach of the special contract. It is true that in answer to the objection of immateriality plaintiff's counsel said:

"I will show you a case where it says that the rule is that plaintiff's expenditure minus any materials which he may have on hand and plus any profits which he might have made"

—evidently referring to *United States v. Behan*, 110 U. S. 338, 344, 346, 4 Sup. Ct. 81, 28 L. Ed. 168; but in responding to a further objection that the material could not be charged to defendant, plaintiff's counsel insisted, "I propose to show that the defendant took it and has it," and followed it up with proof to this effect.

[3] The opinion of the Circuit Court of Appeals (241 Fed. 550, 154 C. C. A. 321) shows that counsel for plaintiff in that court stated that the quantum meruit had been disregarded, and that the trial proceeded solely upon the ground of a breach of the special contract; but the bill of exceptions fails to bear this out, and error cannot be attributed to the trial court on that theory. There was no waiver of the general claim for materials, and the evidence referred to furnished a ground of recovery upon that claim, irrespective of plaintiff's right to recover damages for breach of the special contract.

[4] But upon the latter question also it was admissible, *upon the assumption that the rule of damages laid down in *United States v. Behan*, supra, was applicable, which is not disputed. That rule would give the plaintiff a right to recover what it had expended toward performance of the contract, subject to a deduction for the value of the materials remaining on hand at the time performance was stopped. But of course the deduction is based upon the theory that those materials remained the property of plaintiff and subject to its disposal. If they were appropriated by defendant to its use—and this is what the evidence tended to show—it is plain that their value should not be deducted from, but should be treated as a part of, plaintiff's contribution to the performance of the contract, in addition to its other outlay in respect of work performed.

[5] The Circuit Court of Appeals considered that the furnishing of the materials in question was a matter so entirely outside of the contract that it could not properly be considered as an element of damage for its breach, and that plaintiff's remedy to recover their value must be by action of tort for conversion. But the evidence showed no tortious conversion; it tended to show that the articles were appropriated by defendant with plaintiff's consent; and it hardly is necessary to say that, if tort there were, plaintiff could waive it and sue upon the implied assumpsit. *Great Falls Mfg. Co. v. Atty. Gen.*, 124 U. S. 581, 598, 8 Sup. Ct. 631, 31 L. Ed. 527; *Hirsch v. C. W. Leatherbee Lumber Co.*, 69 N. J. Law, 509, 513, 55 Atl. 645.

[6] Nor was this a matter entirely outside of the contract. The materials in question consisted in the main of tools and appliances that had been brought to the building by plaintiff for use in the performance of the contract, were so used, presumably were fitted for further use on the building, and upon the interruption of the work were left in position in the control of defendant and ready to be employed by it whenever it should proceed with the *work that plaintiff had been prevented from doing. If they were accepted and retained by defendant, as the evidence tended to show was the fact, it was proper to take them into account as a part of plain-

tiff's expenditures upon which the damages caused by defendant's breach of the contract were to be computed.

[7] 3. The next ground of error upon which the Circuit Court of Appeals based its decision was an instruction given to the jury, in substance, that if defendant failed to make payments on account as called for by the contract—"a substantial failure, amounting substantially to the withholding of the whole payment, not necessarily the whole payment, but the bulk of the payment"—such failure constituted a breach on the part of defendant justifying plaintiff in stopping work and entitling it to recover damages from defendant; and the refusal of a requested instruction to the effect that "the delay of defendant to make payments on estimates, in the absence of a positive refusal to pay anything, was not ground for rescission or termination of the contract by plaintiff," and that plaintiff's remedy was to recover interest on the deferred payments.

The Circuit Court of Appeals very properly held that in a building or construction contract like the one in question, calling for the performing of labor and furnishing of materials covering a long period of time and involving large expenditures, a stipulation for payments on account to be made from time to time during the progress of the work must be deemed so material that a substantial failure to pay would justify the contractor in declining to proceed. In addition to the provisions of paragraph 12, already referred to, the concluding paragraph of the contract was as follows:

"And the said general contractors hereby promise and agree with the said subcontractor to employ, and do hereby employ him to provide the materials and to do the said work according to the terms *and conditions herein contained and referred to for the price aforesaid, and hereby contract to pay the same at the time, in the manner and upon the conditions above set forth."

As is usually the case with building contracts, it evidently was in the contemplation of the parties that the contractor could not be expected to finance the operation to completion without receiving the stipulated payments on account as the work progressed. In such cases a substantial compliance as to advance payments is a condition precedent to the contractor's obligation to proceed. *Canal Co. v. Gordon*, 6 Wall. 561, 569, 18 L. Ed. 894; *Phillips & O. Construction Co. v. Seymour*, 91 U. S. 646, 649, 23 L. Ed. 341.

[8] But it was held that defendant's refusal to pay was justified because plaintiff's requisitions were not made out in accordance with the provisions of the contract. There were but two requisitions in evidence, one dated December 30, 1911, the other March 9, 1912. Both were held defective, in that they included not only 85 per cent. of the estimated amount of the concrete construction, which

was the principal subject-matter of plaintiff's contract, but also a like percentage of the amount earned in setting granite under the accepted option in paragraph 25. The court held that the provision for monthly installments related only to the former, and that as to the granite work plaintiff was not entitled to payments on account in advance of its completion. In our opinion, however, defendant's acceptance of the option to call upon plaintiff to set the granite blocks did not make a separate contract, but merely added something to the work that plaintiff was to do under the contract previously made; and by necessary inference it subjected the granite setting to the appropriate general provisions respecting the method of performance and the time when the work was to be paid for.

Were it otherwise, the requisition of March 9 could not be rejected merely on the ground that it called for a payment for granite work. We say this because there was clear evidence—apparently uncontradicted, and at least sufficient to go to the jury—tending to show that the granite setting was substantially completed by the early part of February, and that because the few blocks remaining to be set were arriving intermittently and could be set only at unreasonable cost, it was then at plaintiff's request agreed by defendant that plaintiff should set no more granite. This part of the work was thus brought to a close, or so the jury might find; in which event, if it constituted a separate contract, payable at completion, as the Circuit Court of Appeals held, plaintiff on March 9 was entitled to demand not only 85 per cent., but the entire amount due for granite setting.

[9, 10] 4. The court held the requisition of March 9 to be defective upon the further ground that it was based upon the unit price of \$1.07 per cubic foot, pursuant to the understanding said to have been arrived at between the parties on February 2, instead of the actual cost of the work erected in the building as required by paragraph 12 of the contract. It was held that since the complaint alleged that plaintiff's demands for payment were made "in accordance with the contract," evidence to show the agreement made on February 2 about unit prices was not admissible without an amendment of the complaint setting up a modification of the contract.

This view cannot be upheld. The allegation quoted from the complaint did but touch upon the performance of a condition precedent, concerning which the former niceties of pleading no longer obtain. And besides, evidence of the agreement of February 2 about unit prices was introduced at the first trial, and was particularly referred to in our opinion reviewing it (240 U. S. 273, 274, 36 Sup. Ct. 300, 60 L. Ed. 636); and the requisition of March 9, then as now relied upon by plaintiff, was excluded from consideration

*347 by us only because such details as were then furnished did not appear *to bear out the estimate contained in it as to the amount of work that had been completed (240 U. S. 282, 36 Sup. Ct. 300, 60 L. Ed. 636), an omission that was supplied at the second trial. As the case went back for further proceedings in conformity with that opinion, the trial court doubtless considered that compliance with our mandate required the admission of the testimony as to the agreement of February 2, which furnished the basis of the requisition of March 9, and that no amendment of the pleadings was necessary. Were there doubt about this, we should deem it proper that the complaint be amended, or treated as if amended, even in the appellate court, rather than that the judgment should be reversed for so unimportant a variance, not in the least prejudicial to defendant.

[11] 5. The final ground upon which the reversal was rested was an instruction given by the trial court to the jury upon the question of damages in the following terms:

"If you find he [meaning plaintiff] was justified in terminating the contract as he did on May 22 upon the principles above given you, you can consider the reasonable expenditures incurred by the plaintiff, the unavoidable losses incident to stoppage, the amount of work actually performed, the amount plaintiff was actually entitled to by reason of such work at the contract price, and the profits which plaintiff could have made if allowed to complete the work under the contract. So the different items that you may, if you come to the question, take into account, are the outlays less the material on hand, the amount of work actually performed, and the profits, if you find there were any which were not speculative. The measure of profits is the contract price less what is shown to you as the expense of carrying out the contract, if that is shown to you to your satisfaction."

*348 The appellate court held this instruction to be misleading because it embodied a duplication of elements. Respecting this a difficult question would be presented if defendant were *in a position to raise it. When the case was here before we assumed (240 U. S. 282, 36 Sup. Ct. 300, 60 L. Ed. 636) that an instruction similarly phrased ought to have been granted at plaintiff's request had it been confined in its application to a recovery based upon a finding that the contract was rightfully terminated by the notice of May 22, 1912; but this was an assumption arguendo, and not a part of the matter decided.

At the second trial this part of the charge was given by the court of its own motion, not at plaintiff's request; nor was it excepted to by defendant. The statement of the Circuit

Court of Appeals to the contrary (241 Fed. 555, 154 C. C. A. 321) is not borne out by the record. The proposition criticized is not contained in any of the instructions requested by plaintiff; and, even had it been requested, there is no exception touching it, unless it be the following:

"I will ask on behalf of the defendant an exception * * * to the action of his honor * * * in giving all instructions requested by plaintiff."

This is altogether too general to be regarded as directing the mind of the trial court to any single and precise point of alleged error so as to call for a reconsideration of the ruling, and hence could not furnish a basis for reversing the judgment. That an exception must be specific need not be emphasized. *McDermott v. Severe*, 202 U. S. 600, 610, 26 Sup. Ct. 709, 50 L. Ed. 1162; *United States v. U. S. Fidelity Co.*, 236 U. S. 512, 529, 35 Sup. Ct. 298, 59 L. Ed. 696.

There was another exception, couched in these terms:

"To that part of the charge to the effect that if the plaintiff had the right to terminate the contract under the authority of the Behan Case, the measure of damages would be not only the expenses incurred by the plaintiff, but also reasonable profits."

This, however, refers to another passage in which the trial court quoted from the headnote in 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168. This clause contained no reference to the amount of work performed or what plaintiff was entitled to by reason of this work at the contract *price; it mentioned only (a) plaintiff's outlay, and (b) the lost profits, embodied no duplication of elements, and was not erroneous.

Having found that none of the grounds relied upon by the Circuit Court of Appeals for reversal of the judgment of the trial court is tenable, it remains to consider what judgment ought to have been rendered upon the record and bill of exceptions, in view of the assignments of error other than those we have thus far considered. *United States v. U. S. Fidelity Co.*, 236 U. S. 512, 528, 35 Sup. Ct. 298, 59 L. Ed. 696. There were 101 assignments in all, and these have been examined with the aid of respondent's brief, which extends to 250 pages, in addition to the oral argument; but we have found no ground for reversing the judgment of the trial court.

Judgment of the Circuit Court of Appeals reversed, and that of the District Court affirmed.

(248 U. S. 359)

CHICAGO, R. I. & P. RY. CO. v. MAUCHER.

(Argued Dec. 17 and 18, 1918. Decided Jan. 7, 1919.)

No. 85.

1. COMMERCE $\Leftrightarrow$ 8(12) — CARMACK AMENDMENT—TRANSPORTATION OF PERSONS.

The Carmack Amendment (Comp. St. §§ 8604a, 8604aa) deals only with shipments of property, and not with transportation of persons.

2. CARRIERS $\Leftrightarrow$ 241—RELATION OF PASSENGER—TRAIN RUN BY PERMISSION.

One riding on a train running over a railroad under right given the train owner by contract with the railway company, stipulating that the company was not acting therein as a common carrier, was not a passenger of the company; but his claim for injury from its negligence rests on the general right of an individual not to be injured by another's negligence.

In Error to the Supreme Court of the State of Nebraska.

Action by Joseph Maucher against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff was affirmed by the Supreme Court of Nebraska (100 Neb. 237, 159 N. W. 422), and defendant brings error. Dismissed.

Mr. William D. McHugh, of Omaha, Neb., for plaintiff in error.

Messrs. Philip E. Horan, T. J. Mahoney, and J. A. C. Kennedy, all of Omaha, Neb., for defendant in error.

*Mr. Justice BRANDEIS delivered the opinion of the Court.

Barnum & Bailey, who owned rolling stock adapted to carrying their circus equipment and personnel, made, in 1913, a special contract with the Chicago, Rock Island & Pacific Railway Company concerning transportation on its lines. The railway agreed, for a sum fixed, to give the right to use its tracks and locomotives, fully manned and supplied, to haul the circus trains. Barnum & Bailey agreed, among other things, that the railway was not acting therein as a common carrier; that it should not be liable for any injury, though arising from negligence, either to their own person or property, or to that of any other of their *employés; and that they would indemnify the railway against any such injury.

While the circus train was being moved in Nebraska, from Lincoln, to Atlantic, Iowa, it was crashed into by one of the railway's regular passenger trains, and Maucher, an employé of the circus, was injured. He had, by his contract of employment, agreed to release all railroad companies from any claim for injuries suffered while traveling with the

circus on their lines; but he brought, in a state court of Nebraska, an action against the railway for damages, alleging that he had been injured by its negligence. The railway defended on the ground that its contract with Barnum & Bailey, and thus with the plaintiff, operated to release it from all liability; that, since the contract related to a movement in interstate commerce, its validity was to be determined by the federal law; and that by the federal law the contracts were valid, although undertaking to release the railway from liability, since it was not acting as common carrier. *Santa Fé, Prescott & Phoenix Railway Co. v. Grant Bros. Construction Co.*, 228 U. S. 177, 33 Sup. Ct. 474, 57 L. Ed. 787. The trial court held that the liability was to be determined by the law of Nebraska, and entered judgment for plaintiff, which was affirmed by the Supreme Court of the state. *Maucher v. Chicago, R. I. & P. R. Co.*, 100 Neb. 237, 159 N. W. 422. The case came here on writ of error under section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156 [Comp. St. § 1214]).

[1, 2] The railway admits that prior to the enactment of the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 584, 595 [Comp. St. §§ 8604a, 8604aa]) Congress had not dealt with the right of carriers to limit by contract their liability for injuries occurring in interstate transportation, and that consequently the states were free to establish their own laws and policies and apply them to such contracts. *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268. But it contends that this power of the states was superseded by the Carmack Amendment, since that amendment dealt with the power of carriers to contract in respect to such liability *(*Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. [N. S.] 257; *Boston & Maine Railroad v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593); that it was the intention of Congress to deal with the whole subject; and that the rights of plaintiff in respect to personal injuries are governed by the federal law. But the Carmack Amendment deals only with the shipment of property. Its language is so clear as to leave no ground for the contention that Congress intended to deal with the transportation of persons. Furthermore plaintiff was not even a passenger on the railway. His claim rests not upon a contract of carriage, but upon the general right of a human being not to be injured by the negligence of another. Compare *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 613, 33 Sup. Ct. 277, 57 L. Ed. 662, 43 L. R. A. (N. S.) 901. The case presents no substantial federal question. The writ of error is Dismissed.

(248 U. S. 354)

TURNER v. UNITED STATES et al.

(Argued and Submitted November 13 and 14, 1918. Decided Jan. 7, 1919.)

No. 33.

1. INDIANS ⇨25—LIABILITY OF CREEK NATION—INJURY FROM MOB.

In the absence of statute, the Creek Nation, recognized by the United States as a distinct political community, is, like other governments, free from liability for injury from mob violence or failure to keep the peace; and this though an officer, acting in open and known violation of law, and not *colore officii*, participated, and though the person injured in his property rights was a grantee of such government.

2. INDIANS ⇨25—LIABILITY OF CREEK NATION—CREATION BY STATUTE.

Act May 29, 1908, § 26, authorizing the Court of Claims to consider, adjudicate, and render judgment as law and equity may require in the matter of a certain claim against the Creek Nation, creates no substantive right against, and imposes no liability on, such government.

3. UNITED STATES ⇨125—SUIT AGAINST—CLAIM AGAINST INDIANS.

No permission to sue the United States being given, it is improperly joined as defendant, though in the capacity of trustee, in a petition to recover from the Creek Nation.

Appeal from the Court of Claims.

Petition by Clarence W. Turner against the United States and the Creek Nation of Indians. Petition was dismissed by the Court of Claims (51 Ct. Cl. 125), and claimant appeals. Affirmed.

Messrs. Charles H. Merillat and Charles J. Kappler, both of Washington, D. C., for appellant.

Mr. Asst. Atty. Gen. Thompson and Mr. Geo. M. Anderson, of Washington, D. C., for the United States.

Messrs. James C. Davis, of Muskogee, Okl., and R. C. Allen, of Tulsa, Okl., for the Creek Nation.

Mr. Justice BRANDEIS delivered the opinion of the Court.

*355 The Creek or Muskogee Nation or Tribe of Indians had, in 1890, a population of 15,000. Subject to the control of *Congress, they then exercised within a defined territory the powers of a sovereign people, having a tribal organization, their own system of laws, and a government with the usual branches, executive, legislative, and judicial. The territory was divided into six districts; and each district was provided with a judge.¹

In 1889 the Creek Nation enacted a statute which conferred upon each citizen of the Nation, head of a family engaged in grazing livestock, the right to inclose for that purpose one square mile of the public domain without paying compensation. Inclosure of a greater area was prohibited; but provision was made for establishing, under certain conditions, more extensive pastures near the frontiers, to protect against influx of stock from adjoining nations. The conditions prescribed were these: If the district judge should receive notice from citizens of a desire to establish such a pasture, he was required to call a meeting of citizens to consider and act upon the subject; and if it appeared that a majority of the persons of voting age in the neighborhood thus to be protected favored its establishment, the district judge was directed to let such pasture for three years (subject to renewal) to citizens who would by contract bind themselves to build a substantial fence around the pasture, and to pay at least five cents per acre per annum for the grazing privilege.

In 1890 Turner and a partner formed, under the name of Pussy, Tiger & Co., an organization consisting of themselves and 100 Creeks, with a view to securing such a pasture in the Deep Fork district. They caused an election to be held and a contract to be entered into by the district judge with Pussy, Tiger & Co., which covered about 256,000 acres. The fence required to inclose it was *about 80 miles in length. Before its construction was begun, dissatisfaction had already developed in the neighborhood; and from the time the fence was commenced, there were rumors of threats by Indians to destroy it if built. The work was, however, undertaken; the threats continued; and Turner and one of his assignees secured from the United States Court in the Indian Territory, First Judicial Division, an injunction restraining the Creek district judge for the Deep Fork district and L. C. Perryman, the Principal Chief of the Nation, from interfering with or damaging the fence. After it had been nearly completed, three bands of Creek Indians destroyed the fence, cutting the wire and posts and scattering the staples. It does not appear that either the Creek judge or the Chief or any other official of the Creek government had any part in the destruction of the fence, except one Moore, the treasurer, whose only official duties seem to have been "to receive and receipt for all national funds and to disburse the same, as should be provided for by law."

More than \$10,000 net expended in constructing the fence, and \$2,500 paid by Turner to the 100 Creek Indians associated with him for the release of their grazing rights were lost, and large profits which it was

¹ Treaty of June 14, 1866, art. X (14 Stat. 785, 788); Report of the Commissioner of Indian Affairs for 1883, p. 113; for 1889, p. 202; for 1890, pp. 89, 90; for 1891, vol. 1, pp. 240, 241.

expected would be made through assignment of pasturage rights to cattle raisers were prevented. Claims for compensation were repeatedly presented by Turner to the Creek Nation. Once its National Council voted to make compensation; but Chief Perryman vetoed the action and his veto was sustained. Later the Creek Supreme Court declared the fence a legal structure; but still the Nation failed to make any compensation. On March 4, 1906, the tribal organization was dissolved pursuant to Act March 1, 1901, c. 676, § 46 (31 Stat. 861, 872). In 1908 Congress provided, by section 26 of the Act of May 29, 1908, c. 216 (35 Stat. 444, 457), as follows:

"That the Court of Claims is hereby authorized to *consider and adjudicate and render judgment as law and equity may require in the matter of the claim of Clarence W. Turner, of Muskogee, Oklahoma, against the Creek Nation, for the destruction of personal property and the value of the loss of the pasture of the said Turner, or his assigns, by the action of any of the responsible Creek authorities, or with their cognizance and acquiescence, either party to said cause in the Court of Claims to have the right of appeal to the Supreme Court of the United States."

In August, 1908, Turner, having acquired all the rights of his associates, filed a petition in the Court of Claims against the Creek Nation and the United States as trustee of Creek funds,² to recover the amount lost, which he alleged to be the sum of \$105,698.03. The Court of Claims dismissed the petition (51 Ct. Cl. 125), and the case comes here by appeal.

The claimant contends that, by the general law, the Creek Nation is liable in damages for the action of the mob which resulted in the destruction of his property and prevented him from securing the benefits of the contract entered into between him as grantee and the Creek Nation, and that if the substantive right did not already exist, it was created by the act which conferred jurisdiction upon the Court of Claims to hear and adjudicate the controversy.

[1] First. No such liability existed by the general law. The Creek Nation was recognized by the United States as a distinct political community, with which it made treaties and which within its own territory administered its internal affairs. Like other governments, municipal as well as state, the Creek Nation was free from liability *for injuries to persons or property due to mob

violence or failure to keep the peace. Compare *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 287, 291, 3 Sup. Ct. 211, 27 L. Ed. 936; *South v. Maryland*, 18 How. 396, 15 L. Ed. 433; *Murdock Grate Co. v. Commonwealth*, 152 Mass. 28, 31, 24 N. E. 854, 8 L. R. A. 399. Such liability is frequently imposed by statute upon cities and counties (see *City of Chicago v. Pennsylvania Co.*, 119 Fed. 497, 57 C. C. A. 509); but neither Congress nor the Creek Nation had dealt with the subject by any legislation prior to 1908. The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace. And the participation in the injuries of an officer acting, not *colore officii*, but in open and known violation of the law, cannot alter the case. The claimant's contention that the defendant owed to the claimant, as its own grantee, a greater duty than it owed to other persons in the territory, to protect him against mob violence, finds no support in reason or authority.

[2] Second. The special act of May 29, 1908, did not impose any liability upon the Creek Nation. The tribal government had been dissolved. Without authorization from Congress, the Nation could not then have been sued in any court; at least without its consent. The Court of Claims is "authorized to consider and adjudicate and render judgment as law and equity may require." The words of the act which follow merely identify the claims which the court is authorized to consider. Authority to sue the Creek Nation is implied; but there is nothing in the act which even tends to indicate a purpose to create a new substantive right. Compare *United States v. Mille Lac Chippewas*, 229 U. S. 498, 500, 33 Sup. Ct. 811, 57 L. Ed. 1299; *Green v. Menominee Tribe*, 233 U. S. 558, 568, 34 Sup. Ct. 706, 58 L. Ed. 1093; *Thompson v. United States*, 246 U. S. 547, 38 Sup. Ct. 349, 62 L. Ed. 876. The act simply provides a forum for the adjudication of such rights as Turner may have against the Creek Nation.

[3] *Third. The United States objected also to the jurisdiction of the court over it. Neither the special act nor any general statute authorized suit against the United States. As it cannot be sued without its consent, the United States was improperly joined as a party defendant, although in the capacity of trustee for the Creek Nation. Compare *Green v. Menominee Tribe*, *supra*.

It is not necessary to consider the many other objections urged against the petition. The Court of Claims properly dismissed it; and the judgment is

Affirmed.

² On November 18, 1915, the sum of \$1,325,167.16 was held by the United States in trust for the Creek Nation of Indians. In addition thereto approximately \$1,110,000.00 of the tribal funds of the Nation were on deposit in the Oklahoma state and national banks, on April 10, 1916, under the provisions of Act March 3, 1911, c. 210, § 17, 36 Stat. 1058, 1069 (Comp. St. § 725).

(248 U. S. 268)

FARSON, SON & CO. v. BIRD, County Treasurer.

(Submitted Nov. 15, 1918. Decided Jan. 7, 1919.)

No. 54.

COURTS — 394(9) — REVIEW OF STATE COURTS—FEDERAL QUESTION.

Decision of state court that mandamus would not lie against county treasurer to enforce contract claim, but that remedy was by proceedings against different officers or the county, does not impair contract rights, so as to allow review by national court.

In Error to the Supreme Court of the State of Alabama.

Mandamus by Farson, Son & Co. against Joe S. Bird, County Treasurer of Shelby County, Ala. Judgment for respondent was affirmed by the Supreme Court of Alabama (197 Ala. 384, 72 South. 550), and petitioner brings error. Writ dismissed.

Mr. Giles William Lawrence Smith, of Brewton, Ala., for plaintiff in error.

Mr. Ray Rushton, of Montgomery, Ala., for defendant in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

But a single question is required to be decided. We state the case only to the extent essential to make this clear and to elucidate the issue to be considered.

In 1905 and 1907 the county of Shelby contracted to build and furnish a courthouse. It was stipulated that the price for the work should be evidenced by interest-bearing warrants, maturing during a series of years. By the Constitution and laws of Alabama the power of taxation of the county for general purposes was limited, but, in addition, the Constitution and laws authorized counties to levy annually a special tax of one-fourth of 1 per cent. to be applied to the erection or repair of county buildings, the construction of roads, bridges, etc. The warrants under the contract were in terms secured by an agreement of the county to levy this one-fourth of 1 per cent. tax annually and apply it to the payment of the warrants. The state law contained a provision authorizing the registry of county warrants and making such registration operate as a lien on the proceeds of the taxes dedicated to the payment of the warrants. The courthouse was completed, furnished, and accepted, and the warrants were issued in conformity with the contract and according to law.

In 1916 Farson, Son & Co., alleging themselves to be holders of warrants issued under the contract as above stated, filed their suit for mandamus against the county treas-

urer. The petition alleged the contract for the courthouse and averred that the board of revenue of the county, the governing body which had succeeded to the county commissioners previously in authority, while continuing the levy of the one-fourth of 1 per cent. tax, had in impairment of the obligation of the courthouse contract, dedicated the proceeds of that tax, as collected, to roads or bridges, thus depriving the warrant holders under the courthouse contract of the means of payment to which they were entitled. It was alleged that, in consequence of such action, the county treasurer had refused to pay any of the proceeds of the one-fourth of 1 per cent. tax to the courthouse warrant holders, and had, in further violation of his duty, credited the same to other funds and paid them out accordingly. It was moreover charged that the treasurer had in his hands, despite such wrongful payments to others, the sum of about \$7,000, derived from the one-fourth of 1 per cent. tax collected in 1915, which it was his duty to apply as far as necessary to the discharge of a sum of \$1,565, with interest, due on the courthouse warrants, and which he had refused to pay although demand had been made on him to do so. The petition expressly counted upon the protection of the contract rights which it asserted, not only by the Constitution of the state but also by the contract clause of the Constitution of the United States, alleging impairment thereof by action of the board of revenue, legislative in character; and the prayer was that the county treasurer be mandamusd to pay out of the one-fourth of 1 per cent. tax for 1915 in his hands the sum of \$1,565, with interest. A demurrer to the petition, as stating no cause for relief, was sustained, and the case is before us upon the ground of the deprivation of federal right which arose from the action of the court below in affirming the trial court.

The court below conceded that under the state law mandamus was appropriate if the county treasurer had capacity to stand in judgment. It moreover conceded that, if the contract had been entered into as alleged, the attempt to violate it by dedicating the proceeds of the one-fourth of 1 per cent. tax to any purpose other than to the payment of courthouse warrants was, in so far as such proceeds were necessary to pay said warrants, void as an impairment of the obligation of a contract forbidden both by the state Constitution and that of the United States. But from these premises it nevertheless decided that there was no right to the mandamus against the county treasurer. It rested its conclusion on provisions of the state Constitution and laws, which it held defined the duty of that officer and absolute-

ly deprived him of all power to apply or pay money coming into his hands by taxation levied for a particular purpose to another and different purpose. It decided, therefore, that if under the theory that the board of revenue had wrongly directed the appropriation of the one-fourth of 1 per cent. tax, action against that body and not merely against the county treasurer was appropriate and necessary under the state law. The court said:

"If the facts alleged in this petition are true, they [the courthouse warrant holders] ought to have relief, and the county ought to be required to carry out its contract, or to answer in damages for the breach thereof, if the contract was valid and binding; but the relief must be had by different proceedings and against different officers, or the county itself, and not against the county treasurer. Mandamus may be petitioners' remedy, but under the facts alleged it must be against different officers than the county treasurer." 197 Ala. 384, 72 South. 550.

Thus resting its decision exclusively upon the question of procedure and the power of the particular officer against whom the mandamus was asked as limited and defined by the state law, we see no basis for the contention that the action of the state court gave effect to the impairment of the obligation of a contract in violation of the contract clause of the Constitution. On the contrary, we are of opinion that when correctly tested it becomes apparent that the action of the court below involved only a ruling upon a question of remedy resting upon considerations of state law broad enough to sustain the conclusion reached without any reference to the federal questions which were raised and relied upon.

And any possible doubt on this subject, we are of opinion, is removed by the subsequent action of the court below in the case of Board of Revenue of Shelby County v. Farson, Son & Co., 197 Ala. 375, 72 South. 613, L. R. A. 1918B, 881, cited in the brief of the plaintiff in error. In that case, which was an action against the board of revenue of Shelby county to compel the levy of the one-fourth of 1 per cent. tax, as provided in the courthouse contract, for the purpose of paying, not only certain warrants which were past due in 1916, but to provide for the warrants falling due in 1917, the court awarded the mandamus sought. In doing so, it not only held that the courthouse contract was valid and that the agreement to levy the tax as therein stipulated was lawful, but, moreover, that the subsequent action of the board of revenue in diverting the fund to the detriment of the courthouse warrant holders was an impairment of the obligations of the contract and was void because of repugnance

to the Constitution of the state and to the contract clause of the Constitution of the United States.

It is true, indeed, that in that case the court referred to its ruling in this case with approval, but the relief which was denied in the one and afforded in the other leaves no support upon which to rest the contention that contract rights secured by the Constitution were impaired by the ruling which was made in this case.

As our conclusion is that the federal question relied upon as the basis for the writ of error had no foundation, it follows that our decree must be, and it is,

Writ of error dismissed for want of jurisdiction.

(248 U. S. 308)

UNION FISH CO. v. ERICKSON.

(Submitted Nov. 22, 1918. Decided Jan. 7, 1919.)

No. 76.

1. ADMIRALTY — JURISDICTION — MARITIME CONTRACT.

A contract for service as master of a vessel is maritime in its nature, within the jurisdiction of admiralty, conferred by Const. art. 3, § 2, on the federal courts.

2. ADMIRALTY — JURISDICTION — MARITIME CONTRACT — STATE STATUTE OF FRAUDS.

A maritime contract for services to be performed on the waters away from a state, mainly on the sea, cannot be nullified, so as to prevent enforcement in an admiralty court, by the statute of frauds of the state where the contract is made.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Suit in admiralty by John W. Erickson against the Union Fish Company. Decree for libellant was affirmed by the Circuit Court of Appeals (235 Fed. 385, 148 C. C. A. 647), and respondent brings certiorari. Affirmed.

Messrs. G. S. Arnold and William Denman, both of San Francisco, Cal., for petitioner.

Mr. Charles J. Heggerty, of San Francisco, Cal., for respondent.

*Mr. Justice DAY delivered the opinion of the Court.

Erickson filed a libel in admiralty in the District Court of the United States for the Northern District of California, alleging that by an oral contract with the petitioner, owner of the vessel Martha, he engaged to proceed to Pirate Cove, Alaska, and after arrival there to serve for a year as master of the vessel, and perform certain duties in connection therewith for an agreed compen-

sation. The libel averred that he proceeded to Pirate Cove, and performed his duties under the contract until he was wrongfully discharged by the respondent. Libellant sought to *recover damages for breach of contract. An answer was filed denying the alleged contract, and averring that libellant was discharged because of his wrongful conduct.

A decree was rendered in favor of libellant in the District Court; upon appeal that decree was affirmed by the Circuit Court of Appeals. 235 Fed. 385, 148 C. C. A. 647.

[1, 2] The question presented and argued here concerns the application of the California statute of frauds, which it is alleged rendered the contract void because not to be performed within one year from the making thereof. The Civil Code of California provides (section 1624):

"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent:

"1. An agreement that by its terms is not to be performed within a year from the making thereof."

The contract of the master was of a maritime character. This does not seem to be controverted by the petitioner. See *The Boston*, Fed. Cas. No. 1669; *The William H. Hoag*, 168 U. S. 443, 18 Sup. Ct. 114, 42 L. Ed. 537. We have, then, a maritime contract for services to be performed principally upon the sea and the question is can such engagement be nullified by the local laws of a state, where the contract happens to be entered into, so as to prevent its enforcement in an admiralty court of the United States?

The Constitution (article 3, § 2) extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. Admiralty jurisdiction under the federal Constitution "embraces," says Mr. Justice Story in his treatise on the Constitution, "two great classes of cases—one dependent upon locality and the other upon the nature of the contract. In the latter class are embraced maritime contracts and services, rights and duties appertaining to commerce and navigation." Story on the Constitution (4th Ed.) § 1666.

*This court has had occasion to consider the nature and extent of admiralty jurisdiction as it was intended to be conferred by the Constitution. In *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654, the subject was much considered, and Mr. Justice Bradley, speaking for the court, said:

"One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly

in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states."

This principle was reiterated in *Workman v. New York City*, 179 U. S. 552, 560, 21 Sup. Ct. 212, 45 L. Ed. 314. In that case it was declared that neither local law nor decisions could deprive of redress where a cause of action, maritime in its nature, was prosecuted in a court of admiralty of the United States.

In the recent case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 216, 37 Sup. Ct. 524, 529 (61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900), the subject was again considered and the cases in this court reviewed and state legislation was declared invalid "if it * * * works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. The parties must be presumed to have had in contemplation the system of maritime law under which it was made. *Watts v. Camors*, 115 U. S. 353, 362, 6 Sup. Ct. 91, 29 L. Ed. 406.

In different countries the appointment of masters of *vessels has been the subject of maritime law which has directed the conduct of "those who pursue commerce and put to sea." Their duties and qualifications have been the subject of regulation by the recognized principles of admiralty law. Benedict's Admiralty (4th Ed.) § 146. They are regulated by statutes enacted under Federal authority. See U. S. Comp. Stats. of 1916, vol. 12, Index, "Masters of Vessels."

If one state may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a state may deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the states.

We think the Circuit Court of Appeals correctly held that this contract was maritime in its nature and an action in admiralty thereon for its breach could not be defeated by the statute of California relied upon by the petitioner.

Affirmed.

(248 U. S. 365)

**MERCHANTS' EXCHANGE OF ST. LOUIS
v. STATE OF MISSOURI ex rel.
BARKER, Atty. Gen.**

(Argued Dec. 19, 1918. Decided Jan. 7, 1919.)
No. 116.

1. CONSTITUTIONAL LAW — 296(1)—DEPRIVATION OF LIBERTY OR PROPERTY — GRAIN WEIGHT CERTIFICATES.

Laws Mo. 1913, p. 354, as to inspection and weighing of grain, section 63 of which prohibits any one other than a state weigher issuing weight certificate for, or charging for, weighing grain weighed at a public warehouse, where state weighers are stationed, does not deprive one of liberty or property, in violation of Const. U. S. Amend. 14.

2. WEIGHTS AND MEASURES — 2 — GRAIN WEIGHT CERTIFICATES—POLICE POWER.

Laws Mo. 1913, p. 354, as to inspection and weighing of grain, section 63 of which prohibits any one other than a state weigher issuing weight certificates for grain weighed at a public warehouse, is a valid exercise of the police power, in regulating weights and measures to prevent fraud.

3. CONSTITUTIONAL LAW — 240(1) — EQUAL PROTECTION—GRAIN WEIGHT CERTIFICATES.

That Laws Mo. 1913, p. 354, as to inspection and weighing, is limited to grain and hay, does not make it an arbitrary discrimination against dealers in those articles.

4. CORPORATIONS — 391 — REGULATION — POLICE POWER.

A corporation is subject to the state's police power.

5. COMMERCE — 57—BURDENING INTERSTATE COMMERCE—WEIGHING GRAIN.

Laws Mo. 1913, p. 372, § 63, prohibiting any one other than state weigher issuing weight certificate for grain weighed at a public warehouse, does not burden interstate commerce, and so violate the commerce clause of the federal Constitution.

6. COMMERCE — 8(1) — WEIGHING GRAIN — FEDERAL LEGISLATION.

State regulation of weighing of grain was not superseded by United States Grain Standards Act (Comp. St. 1918, §§ 8747½-8747½k); it in no way referring to the weighing of grain, and by section 7 (section 8747½f), as does the United States Warehouse Act (section 8747¼-8747¼pp), by section 29 (section 8747¼nn) manifesting intention to co-operate with state officials charged with enforcement of state laws for inspection and weighing of grain.

In Error to the Supreme Court of the State of Missouri.

Quo warranto by the State of Missouri, at the relation of John T. Barker, Attorney General, against the Merchants' Exchange of St. Louis. Judgment was against respondent (269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E, 871), and it brings error. Affirmed.

Messrs. Percy Werner, of St. Louis, Mo., and Frank Hagerman, of Kansas City, Mo., for plaintiff in error.

Messrs. John T. Gose, of Shelbina, Mo., and Frank McAllister, of Jefferson City, Mo., for defendant in error.

*Mr. Justice BRANDEIS delivered the opinion of the Court.

A statute of Missouri relating to the inspection and weighing of grain, approved March 20, 1913 (Laws Missouri 1913, pp. 354-373) and amended March 23, 1915 (Laws Missouri 1915, p. 302), declares that in cities of more than 75,000 inhabitants all buildings used for the storage or transferring of grain of different owners, for a compensation, shall be deemed public warehouses; and, by section 63 (page 372) thereof, prohibits under severe penalties "any person, corporation or association other than a duly authorized and bonded state weigher to issue any weight certificate [for any] grain weighed at any warehouse or elevator in this state where duly appointed and qualified state weighers are stationed, * * * or to make any charge for such weighing, * * * or weight certificates. * * *"

In June, 1915, an original proceeding in the nature of quo warranto was brought under this statute at the relation of the Attorney General in the Supreme Court of the state against the Merchants' Exchange, a Missouri corporation with the usual powers of a board of trade. See *House v. Mayes*, 219 U. S. 270, 31 Sup. Ct. 234, 55 L. Ed. 213; *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031. The information stated that St. Louis is a city of more than 75,000 inhabitants; that *public weighers of grain are maintained there at all public warehouses and elevators in compliance with the act; and that the respondent in violation thereof and in abuse of its corporate franchise maintains a bureau for weighing grain, grants weight certificates, and makes charges therefor. The prayer is that respondent be adjudged guilty of these practices and that a fine be imposed. The return admitted substantially the facts stated in the information but alleged that the services were rendered only at the request of members; that the weighing by its bureau in addition to that of the public weighers added to the general security, thus benefiting farmer, dealer, and consumer; that similar weighing bureaus were maintained by the boards of trade at competing grain markets; and that the statute, in prohibiting the practice, deprived its members of liberty and property and of equal protection of the laws in violation of the Fourteenth Amendment. The return also set forth that the grain weighed by its bureau was in large part shipped into or out of the state; that

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It is commercially necessary as a part of interstate transit to pass grain through an elevator where it is weighed, and the issue of certificates of weight is essential; and that the provisions of the Missouri act therefore violated the commerce clause of the federal Constitution. Upon a demurrer to the return, the full court found the respondent guilty and ordered that it be ousted of the usurped power of weighing grain received into or discharged from public warehouses and elevators and of making charges therefor, and of issuing weight certificates and making charges therefor; and that the respondent pay costs. State ex inf. Barker v. Merchants' Exchange of St. Louis, 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E, 871. The case comes here on writ of error.

[1-4] First. Section 63 of the act does not violate the Fourteenth Amendment. As the state court has pointed out, the statute does not prohibit owners of grain from weighing it before it is sent to a public warehouse or after it is removed therefrom. But the issue of a private weigher's *certificate in addition to the certificate of the public weigher might lead to embarrassment or confusion or prove a means of deception. The regulation of weights and measures with a view to preventing fraud and facilitating commercial transactions is an exercise of the police power. To require that goods received in or discharged from public warehouses shall be weighed by public weighers and that no one else shall issue certificates of or make charges for weighing under those circumstances is not an unreasonable or arbitrary exercise of the discretion vested in the Legislature. Compare House v. Mayes, supra; Brodnax v. Missouri, 219 U. S. 285, 31 Sup. Ct. 238, 55 L. Ed. 219. Nor can we say that to limit the application of the provision to grain and hay is an arbitrary discrimination against dealers in those articles. The fact that respondent is a corporation does not lessen the scope of the state's police power. We have no occasion to consider whether it is thereby enlarged.

[5, 6] Second. Section 63 does not violate the commerce clause of the Constitution (article 1, § 8, cl. 3). The contention that it does was rested below solely on the ground that the prohibition, as applied to grain received from or shipped to points without the state, burdens interstate commerce. It clearly does not. Pittsburg & Southern Coal Co. v. Louisiana, 156 U. S. 590, 15 Sup. Ct. 459, 39 L. Ed. 544; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619. But the additional contention is made here that all state regulation of the weighing of grain was superseded by the United States Grain Standards Act, approved August 11, 1916 (39 Stat. 482 [Comp. St. 1918, §§ 8747½-8747½k]). That act (which is part

B of chapter 313) relates exclusively to the establishment by the Secretary of Agriculture of standards of quality and condition. It does not in any way refer to the weighing of grain. And part B of chapter 313, by section 7 (page 484 [section 8747½f]), like part C, the United States Warehouse Act (sections 8747¼-8747¼pp), which does contain some reference to weighing, by section 29 (page 490 [section 8747¼nn]), makes manifest the purpose of Congress not to supersede *state laws for the inspection and weighing of grain, but to co-operate with state officials charged with the enforcement of such state laws. The Missouri act is not superseded by or in conflict with the federal legislation.

The judgment of the Supreme Court of Missouri is therefore
Affirmed.

(248 U. S. 328)

LEARY v. MAYOR AND ALDERMEN OF JERSEY CITY et al.

(Argued Nov. 12 and 13. 1918. Decided Jan. 7, 1919.)

No. 3.

TAXATION ⚡179 — TIDELANDS — LEASE OR GRANT BY STATE.

An instrument executed on behalf of the state of New Jersey under its statutes, whereby in terms it bargained, sold, leased, and conveyed forever, lands under tide water to a riparian owner, with privilege of excluding the waters therefrom, subject to payment of specified rent, with right of re-entry for nonpayment, and covenanted to convey free from rent charge on payment of a certain sum, held to confer such an ownership as was taxable under state laws.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Suit by Daniel J. Leary against the Mayor and Aldermen of the City of Jersey City and another. Decree dismissing the bill (189 Fed. 419) was affirmed by the Circuit Court of Appeals (208 Fed. 854, 126 C. C. A. 12) and complainant appeals. Affirmed.

Messrs. Merritt Lane, of Newark, N. J., and John M. Enright, of Jersey City, N. J., for appellant.

Mr. John Bentley, of Jersey City, N. J. (Messrs. John Milton and Edward P. Stout, both of Jersey City, N. J., of counsel), for appellees.

*Mr. Justice PITNEY delivered the opinion of the Court.

This was a suit in equity brought in the United States Circuit (afterwards District) Court for the District of New Jersey by Leary, the appellant, against the city of

Jersey City and the city collector to remove a cloud upon the title held by Leary in certain lands lying beneath the waters of New York Bay adjacent to the New Jersey shore, arising from the lien asserted by the city to secure payment of certain taxes assessed against those lands and alleged by complainant to be invalid under the constitution and laws of the state and repugnant to the Constitution of the United States. The Circuit Court dismissed the bill (189 Fed. 419), the Circuit Court of Appeals for the Third Circuit affirmed its decree (208 Fed. 854, 126 C. C. A. 12), and an appeal to this court was allowed.

The lands in question were granted or leased April 30, 1881, by the state of New Jersey, acting by its riparian commissioners appointed under an Act of March 31, 1869 (P. L. p. 1017), supplementary to an Act of April 11, 1864 (P. L. p. 681). The recipient of the grant was the Morris & Cumings Dredging Company, a corporation of the state of New York, and this company on February 24, 1904, assigned its interest to appellant. The taxes in question were assessed annually for the years 1883 to 1905, inclusive, amounted in all to \$163,392.24, and remain unpaid. The lands having been advertised for sale by the city collector to pay them, the original bill was filed to restrain such sale. Afterwards the city under an act of the Legislature known as the Martin Act, approved March 30, 1886 (P. L. p. 149), and its supplements, caused an adjustment of the taxes to be made, which was confirmed by a circuit judge, pursuant to the act. The assessment resulted in a large reduction in the amount of the taxes, fixing the aggregate burden upon appellant's land at about \$108,000, including the taxes for the years 1904, 1905, 1906, and 1907, which were included in the adjustment. The adjusted taxes were made the basis of a supplemental bill herein. At the same time they were reviewed by the Supreme Court of the state upon a writ of certiorari prosecuted by the city, and were sustained by that court and by the Court of Errors and Appeals. *Jersey City v. Spear*, 78 N. J. Law, 34, 72 Atl. 448; *Id.*, 79 N. J. Law, 598, 76 Atl. 1037. That review, however, did not involve the questions now raised.

In the present suit the validity of the taxes was assailed principally upon four grounds: First, that the lands were not owned by the Morris & Cumings Dredging Company or by appellant in such a sense as to make them taxable in their hands under the state laws, but on the contrary remained the property of the state; second, that the lands, although within the territorial limits of the state of New Jersey, were, by the compact made in the year 1833 between that state and the state of New York, approved by Act of Congress of June 28, 1834 (4 Stat. 708, c.

126), made subject to the governmental jurisdiction of the state of New York, and that the imposition of a tax upon *them under the authority of the state of New Jersey would deprive appellant of his property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States; third, that the lands were not within the taxing district of Jersey City; and, fourth, that the lien of the taxes had expired.

Since the suit was commenced the second contention, which raised the only substantial federal question, has been decided adversely to appellant by this court in *Central R. R. Co. v. Jersey City*, 209 U. S. 473, 28 Sup. Ct. 592, 52 L. Ed. 896.

The third and fourth points are satisfactorily dealt with in the opinions of the Circuit Court and Circuit Court of Appeals.

The first point—whether the interest of appellant and of his predecessor in title were taxable under the laws of the state—is the one chiefly relied on in this court. It is insisted, and for the purposes of the decision we assume, that the state laws provide for taxing lands only against the owner, and not against a lessee. Hence, the crucial question on this branch of the case is whether the riparian grant under which appellant derives his title is a mere lease, as contended by him, or confers such an ownership as is taxable under the state laws; in short, whether the state or the grantee is the owner.

The legislation by which the powers of the riparian commissioners are defined is set forth in the opinion of the Circuit Court (189 Fed. 422-425), and need not be here repeated. Suffice it to say that it authorizes the making, in the name and behalf of the state, of such a grant or lease as that which was made to the Morris & Cumings Dredging Company, and which that company assigned to appellant. The instrument recites that the company, being the owner of lands fronting on New York Bay, and desirous of obtaining a lease for the lands under water lying in front of them, had applied to the riparian commissioners and the governor for such a lease, and in compliance with the application the commissioners had agreed to lease the submerged lands in question, and had fixed the sum of \$4,233.60 as the annual rental to be paid for them, and the sum of \$60,480 as the price on payment of which a conveyance of the lands free from rent would be made; the instrument proceeds in the name of the state to "bargain, sell, lease, and convey unto the said the Morris & Cumings Dredging Company and to its successors and assigns forever" the submerged lands in question (describing them), "and also the right, liberty, privilege, and franchise to exclude the tide water from so much of the lands above described as lie

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under tide water by filling in or otherwise improving the same and to appropriate the land above described to their exclusive private use." There follows an habendum clause to the effect that the lands granted and all rights and privileges exercisable within and over or with reference to the same in manner and form as granted are to be held by the company and its successors and assigns forever, subject to the payment of the rent specified in semi-annual instalments. There is an express covenant for the payment of the rent at the times appointed, with the right on the part of the state to reënter for nonpayment; and there is a covenant by the state to convey the lands or any part thereof to the company, its successors or assigns, free and discharged of the rent, upon payment to the state of the sum of \$60,480, or an equitable portion thereof.

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With respect to a similar grant, made under the same statutory authority and containing like provisions, the court of last resort of New Jersey has held that it transmitted the entire estate of the grantor to the grantee; that the interest remaining in the state was not an actual estate but a right of entry for nonpayment of rent, and the mere possibility of a reverter for condition broken did not amount to an estate in reversion; and that the lands covered by the grant were not lands belonging to the state within the meaning of a section of the general railroad act which limited the power of corporations created thereunder to condemn lands for the uses contemplated by the act. *Hudson Tunnel Co. v. Attorney General*, 27 N. J. Eq. 573, 578. In *Cook v. Bayonne*, 80 N. J. Law, 596, 77 Atl. 1048, the Supreme Court of the state held that a riparian grant of the same character amounted to a conveyance in fee subject to a rent charge, and that the lands were taxable in the hands of the grantee. A similar view as to the nature of the estate which passes under a "riparian lease" was taken by Vice Chancellor Leaming in the recent case of *Ocean Front Imp. Co. v. Ocean City Gardens Co.* (N. J. Ch.) 103 Atl. 419. The last two cases do not appear to have been reviewed by the court of last resort.

Appellant refers to that part of the lease which grants the right to exclude the tide water from the lands described by filling in or otherwise improving the same and to appropriate the lands described to private use, and upon the strength of this insists that the instrument, whether by way of lease or in fee, confers a mere license to reclaim, and does not constitute the licensee the owner of the land or extinguish public rights therein unless and until the license is executed by actual reclamation. *Polhemus v. Bateman*, 60 N. J. Law, 163, 37 Atl. 1015, a decision by the Court of Errors and Appeals, is relied

upon to support this contention. But the authority of that case has been much restricted by the subsequent decision of the same court in *Burkhard v. Heinz Co.*, 71 N. J. Law, 562, 564, 60 Atl. 191, where it was pointed out that the judgment in the *Polhemus* Case was not as far-reaching as the opinion; that its legal effect was simply that such common rights as the right to fish in the sea were not annulled by a riparian grant until the grantee made some appropriation of the property inconsistent with them. We do not regard this as conclusive upon the present question.

The other cases particularly relied upon, *Long Dock Co. v. Board of Equalization of Taxes*, 87 N. J. Law, 22, 93 Atl. 111, and *Long Dock Co. v. State Board of Assessors*, 89 N. J. Law, 108, 97 Atl. 900, and 90 N. J. Law, 701, 101 Atl. 867, so far as they touch the point at all, are based upon the language of the charter of the Long Dock Company (P. L. 1856, p. 67), and are not inconsistent with *Hudson Tunnel Co. v. Attorney General*, *Cook v. Bayonne*, and *Ocean Front Imp. Co. v. Ocean City Gardens Co.*, supra. Under the doctrine of these cases, which we accept as well founded in reason, to say nothing of authority, appellant's estate is taxable under the New Jersey laws.

Other points are raised, but none that seems to require mention.

Decree affirmed.

(248 U. S. 372)

UNION DRY GOODS CO. v. GEORGIA PUBLIC SERVICE CORPORATION.

(Argued and Submitted Dec. 18, 1918. Decided Jan. 7, 1919.)

No. 87.

1. CONSTITUTIONAL LAW §154(2) — ELEC- TRICITY §11—OBLIGATION OF CONTRACT— RATES OF PUBLIC SERVICE CORPORATION.

Private contract with public service electric company, fixing rates, is subject to the police power of regulation, so that exercise thereof, by fixing a higher rate, does not impair obligation of contract.

2. CONSTITUTIONAL LAW §298(7) — DUE PROCESS OF LAW—RATES OF PUBLIC SER- VICE CORPORATION.

One having a contract with a public service electric company fixing rates is not deprived of property without due process by the fixing of higher rates in the exercise of the state's police power of regulation.

In Error to the Supreme Court of the State of Georgia.

Suit by the Union Dry Goods Company against the Georgia Public Service Corporation. Judgment for defendant was affirmed

by the Supreme Court of Georgia (142 Ga. 841, 83 S. E. 946, L. R. A. 1916E, 358), and plaintiff brings error. Affirmed.

Messrs. R. Douglas Feagin and Rudolph S. Wimberly, both of Macon, Ga., for plaintiff in error.

Messrs. Roland Ellis, of Macon, Ga., and Thomas W. Hardwick, of Sandersville, Ga., for defendant in error.

*Mr. Justice CLARKE delivered the opinion of the Court.

The Georgia Public Service Corporation and the Union Dry Goods Company, both corporations organized under Georgia law and doing business in Macon on July 18, 1912, contracted together in writing for the term of five years, the former to supply electric light and power to the latter, which agreed to pay stipulated rates for the service.

The contract was performed for almost two years until in April, 1914, when the Dry Goods Company refused to pay a bill for service rendered during March, in which a rate higher than that of the contract was charged. The Service Corporation claimed that this rate was authorized and required by an order of the Railroad Commission of Georgia, entered after investigation and hearing.

Soon thereafter the Dry Goods Company commenced this suit to compel specific performance of its contract, which had three years yet to run; to enjoin the Service Corporation from charging the higher rate, and from executing a threat to cut it off from a supply of electricity, because of failure to pay the increased rate.

The trial court and the Supreme Court of Georgia both held against the claims of the Dry Goods Company, and the case is here for review on writ of error.

The order of the Railroad Commission of Georgia, entered on February 24, 1914, reads:

"Ordered: That on and after March 1, 1914, and until the further order of the Commission, the following schedule of rates shall be the maximum schedule of rates to be charged by the Georgia Public Service Corporation."

Then follow the rates complained of.

No opinion was rendered in this case, but on the same date, in prescribing the same rates in a proceeding instituted by the Macon Railway & Light Company, also of Macon, the Commission said:

*"The rates prescribed herein are in the opinion of the Commission at this time just and reasonable. We have no power to compel the company to accept less, except as implied in the power to prevent unlawful discrimination.

* * * All special rates, whether in the form of contracts for definite periods, or informal, in excess of these prescribed rates are illegal."

[1, 2] Of the several claims pressed in argument, we need notice only two: That the ob-

ligation of the contract of July 18, 1912, was impaired, and that the plaintiff in error was deprived of its property without due process of law, by the decision of the Supreme Court of Georgia, holding that the rates prescribed by the Railroad Commission were valid and superseded those of the contract between the parties.

Long prior to the contract of 1912 the Railroad Commission was given jurisdiction over, and power to regulate, the rates of electric light and power companies by statutes in form not greatly different from those of many other states, and, since no reason is assigned for assailing their validity, other than the result in this case, they must be accepted as valid laws.

As we have seen, the rates prescribed by the Commission were declared by it to be reasonable and the Service Company was given authority to charge them. The plaintiff in error did not assert in its pleadings, or offer evidence tending to prove, that these commission rates were unreasonable, but complained, only that they were higher than the contract rates, and for this reason, it argued, that to give effect to the order as the state Supreme Court did, violated the provisions of the Constitution referred to.

The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants *of a city is devoted to a use in which the public has an interest which justifies rate regulation by a state in the exercise of its police power. *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; *German Alliance Ins. Co. v. Lewis*, Superintendent of Insurance of the State of Kansas, 233 U. S. 389, 407, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C. 1189.

Thus it will be seen that the case of the plaintiff in error is narrowed to the claim that reasonable rates, fixed by a state in an appropriate exercise of its police power, are invalid for the reason that if given effect they will supersede the rates designated in the private contract between the parties to the suit, entered into prior to the making of the order by the Railroad Commission.

Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion.

That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court. Thus in *Manigault v. Springs*, 199 U. S. 473, 480, 26 Sup. Ct. 127, 130 (50 L. Ed. 274), it was declared that:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from" properly exercising its police powers "for the general good of the public, though contracts previously entered into between individuals may thereby be affected."

This on authority of many cases which are cited.

In *Hudson Water Co. v. McCarter*, 209 U. S. 349, 357, 28 Sup. Ct. 529, 531 (52 L. Ed. 828, 14 Ann. Cas. 560), it is said that:

"One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."

*In *L. & N. R. R. Co. v. Mottley*, 219 U. S. 467, 482, 31 Sup. Ct. 265, 270 (55 L. Ed. 297, 34 L. R. A. [N. S.] 671), this is quoted with approval from *Knox v. Lee*, 12 Wall. 457, 550, 551, 20 L. Ed. 287, viz.:

"Contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority."

In the same report, in *Chicago, B. & Q. R. R. Co. v. McGuire*, 219 U. S. 567, 31 Sup. Ct. 259, 262 (55 L. Ed. 328), it is said:

"There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

In *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 558, 34 Sup. Ct. 364, 368 (58 L. Ed. 721), the court said:

"It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

And in *Rail & River Coal Co. v. Ohio Industrial Commission*, 236 U. S. 338, 349, 35 Sup. Ct. 359, 362 (59 L. Ed. 607), the state of the law upon the subject is thus aptly described:

"This court has so often affirmed the right of the state in the exercise of its police power to place reasonable restraints, like that here involved, upon the freedom of contract, that we need only to refer to some of the cases in passing."

*These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state, and the judgment of the Supreme Court of Georgia must be Affirmed.

(248 U. S. 319)

DANCIGER et al. v. COOLEY.

(Submitted Nov. 14, 1918. Decided Jan. 7, 1919.)

No. 37.

1. INTOXICATING LIQUORS 167—OFFENSES.—INTERSTATE SHIPMENT—COLLECTION OF PRICE—"OTHER PERSON."

"Other person," within Criminal Code, § 239 (Comp. St. § 10409), declaring a punishment for any railroad company, express company, or other common carrier, "or any other person" who, in connection with interstate transportation of liquor, shall collect the purchase price, is not limited to an agent of a common carrier, but includes all persons doing the prescribed act; the practice of collecting the purchase price at destination as a condition to delivery being the thing aimed at, and the rule of ejusdem generis never being applied when it will defeat the intention of the legislative body.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Other.]

2. INTOXICATING LIQUORS 138 — OFFENSES.—INTERSTATE SHIPMENT—COLLECTION OF PRICE—"IN CONNECTION WITH" TRANSPORTATION.

Collection of purchase price of liquor is "in connection with" transportation of interstate shipment of liquor, within the denoucement of Criminal Code, § 239 (Comp. St. § 10409), where shipper's agent at destination, according to shipper's instructions, required payment before bill of lading passed to purchaser.

[Ed. Note.—For other definitions, see Words and Phrases, In Connection With.]

3. COURTS 366(27) — REVIEW OF STATE COURT—LOCAL LAW.

Ruling of state court, on right of principal to recover from agent money received by him in carrying out arrangement between them involving violation of criminal statute, turning on question of local law, cannot be re-examined by national court.

In Error to the Supreme Court of the State of Kansas.

Action by Abe Danciger and others against D. G. Cooley. Judgment for defendant was affirmed by the Supreme Court of Kansas (98 Kan. 38, 157 Pac. 453; 98 Kan. 484, 158 Pac. 1119), and plaintiffs bring error. Affirmed.

Mr. Edwin A. Krauthoff, of Washington, D. C., for plaintiffs in error.

Mr. Edwin A. Austin, of Topeka, Kan., for defendant in error.

*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

Danciger Bros., who conducted a mail-order liquor business in Kansas City, Missouri, brought this suit in a Kansas court to recover from Cooley certain moneys collected by him, under an arrangement with them, as the purchase price of intoxicating liquors sold by them in interstate commerce, and also to enforce a similar claim assigned to them by another liquor dealer. After issue and trial Cooley prevailed and the judgment was affirmed; the appellate court holding that the arrangement under which the moneys were collected involved a violation of section 239 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1136 [Comp. St. § 10409]), and that, applying the settled rule of the Kansas courts, a principal who employs an agent to make collections in violation of a criminal law cannot compel the agent to account for what he collects. 98 Kan. 38, 484, 157 Pac. 453, 158 Pac. 1119. The case is here on writ of error sued out prior to the Act of September 6, 1916, c. 448, 39 Stat. 726.

These are the facts: During the year 1910 Danciger Bros. received through the mails several orders for whisky from customers in Topeka, Kansas, and in each instance shipped the liquor from Kansas City, Missouri, to Topeka as freight. Each package was consigned to the shipper's order and was to be delivered by the carrier only on the surrender of the bill of lading properly indorsed. A sight draft was drawn on the customer for the purchase price and this with the bill of lading attached was sent to Cooley under an arrangement whereby he was to collect the draft, was then to hand the bill of lading suitably indorsed to the customer to enable the latter to get the package from the carrier, and ultimately was to remit to Danciger Bros. the amount collected less a commission for the service rendered. Before this arrangement was made the banks had refused to make such collections.

The assigned claim need not be separately described, for it was essentially like the other.

As the transactions occurred before the passage of the Webb-Kenyon Act, March 1, 1913, c. 90, 37 Stat. 699 (Comp. St. § 8739), we are not concerned with it, but only with the situation theretofore existing.

Whether section 239 of the Criminal Code reaches and embraces acts done by an agent such as Cooley was in this instance, or is confined to acts of common carriers and their agents, is a question about which there has been some contrariety of opinion, and it is

now before this court for the first time. Of course, the chief factor in its solution must be the words of the statute. Omitting what is irrelevant here, they are:

"Sec. 239. Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any * * * intoxicating liquor * * * from one state * * * into another state, * * * shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined," etc.

A reference to the conditions existing when the section was enacted, in 1909, will, together with its words, conduce to a right understanding of the evil at which it is aimed and the relief it is intended to afford. The conditions were these: In some of the states there were state-wide laws prohibiting the manufacture and sale of intoxicating liquor; in some there was a like prohibition operative only in particular districts, and in other states the business was lawful. But the prohibitory laws did not reach sales or transportation in interstate commerce, for under the Constitution of the United States that was a matter which only Congress could regulate. True, there was a regulation by Congress, known as the Wilson Act Aug. 8, 1890, c. 728, 26 Stat. 313 (Comp. St. § 8738), which subjected liquor transported into a state to the operation of the laws of the state enacted in the exercise of its police power, but the time when the liquor was thus to come within the operation of those laws was after the shipment arrived at the point of destination and was there delivered by the carrier. *Rhodes v. Iowa*, 170 U. S. 412, 426, 18 Sup. Ct. 664, 42 L. Ed. 1088. Thus a state, although able effectively to prohibit the manufacture and sale of liquor within its own territory, was unable to prevent its introduction from other states through the channels of interstate commerce. Of course, the real purpose of the prohibitory laws was to prevent the use of liquor by cutting off the means of obtaining it. But with the channels of interstate commerce open those laws were failing in their purpose, for dealers in states where it was lawful to sell were supplying the wants of intending users in states where manufacture and sale were prohibited. This interstate business generally was carried on by means of orders transmitted through the mails and of shipments made according to some plan whereby ultimate delivery was dependent on payment of the purchase price. The plans varied in detail, but not in principle or result. All included the collection of the purchase price at the point

of destination before or on delivery. One made the carrier having the shipment the collecting agent; another committed the collections to a separate carrier, the liquor being forwarded as railroad freight *and the bill of lading being sent to an express company with instructions to hand it to the buyer when the money was paid; and still another made use of an agent, such as Cooley was here, the bill of lading being sent to him with a sight draft on the buyer for the purchase price. In some instances the liquor was consigned to the buyer and in others to the shipper's order, the bill of lading then being suitably indorsed by the shipper.

Where the transactions were real and not merely colorable, the business so conducted was lawful interstate commerce and entitled to protection as such until the sale and transportation were consummated by the delivery of the liquor to the vendee at the point of destination. Such was the decision of this court in *American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182, 49 L. Ed. 417, a case which arose out of the transportation into the state of Iowa of a collect-on-delivery shipment of liquor ordered from a dealer in Illinois. The Supreme Court of Iowa had held that, as the sale was to be completed in that state by payment and delivery there, the laws of the state enacted to prevent sales of liquor therein applied. This court reversed that ruling and said in the opinion (196 U. S. 143, 144, 25 Sup. Ct. 184 [49 L. Ed. 417]):

"The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and in doing so to fix by agreement the time when [and] the condition on which the completed title should pass, is beyond question. The shipment from the state of Illinois into the state of Iowa of the merchandise constituted interstate commerce. * * *

"When it is considered that the necessary result of the ruling below was to hold that wherever merchandise shipped from one state to another is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment the movement of such merchandise is not interstate commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple if not destroy that freedom of commerce between the states which it was the great purpose of the Constitution to promote. If upheld, the doctrine would deprive a citizen of one state of his right to order merchandise from another state at the risk of the seller as to delivery. It would prevent the citizen of one state from shipping into another unless he assumed the risk; it would subject contracts made by common carriers and valid by the laws of the state where made to the laws of another state, and it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the commerce clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce

by means of bills of lading to the shipper's order with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof."

After that decision the matter of further regulating interstate commerce in liquor was much considered in Congress and as a result of extended hearings conducted by the Committee on the Judiciary of the Senate that committee, speaking through Senator Knox, proposed the enactment of what afterwards became sections 238-240 of the Criminal Code (Comp. St. §§ 10408-10410). The report of the committee shows that its attention was directed to the practice of shipping liquor from one state into another, to be paid for as a condition to delivery, and that the committee regarded it as an evil which should be met and corrected.

[1] With the conditions just described in mind we come to examine section 239. It consists of two parts, both relating to liquor transported from one state into another. The first deals with the collection of the purchase price, and *the second with acts done "for the purpose of buying or selling or completing the sale" of "any such liquor." If the meaning of the first is affected by the second it is not in a restrictive way, but the reverse, so, if Cooley and his acts are within the first, the second need not be noticed further. The first, as before quoted, says:

"Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any * * * intoxicating liquor * * * from one state * * * into another state, * * * shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, * * * shall be fined," etc.

The words "any railroad company, express company, or other common carrier," comprehend all public carriers; and the words "or any other person" are equally broad. When combined they perfectly express a purpose to include all common carriers and all persons; and it does not detract from this view that the inclusion of railroad companies and express companies is emphasized by specially naming them. To hold that the words "or any other person" have the same meaning as if they were "or any agent of a common carrier" would be not merely to depart from the primary rule that words are to be taken in their ordinary sense, but to narrow the operation of the statute to an extent that would seriously imperil the accomplishment of its purpose. The rule that where particular words of description are followed by general terms the latter will be regarded as applicable only to persons or things of a like class is invoked in this con-

nection, but it is far from being of universal application, and never is applied when to do so will give to a statute an operation different from that intended by the body enacting it. Its proper office is to give effect to the true intention of that body, not to defeat it. *United States v. Mescall*, 215 U. S. 26, 30 Sup. Ct. 19, 54 L. Ed. 77.

*Without question the practice of collecting the purchase price at the point of destination as a condition to delivery is the thing at which the statute is aimed. Through that practice the sale of liquor in interstate commerce was rapidly increasing. But, as before shown, such collections were not confined to carriers and their agents, but often were made by others. In principle and result there was no difference; the evil was the same in either event. Besides, if the statute were made applicable only to carriers and their agents, it could be evaded so readily by having other collectors that it would accomplish nothing. The volume of the business and the attending mischief would be unaffected. Doubtless all this was in mind when the statute was drafted and accounts for its comprehensive terms. That the words "or any other person" are intended to include all persons committing the acts described is, as we think, quite plain.

[2] To be within the statute it is essential that the act of collecting the purchase price be done "in connection with the transportation of" the liquor. The statute does not say "in the transportation," but "in connection with" it. Transportation, as this court often has said, is not completed until the shipment arrives at the point of destination and is there delivered. *Rhodes v. Iowa*, 170 U. S. 412, 415, 420, 18 Sup. Ct. 664, 42 L. Ed. 1088; *Vance v. Vandercook Co.*, 170 U. S. 438, 451, 18 Sup. Ct. 674, 42 L. Ed. 1100; *Louisville & Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 82, 32 Sup. Ct. 189, 56 L. Ed. 355; *Kirmeyer v. Kansas*, 236 U. S. 568, 572, 35 Sup. Ct. 419, 59 L. Ed. 721; *Rosenberger v. Pacific Express Co.*, 241 U. S. 48, 50, 36 Sup. Ct. 510, 60 L. Ed. 880. What Cooley did, while not part of the transportation, was closely connected with it. He was at the point of destination and held the bill of lading, which carried with it control over the delivery. Conforming to his principal's instructions he required that the purchase price be paid before the bill of lading was passed to the vendee. The money was paid under that requirement and he then turned over the bill of lading. A delivery of the shipment *followed and that completed the transportation. Had the carrier done what he did all would agree that the requisite connection was present. As the true test of its presence is the relation of the collection, rather than the collector, to the transporta-

tion, it would seem to be equally present here.

[3] We conclude that section 239 reaches and embraces acts done by an agent such as Cooley was. The ruling on the right of a principal to recover from an agent money received by the latter in carrying out an arrangement between them which involved the violation of a criminal statute turned on a question of local law and cannot be re-examined here.

Judgment affirmed.

(248 U. S. 314)

FISHER v. RULE.

(Argued Nov. 22, 1918. Decided Jan. 7, 1919.)

No. 78.

1. PUBLIC LANDS ⚡128 — PATENT — ATTACK FOR GOVERNMENT.

An individual, maintaining a suit to have a patentee of land declared a trustee thereof for him, may not complain on behalf of the United States that defendant was not entitled to a patent.

2. PUBLIC LANDS ⚡102—ESTABLISHMENT OF TRUST—INTEREST OF PLAINTIFF—APPLICATION TO ENTER.

Plaintiff, by application, never allowed, to enter land as a homestead, acquired no right or interest in the land, entitling him to complain of issuance of patent to defendant; the application as originally made, after cancellation of defendant's entry on decision and direction of the Secretary of the Interior, not sufficiently showing plaintiff was a qualified applicant, and, before further showing was made all action under the Secretary's decision being by him suspended, pending a reconsideration thereof, on which the decision was recalled.

3. PUBLIC LANDS ⚡31 — INITIATION OF CLAIM—SETTLEMENT IN CONTRAVENTION OF ORDER.

Plaintiff's settlement on land, in contravention of an order of the Secretary of the Interior to preserve the status quo pending final action on defendant's entry, is a trespass, initiating no adverse claim, and giving no right under the public land laws.

4. PUBLIC LANDS ⚡128—ESTABLISHMENT OF TRUST.

To succeed in a suit to have a patentee of land declared trustee thereof for plaintiff, he must show a better right than patentee, such as should have been respected by the land department, and being respected, would have given him the patent; it not being enough that patentee should not have received it.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by William Allen Fisher against Newton Rule. Decree for defendant was affirmed by the Circuit Court of Appeals (232 Fed.

861, 147 C. C. A. 55), and plaintiff appeals. Affirmed.

Messrs. Homer Guerry, of Washington, D. C., and Allen G. Fisher, of Chadron, Neb., for appellant.

Mr. Samuel Herrick, of Washington, D. C., for appellee.

*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit by Fisher to have Rule declared a trustee for him of the title to certain land in Nebraska, for which Rule holds a patent under the homestead law of the United States. Fisher lost in the District Court and its decree was affirmed by the Circuit Court of Appeals. 232 Fed. 861, 147 C. C. A. 55.

The case presented by the record is as follows:

In 1904, when the land was public land, a son of Rule applied for and secured a preliminary homestead entry thereof at the local land office. Under the ruling then and for many years prevailing in the land department he had six months within which to establish residence on the land. During the early part of that period he died intestate without establishing such residence. The father was the only heir and as such, according to the ruling then and theretofore prevailing in the land department, *could acquire title under the son's entry without himself residing on the land. Shortly after the son's death he took possession under the entry, fenced the land, erected substantial buildings thereon, cultivated forty acres or more and pastured live stock on the remainder, but resided on an adjoining tract. In due course, after continuing his cultivation and improvements for five years, he submitted final proof at the local land office showing what he had done and made the payments required by law. In that connection his right to a patent was contested by one who, although making no claim to the land, insisted that the entry was extinguished ipso facto when the son died without establishing residence on the land, and that, if the entry was not thus extinguished, the father forfeited his rights thereunder by failing to make the land his own place of residence. The local officers held against the contestant and with the father, and that decision was affirmed by the Commissioner of the General Land Office. But when the matter came before the Secretary of the Interior that officer, conceiving that the settled rulings of the land department before noticed were not well grounded, sustained the insistence of the contestant, reversed the decisions of the local officers and the Commissioner and directed that the entry be cancelled. 42 L. D. 62, 64. The father sought to have the matter reconsidered and, while at first his efforts were unavailing, a rehearing ultimately was granted. On

the rehearing, of which the contestant had timely notice, the Secretary recalled his first decision, adhered to the prior settled rulings, dismissed the contest and directed that the entry be reinstated. 43 L. D. 217. It was under that decision that the patent was issued.

On receiving the usual notice of the Secretary's first decision the local officers complied therewith by cancelling the entry on their records. Fisher, who knew of the entry and the contest, then presented an application to *enter the land as a homestead. The application, while disclosing that he was a minor and unmarried, asserted in a general way that he was the head of a family, and therefore a qualified applicant, by reason of having adopted a minor child.¹ The local officers called for a further showing respecting the asserted adoption and for the time being withheld action on the application. Before a further showing was made the Secretary of the Interior, who was being asked to reconsider his first decision, ordered a suspension of all action under that decision;² and of this Fisher was advised by the local officers. Subsequently Fisher produced a court order purporting to show his adoption of a younger brother eighteen days after his homestead application was presented, but, by reason of the Secretary's suspending order, no further action was had on the application until after the Secretary's last decision, when the application was rejected. During the continuance of the suspending order, and without the consent of Rule, Fisher went on the land, erected improvements and attempted to establish a residence there.

[1-3] In no admissible view of these facts can this suit be sustained. Even if under a right construction of the homestead law Rule was not entitled to the patent—which we do not at all intimate—Fisher is not in a position to take advantage of the error. He cannot be heard to complain on behalf of the United States; and he has no such personal interest in the land as entitles him to complain on his own account. He acquired no right *by his homestead application. It never was allowed; nor could it reasonably have been allowed. As originally presented it did not sufficiently show that he was a qualified applicant, and his additional showing—whatever else might be thought of it—came after the suspending order had superseded the cancellation of the Rule entry and become an obstacle to the initiation of

¹ There was no statement respecting the time, place or mode of adoption or the identity of the child. In Nebraska adoption seems to be controlled by statute, *Kofka v. Rosicky*, 41 Neb. 328, 342, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep. 685; and the statute apparently provides that only adults may adopt. Rev. Stat. 1913, § 1615.

² A second suspending order was made by the Secretary at a time when Rule was resorting to judicial proceedings in the District of Columbia.

any adverse claim. Neither did he acquire any right by his attempted settlement after that order was made. The order was no less effective against that mode of initiating a claim than against the other. Its purpose was to preserve the status quo pending final action on the Rule entry. A settlement in opposition to such an order is nothing short of a trespass and confers no right under the public land laws. *Lyle v. Patterson*, 228 U. S. 211, 216, 33 Sup. Ct. 480, 57 L. Ed. 804.

[4] It is a familiar rule that to succeed in such a suit the plaintiff "must show a better right to the land than the patentee, such as in law should have been respected by the officers of the land department, and being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent." *Sparks v. Pierce*, 115 U. S. 408, 413, 6 Sup. Ct. 102, 105 (29 L. Ed. 428); *Smelting Co. v. Kemp*, 104 U. S. 636, 647, 26 L. Ed. 875; *Bohall v. Dilla*, 114 U. S. 47, 50, 5 Sup. Ct. 782, 29 L. Ed. 61; *Lee v. Johnson*, 116 U. S. 48, 50, 6 Sup. Ct. 249, 29 L. Ed. 570; *Duluth & Iron Range R. R. Co. v. Roy*, 173 U. S. 587, 590, 19 Sup. Ct. 549, 43 L. Ed. 820; *Johnson v. Riddle*, 240 U. S. 467, 481, 36 Sup. Ct. 393, 60 L. Ed. 752; *Anicker v. Gunsburg*, 246 U. S. 110, 117, 38 Sup. Ct. 228, 62 L. Ed. 603.

Decree affirmed.

(248 U. S. 285)

WEIGLE v. CURTICE BROS. CO.

(Argued Dec. 17, 1918. Decided Jan. 7, 1919.)

No. 83.

COMMERCE ⇐8(10)—INTERSTATE COMMERCE—
STATE REGULATION OF SALE — FOOD AND
DRUGS ACT.

The Food and Drugs Act (Comp. St. §§ 8717-8728) does not affect the question when interstate commerce in an article of food satisfying that act ceases, and the article becomes subject to the laws of the state, into which it is brought, prohibiting its sale.

Appeal from the District Court of the United States for the Western District of Wisconsin.

Suit by the Curtice Bros. Company against George J. Weigle. Decree for plaintiff, and defendant appeals. Reversed.

Messrs. Spencer Haven, Atty. Gen., Walter H. Bender, Deputy Atty. Gen., and J. E. Messerschmidt, Asst. Atty. Gen., for appellant.

Mr. H. O. Fairchild, of Green Bay, Wis., for appellee.

*Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by Curtice Brothers Company, a New York corporation,

to restrain Weigle, the Dairy and Food Commissioner of Wisconsin, from enforcing certain laws of the State, especially Statutes of 1913, § 4601g. That section makes it unlawful to sell any article of food that contains benzoic acid or benzoates, with qualifications not material here. The plaintiff makes such articles from fruit, and adds benzoate of soda as a preservative. It put them up in glass bottles and jars properly labelled under the Food and Drugs Act (June 30, 1906, c. 3915, 34 Stat. 768 [Comp. St. §§ 8717-8728]) packs the bottles and jars in wooden cases containing a number of the same, and ships the cases from its factory in New York to customers in Wisconsin among others. Of course the single bottles are sold in the retail trade, and their contents are served to guests in restaurants and hotels. The defendant disavowed any contention that the state laws affected or purported to affect sales by the importer in the unbroken wooden packages containing the bottles and the decree *treated that subject as taken out of the case. But the bill went farther and setting up a decision, incorporated in a regulation under the Food and Drugs Act, that benzoate of soda is not injurious to health and that objection would not be raised to it under the Act if each container should be plainly labelled, contended that under the Food and Drugs Act and the Commerce Clause of the Constitution, the Wisconsin law was invalid even as applied to domestic retail sales of single bottles or the contents of single bottles of the plaintiff's goods. The defendant stood on a motion to dismiss and the District Court made a decree following the prayer of the bill. The defendant appealed.

The argument in support of the decree contends in various forms that the sale of the individual bottles when removed from the original package after entering the State, still is a part of commerce among the States, since the Act of Congress as to misbranding applies to them. But the Food and Drugs Act does not change or purport to change the moment at which an object ceases to move in interstate commerce. It imposes an obligation to label the bottles severally, although contained in one original package, as of course it may. Seven Cases of Eckman's Alternative v. United States, 239 U. S. 510, 515, 516, 36 Sup. Ct. 190, 60 L. Ed. 411, L. R. A. 1916D, 164. It provides for seizure and condemnation of misbranded or adulterated articles that have been transported from one State to another, although the transit is at an end, while the articles remain unsold or in original unbroken packages, as again it may. There is no reason why a lien ex delicto should be lost by the end of the journey in which the wrong was done. The two things have no relation to each other. Hypo-

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lite Egg Co. v. United States, 220 U. S. 45, 57, 58, 31 Sup. Ct. 364, 55 L. Ed. 364. Finally the duty to retain the label upon the single bottles does not disappear at once. For reasons stated in *McDermott v. Wisconsin*, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39, if the State could require the label to be removed while the bottles remained in the importer's hands unsold it could *interfere with the means reasonably adopted by Congress to make its regulations obeyed. But all this has nothing to do with the question when interstate commerce is over and the articles carried in it have come under the general power of the State. The law upon that point has undergone no change.

The Food and Drugs Act indicates its intent to respect the recognized line of distinction between domestic and interstate commerce too clearly to need argument or an examination of its language. It naturally would, as the distinction is constitutional. The fact that a food or drug might be condemned by Congress if it passed from State to State, does not carry an immunity of foods or drugs, making the same passage, that it does not condemn. Neither the silence of Congress nor the decisions of officers of the United States have any authority beyond the domain established by the Constitution. *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 362, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455. When objects of commerce get within the sphere of State legislation the State may exercise its independent judgment and prohibit what Congress did not see fit to forbid. When they get within that sphere is determined, as we have said, by the old long-established criteria. The Food and Drugs Act does not interfere with State regulation of selling at retail. *Armour & Co. v. North Dakota*, 240 U. S. 510, 517, 36 Sup. Ct. 440, 60 L. Ed. 771, Ann. Cas. 1916D, 548; *McDermott v. Wisconsin*, 228 U. S. 115, 131, 33 Sup. Ct. 43, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39. Such regulation is not an attempt to supplement the action of Congress in interstate commerce but the exercise of an authority outside of that commerce that always has remained in the States.

Decree reversed.

(248 U. S. 297)

HEBE CO. et al. v. SHAW, Secretary of Agriculture of Ohio et al.

(Argued Dec. 11 and 12, 1918. Decided Jan. 7, 1919.)

No. 664.

1. FOOD ⚡5 — SALES PROHIBITED — "CONDENSED MILK."

Gen. Code Ohio, § 12725, penalizing sale of condensed milk, unless made from unadulter-

ated milk from which the cream has not been removed, is not limited to sales of condensed milk as such, under that name, but applies to a condensed skimmed milk compounded with vegetable fat, and sold under a fanciful trade-name, with a label giving its ingredients.

2. CONSTITUTIONAL LAW ⚡296(1) — FOOD ⚡1—DUE PROCESS OF LAW—SALE OF FOOD —POLICE POWER.

Gen. Code Ohio, § 12725, penalizing sale of condensed milk, unless made from unadulterated full cream milk, does not, in case of wholesome compound of condensed skimmed milk, contravene Const. U. S. Amend. 14.

3. COMMERCE ⚡41(2) — "ORIGINAL PACK-AGE"—CANS IN CASES.

The "original package" of food in cans, shipped in interstate commerce in fiber cases containing a number of cans, is not the individual can, but the case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Original Package.]

4. COMMERCE ⚡8(10) — INTERSTATE COMMERCE—STATE REGULATION OF SALE—FOOD AND DRUGS ACT.

The Food and Drugs Act (Comp. St. §§ 8617-8728) does not prevent state regulation of domestic retail sales of food shipped in from another state.

5. COMMERCE ⚡60(3) — INTERSTATE COMMERCE—INDIRECT EFFECT OF STATE STATUTE.

Indirect effect on interstate commerce of Gen. Code Ohio, § 12725, penalizing sale of condensed milk, unless made from full cream milk, does not invalidate the act.

Mr. Justice Day, Mr. Justice Van Devanter, and Mr. Justice Brandeis, dissenting.

Appeal from the District Court of the United States for the Southern District of Ohio.

Suit by the Hebe Company and the Carnation Milk Products Company against Norman E. Shaw, Secretary of Agriculture of Ohio, and another. Bill dismissed, and plaintiffs appeal. Affirmed.

Mr. Charles E. Hughes, of New York City, for appellants.

Messrs. Louis D. Johnson, of Urbana, Ohio, and Charles J. Pretzman, of Columbus, Ohio, for appellees.

*Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought to restrain prosecutions threatened against the plaintiffs and their customers for selling a food product of the plaintiffs called Hebe, the bill being based upon the destruction of the plaintiffs' business which it is alleged will ensue. The prosecutions are threatened mainly or wholly under certain statutes of Ohio which, the plaintiffs argue, do not bear the construc-

tion put upon them by the defendants, or, if they do, are bad under the Fourteenth Amendment to the Constitution of the United States and the Commerce Clause. Article 1, § 8. A similar case was heard before three judges. *Hebe Co. v. Calvert* (D. C.) 246 Fed. 711. By agreement the evidence in that case was made the evidence in this. The District Judge adopted the opinion of the three and dismissed the bill.

Hebe is skimmed milk condensed by evaporation to which six per cent. of cocoa nut oil is added by a process that combines the two. It is sold in tin cans containing one pound or six ounces of the product and labelled "Hebe A Compound of Evaporated Skimmed Milk and Vegetable Fat Contains 6% Vegetable Fat, 24% Total Solids," with the place of manufacture and address of the Hebe Company. On the side of the label are the words "For Coffee and Cereals For Baking and Cooking." By section 12725 of the General Code of Ohio "whoever manufactures, sells, exchanges, exposes or offers for sale or exchange, condensed milk unless it has been made from * * * unadulterated * * * milk, from which the cream has not been removed and in which the proportion of milk solids shall be the equivalent of twelve per cent. of milk solids in crude milk, twenty-five per cent. of such solids being fat, and unless the package, can or vessel containing it is distinctly labelled, stamped or marked with its true name, brand, and by whom and under what name made," is subject to a fine, and for each subsequent offense to a fine and imprisonment. The first question is whether Hebe falls within these words.

[1] It is argued that, as Hebe is a wholesome or not unwholesome product, the statutes should not be construed to prohibit it if such a construction can be avoided, and that it can be avoided by confining the prohibition to sales of condensed milk as such, under the name of condensed milk, as was held with regard to ice cream in *Hutchinson Ice Cream Company v. Iowa*, 242 U. S. 153, 37 Sup. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917B, 643. But the statute could not direct itself to the product as distinguished from the name more clearly than it does. You are not to make a certain article, whatever you call it except from certain materials—the object plainly being to secure the presence of the nutritious elements mentioned in the act, and to save the public from the fraudulent substitution of an inferior product that would be hard to detect. *Savage v. Jones*, 225 U. S. 501, 524, 32 Sup. Ct. 715, 56 L. Ed. 1182. By section 5778 a food is adulterated if a valuable ingredient has been wholly or in part abstracted from it, and the effect of this provision upon *skimmed milk is qualified only by section 12720 which states the stringent terms upon which alone that substance can be sold. It seems entirely clear that con-

densed skimmed milk is forbidden out and only out. But if so the statute cannot be avoided by adding a small amount of cocoa nut oil. We may assume that the product is improved by the addition, but the body of it still is condensed skimmed milk, and this improvement consists merely in making the cheaper and forbidden substance more like the dearer and better one and thus at the same time more available for a fraudulent substitute. It is true that so far as the question of fraud is concerned the label on the plaintiffs' cans tells the truth—but the consumer in many cases never sees it. Moreover when the label tells the public to use Hebe for purposes to which condensed milk is applied and states of what Hebe is made, it more than half recognizes the plain fact that Hebe is nothing but condensed milk of a cheaper sort.

[2] We are satisfied that the statute as construed by us is not invalidated by the Fourteenth Amendment. The purposes to secure a certain minimum of nutritive elements and to prevent fraud may be carried out in this way even though condensed skimmed milk and Hebe both should be admitted to be wholesome. The power of the legislature "is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 204, 33 Sup. Ct. 44, 47 (57 L. Ed. 84). If the character or effect of the article as intended to be used "be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury," or, we may add, by the personal opinion of judges, "upon the issue which the legislature has decided." *Price v. Illinois*, 238 U. S. *446, 452, 35 Sup. Ct. 892, 894 (59 L. Ed. 1400); *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 357, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455. The answer to the inquiry is that the provisions are of a kind familiar to legislation and often sustained and that it is impossible for this Court to say that they might not be believed to be necessary in order to accomplish the desired ends. See further *Atlantic Coast Line R. R. Co. v. Georgia*, 234 U. S. 280, 288, 34 Sup. Ct. 829, 58 L. Ed. 1312.

[3-5] With regard to the other objection urged, the statute "was not aimed at interstate commerce but without discrimination sought to promote fair dealing in the described articles of food." *Savage v. Jones*, 225 U. S. 501, 524, 32 Sup. Ct. 715, 56 L. Ed. 1182. The defendants disclaim any intention to interfere with the sale of the goods in the original packages by the consignee, and if the record is thought to raise a doubt with regard to that it may be met by a modifica-

tion of the decree so as to leave it without prejudice in case prosecutions should be threatened or attempted for such sales. Some question was raised as to whether the individual can was not to be regarded as the original package. But it appears that the cans are brought from Wisconsin, where Hebe is manufactured, into Ohio in fiber cases containing forty-eight one-pound cans or ninety-six six-ounce cans. The cases are the original packages so far as the present question is concerned, *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224, although no doubt, as shown by *McDermott v. Wisconsin*, 228 U. S. 115, 136, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39, the power of Congress to regulate interstate commerce would extend for some purposes to the cans. The Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. §§ 8717-8728) dealt with in *McDermott v. Wisconsin*, does not prevent state regulation of domestic retail sales. *Armour & Co. v. North Dakota*, 240 U. S. 510, 517, 36 Sup. Ct. 440, 60 L. Ed. 771, Ann. Cas. 1916D, 548, *Weigle v. Curtice Brothers Co.*, 248 U. S. 285, 39 Sup. Ct. 124, 63 L. Ed. 242, decided today. Indirect effects upon interstate commerce do not invalidate the act. *Sligh v. Kirkwood*, 237 U. S. 52, 61, 35 Sup. Ct. 501, 59 L. Ed. 835; *Savage v. Jones*, 225 U. S. 501, 525, 32 Sup. Ct. 715, 56 L. Ed. 1182. Decree affirmed.

*Mr. Justice DAY, with whom concurred Mr. Justice VAN DEVANTER and Mr. Justice BRANDEIS, dissenting.

The right to prohibit the sale of plaintiffs' product in the state of Ohio is mainly rested upon section 12725 of the General Code of that state. In the absence of a construction by the Supreme Court of Ohio, we must interpret the statute ourselves. We have been unable to come to the conclusion, reached by the majority of the court, as to the meaning of the law. As the result of this decision is to exclude from sale in the state of Ohio, a food product not of itself harmful, but shown to be wholesome, we shall briefly state the reasons which impel the dissent.

Section 12725 of the General Code of Ohio reads:

"Whoever manufactures, sells, exchanges, exposes or offers for sale or exchange, condensed milk unless it has been made from pure, clean, fresh, healthy, unadulterated and wholesome milk, from which the cream has not been removed and in which the proportion of milk solids shall be the equivalent of twelve per cent. of milk solids in crude milk twenty-five per cent. of such solids being fat, and unless the package, can or vessel containing it is distinctly labeled, stamped or marked with its true name, brand, and by whom and under what name made, shall be fined not less than fifty dollars nor more than two hundred dollars, and, for each subsequent offense, shall be fined not

less than one hundred dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days."

The statute defines a crime, and the question is not different than it would be if the plaintiffs were indicted for its violation. While all statutes are to receive a reasonable interpretation, those of a criminal nature are not to be extended by implication. Condensed milk when this statute was passed was well known to be milk from which a considerable portion of water had been evaporated. *Condensed milk to be what its name imports must be made from whole milk. If not so manufactured, the legislature has the right to provide that the public shall be advised of the treatment to which it has been subjected. Skimmed milk, conspicuously labeled as such, may be sold in the State of Ohio. Section 12720, Gen. Code Ohio. The legislature has shown no intention to condemn it as an unwholesome article of food. It is not less so when condensed.

We are unable to find in these statutes anything which prohibits the sale of condensed, skimmed milk when it is a part of a wholesome compound sold for what it really is, and distinctly labeled as such. In the section under consideration, 12725, the Ohio legislature was not dealing with compounds. It was undertaking to assure the purity of a well-known article of food—condensed milk. The statute provides that such condensed milk so offered for sale shall be made of pure, clean, fresh, unadulterated and wholesome milk from which the cream has not been removed, and that the can containing it shall be distinctly labeled with its true name. With deference to the contrary view, it seems to us that reading the statute in the light of its purpose to require condensed milk to be made from whole milk and sold for what it is, the necessary result is to exclude the plaintiffs' compound from the words and meaning of the act. It is not evaporated milk, and makes no pretense of being such. It is a food compound consisting in part of condensed skimmed milk. It is so labeled in unmistakable words in large print on the can containing it. The label states with all the emphasis which large type can give that it is a compound made of "evaporated skimmed milk and vegetable fat." The proportions of the ingredients are stated. The striking label does not describe condensed milk, and he who reads it cannot be misled to the belief that he is buying that article. It is shown to be wholesome and clean and free from impurities.

*It seems to us that the case is within the principle stated by this court in *Hutchinson Ice Cream Co. v. Iowa*, 242 U. S. 153, 37 Sup. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917B, 643, in which a statute forbidding the sale as ice cream of an article not containing a certain

portion of butter fat was sustained as within the police power of the state. The statute was construed by the highest court of the state where it was produced to include articles sold as ice cream; thus interpreted, we held it to be a constitutional exercise of the police power of the state. So here, we think the legislature of Ohio intended to deal with condensed milk when sold as such, and to make it an offense to sell it when of less than the required purity.

It may be conceded that the statute would include such an article when not up to the standard, but sold for the real thing. The public is entitled to protection from deception as well as from impurity. This principle seems to have controlled the decision of the District Court. The record discloses that in one or more instances dealers had supplied this article as condensed milk. But an act or two of this sort by fraudulent dealers ought not to be the test of the plaintiffs' right, or control the meaning of this statute. If such were the case, very few food compounds would escape condemnation. The few instances of deception shown had not the sanction of plaintiffs' authority. Such acts did violence to the plain terms in which the plaintiffs' printed label disclosed that its product was a compound and defined its parts. The label so truly expresses just what the substance is, that it is difficult to believe that any purchaser could be deceived into buying the article for something other than it is.

The interdiction of the State Board is not against the sale of this article as condensed milk, but of all sales of this compound in the state of Ohio. In our view this criminal statute, rightly interpreted, does not embrace the plaintiffs' product, and that reason alone should be sufficient to warrant a reversal of the decree.

(248 U. S. 399)

FINK et al. v. BOARD OF COM'RS OF MUSKOGEE COUNTY, OKL., et al.

(Argued Dec. 13 and 16, 1918. Decided Jan. 13, 1919.)

No. 43.

TAXATION 181—INDIAN LANDS—EFFECT OF ALIENATION.

A homestead allotment to a Creek Indian under Act June 30, 1902, providing it should remain nontaxable, inalienable, and free from incumbrance for 21 years from deed thereof, when made alienable by Act May 27, 1908, § 4, was taxable in the hands of an alienee.

In Error to the Supreme Court of the State of Oklahoma.

Suit by D. N. Fink and another, trustees, against the Board of County Commissioners

of Muskogee County, Okl., and others. Judgment for plaintiffs was reversed by the Supreme Court of Oklahoma (159 Pac. 470), and plaintiffs bring error. Affirmed.

Messrs. Charles B. Rogers, of Tulsa, Okl., W. O. Cromwell and George W. Buckner, both of Enid, Okl., and J. D. Simms, of Muskogee, Okl., for plaintiffs in error.

Mr. S. P. Freeling, of Oklahoma City, Okl., for defendants in error.

*Mr. Justice McKENNA delivered the opinion of the Court.

The question in the case is whether land allotted to an Indian of the Creek Tribe exempt from taxation in the hands of the Indian is exempt in the hands of a purchaser from the Indian.

Considering that the land was so exempt, in other words, that the exemption went with the land, in subsequent hands, the suit was commenced by plaintiffs in error, here called plaintiffs, to restrain the collection of taxes upon part of the land which had become lots in the town of Muskogee. There was a demurrer to the petition by defendant in error, here called defendant, which by stipulation of counsel was submitted solely on the question of exemption, other questions being reserved.

The stipulation recited that plaintiffs sought an injunction against the taxes assessed or hereafter assessed against the lots for the reason that they had been a part of the homestead of Eliza J. Murphy, a Creek Indian allottee and a citizen and member of the Creek Tribe or Nation and for that reason the lots were exempt from taxation for the period of 21 years from the date of the deed or patent.

The District Court overruled the demurrer and enjoined the collection of the taxes. The judgment was reversed by the Supreme Court (Board of County Com'rs of Muskogee County v. Fink, 159 Pac. 470), and the plaintiffs then *dismissed their petition as to all other grounds of relief than that the taxes "were illegal and void because prohibited by the contract, Constitution, laws and treaties of the United States."

A petition for rehearing was denied and a judgment entered sustaining the demurrer and dismissing the petition.

The elements of decision are certain acts of Congress, the deed to Eliza J. Murphy, her deed to plaintiffs, and certain provisions in the Constitution of the state of Oklahoma.

The lands of which the lots involved were a part were allotted to Eliza J. Murphy by virtue of the act of Congress of March 1, 1901, and that of June 30, 1902 (31 Stat. 861, c. 676; 32 Stat. 500, c. 1323). The latter act is known as the Creek Supplemental Agreement and provides (section 16) that an allotment shall not be incumbered or subject to forced sale

for 5 years, except with the approval of the Secretary of the Interior. And the section requires that each citizen of the tribe "shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear."

A deed was made to Eliza J. Murphy on April 20, 1903, and, following the statute, expressed the nontaxability and inalienability and freedom from incumbrance for the designated period of exemption.

There were provisions in the Enabling Act of the state under which its Constitution was drawn which preserved the rights of persons and property of the Indians so long as such rights should remain unextinguished and provided that nothing in the Constitution should be construed to limit or affect the authority of the United States respecting the Indians, their lands, their property or their rights. And the Constitution exempted from taxation such property as might be exempt by reason of treaty stipulations existing between the Indians and the United States or by federal laws during the force and effect of such treaties and laws. Plaintiffs rely on these provisions and the deed to Eliza J. Murphy for their contentions, fortified, they assert, by decisions of this court.

To the contentions defendant opposes the Act of Congress of May 27, 1908 (35 Stat. 312, c. 199, § 4), which removed the existing restrictions on the homestead allotment, thereby enabling the allottee to sell the land, and which provides " * * * that all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were property of other citizens than allottees of the Five Civilized Tribes."

The contention based on this act is that by the Creek Supplemental Agreement, supra, the nontaxability and inalienability and freedom from incumbrance of the land were correlative and to a certain extent, therefore, interdependent, a combination of limitations and rights, and as they existed together they disappeared together. And their coexistence depended upon the Indian and because it did there was no limitation or infringement of rights or impairment of contract. Plaintiffs, it is further contended, are in no better situation, as they only got title by virtue of the act of May 27, 1908, removing the restriction upon alienation and they cannot avail themselves of it and repudiate it at the same time.

The Supreme Court of the state yielded to these contentions and gave special effect to the Act of 1908 which it considered "a comprehensive revision of the laws relating to the Five Civilized Tribes and their lands,"

that by it "the free right of alienation was granted," and as the plaintiffs "took their title to the lots they are *seeking to exempt from taxation by virtue of the terms of this act, they cannot go behind it. But for that act, they could not have purchased the lands in question. They took subject to all the conditions of that act, and they cannot now claim the benefits of the exemption from taxation granted to the allottee by the Creek Supplemental Agreement. *Goudy v. Meath*, 203 U. S. 146 [27 Sup. Ct. 48, 51 L. Ed. 130]."

In resistance to the contentions of the defendant and the conclusions of the court, plaintiffs adduce *Choate v. Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941, and certain cases decided upon its authority, that is, *Gleason v. Wood*, 224 U. S. 679, 32 Sup. Ct. 571, 56 L. Ed. 947; *English v. Richardson*, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949.

Choate v. Trapp has not the extent assigned to it. In that case the state of Oklahoma undertook to tax lands which were yet in the hands of the Indians, asserting the right simply because of the removal of the restrictions upon alienation by the Act of May 27, 1908, supra. The reply of this court was that the law (*Curtis Act* of June 28, 1898, 30 Stat. 505, c. 517), as modified by the Act of July 1, 1902 (32 Stat. 641, c. 1362), provided that all of the lands allotted should "be nontaxable while the title remained in the original allottee." There was no question in the case, and could not be, of the effect of alienation—an exercise of the right conferred by the Act of May 27, 1908, and the consequence of such exercise. It is true it was said that "exemption and nonalienability were two separate and distinct subjects" and that "one conferred a right and the other imposed a limitation." The distinction was apt for that case. The state contended that there was no tax exemption but that that provision was only directed against the absolute alienation of the land. This was, in effect, a contention that the power of alienation unexercised, was the same as the power exercised, and to correct this confusion it was declared that the provision exempting from taxation was a property right. But it was a property right in the Indian, preserved to him not only *for his own interest but in the interest of the policy of the United States regarding him. *Kansas Indians*, 5 Wall. 737, 18 L. Ed. 667; *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532; cases cited in *Choate v. Trapp*. At first his interest was put beyond his control; by the act of May 27, 1908, it was committed to his control, this also satisfying the policy of the United States under the changed conditions. It invades no right of the Indian, therefore, to make the alienation of the land a surrender of the exemption from taxation, and we concur in the conclusion of the Supreme Court of the state that plaintiffs, having taken title under the

act, cannot repudiate its conditions and its manifest policy. *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. Ed. 303, is not in point. We are not dealing with rights in the abstract; we are dealing with rights under special conditions and as determined by acts of the parties under a law of Congress which was availed of by the Indian and a grantee of the Indian, and which, therefore, bound them by its conditions and subjected the land in the hands of the grantee to the usual burdens of government. It is an error to suppose that this takes anything of value from the Indian. We may here invoke the commonplace, for it is commonplace to say that we only know the value of a thing by that which makes its worth. Under the restriction against the alienation the land had no worth but in its uses; the restriction removed, it had the added worth of exchangeability for other things—a power of sale was conferred. To say there was no value in that power is to contradict the examples and estimations of the world. It may be that if exemption from taxation went with the land it might become an element in the price (worth in money) which the Indian might ask and receive, but that was not of concern to the purpose of the law, which was to give to the Indian all of the attributes of ownership, to give him a mastery of his property equal to that of other owners of property, and nothing more, and this consummated the new policy of Congress.

*Further discussion we deem unnecessary, but we may observe that in *Tiger v. Western Investment Co.*, 221 U. S. 286, 310, 31 Sup. Ct. 578, 55 L. Ed. 738, and in *Williams v. Johnson*, 239 U. S. 414, 420, 421, 36 Sup. Ct. 150, 60 L. Ed. 358, a question was intimated whether a grantee of an Indian could avail himself of the Indian's right, if he had any, to assert the unconstitutionality of an act of Congress. Opinion, however, was reserved, and we reserve it here, and rest the case on the grounds we have discussed.

Judgment affirmed.

(248 U. S. 409)

FULLINWIDER v. SOUTHERN PAC. R. CO. OF CALIFORNIA et al.

(Submitted Dec. 20, 1918. Decided Jan. 13, 1919.)

No. 121.

1. STATUTES 184 — CONSTRUCTION — POLICY OF LAWMAKERS.

Though an existing policy of the law-makers may be used to resolve an uncertainty of a law, it cannot be a substitute for a law.

2. PUBLIC LANDS 70 — RAILROAD LAND GRANTS—CONSTRUCTION—CONDITIONS.

The conditions of Act March 3, 1871, § 9, on which lands were granted to the Texas Pa-

cific Railway Company, subjecting lands unsold within three years to settlement and pre-emption, at certain price, are not the conditions of the grant to the Southern Pacific Railroad by section 23, authorizing it to build a railroad "with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted" to it "by Act July 27, 1866."

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by George S. Fullinwider against the Southern Pacific Railroad Company of California and others. Decree dismissing the bill was affirmed by the Circuit Court of Appeals (229 Fed. 717, 144 C. C. A. 127), and complainant appeals. Affirmed.

Mr. Fred Beall, of Washington, D. C., for appellant.

Messrs. Charles R. Lewers and William F. Herrin, both of San Francisco, Cal., for appellee.

Mr. Justice McKENNA delivered the opinion of the Court.

Appeal from a decree of the Circuit Court of Appeals affirming a decree of the District Court in and for the Southern District of California dismissing bill upon demurrer brought by appellant (we shall refer to him as complainant) against the railroad company to compel the company to convey to him a certain one-half section of land within the limits of the congressional grant to the company made by the Act of March 3, 1871, c. 122, 16 Stat. 573.

The bill alleged the incorporation of the company and that of various corporations impleaded with it, and the following facts: March 3, 1871, Congress made a grant to the Texas Pacific Railroad Company of certain sections of the public lands and provided that the lands which should not be sold or otherwise disposed of within three years after the completion of the entire road should be subject to settlement and pre-emption like other lands at a price to be fixed by and paid to the company at not exceeding an average of \$2.50 per acre for all of the lands granted.

Section 23 of the act made a further grant of certain sections of the public lands in the State of California to the Southern Pacific Railroad and contained the provision that the company should construct a line of railroad from and to certain named points, "with the same rights, grants, and privileges and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the Act of July 27, 1866."

The road was completed between the designated points more than ten years prior to the 1st of December, 1913.

Among the lands which have not been sold or disposed of that are within the limits of the grant are those described in the bill, and

on October 29, 1913, complainant (appellant) tendered the company \$800 and demanded of it and the other defendants (appellees) a conveyance of the land, which demand was refused, to the injury and damage of complainant. The land is of the value of \$3,000 and complainant has the qualifications entitling him to purchase the land.

Complainant offers to pay the \$800 in court and alleges *that the suit was brought, among other things, for the purpose of having the court interpret and construe the acts of Congress referred to. The other defendants are alleged to have an interest in the land and a construction of the acts of Congress is prayed and of all other acts that have any relation to them; that defendants be decreed to convey to complainant the land and that he have general relief.

Sections 9 and 23 of the Act of March 3, 1871, are directly involved; the other sections of the act and other acts only as illustrating sections 9 and 23.

By section 9 a land grant is made to the Texas Pacific Railroad of public land in California in the terms and qualifications which are quite familiar and contains the provision set out in the bill which subjects the land unsold within three years after the completion of the road to settlement and pre-emption at a price not exceeding an average of \$2.50 an acre.

By section 23 the Southern Pacific Railroad Company of California was authorized to construct a line of railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, "with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted" to the Southern Pacific Railroad Company by the Act of July 27, 1866, c. 278, 14 Stat. 292, with reservations of rights to other railroad companies.

[1, 2] Based on this provision complainant puts three questions as involved in the case, but says it is only necessary for this court to answer the following one:

"Was this grant of lands to the Southern Pacific Railroad Company under the Act of March 3, 1871, made subject to the rights, grants and privileges of said act, or under the rights, grants and privileges of the Act of July 27, 1866, and subject only to its terms?"

Complainant's answer to the question is that the grant to the Southern Pacific was

*made under the act of 1871 and not under the act of 1866 and deduces from that that the provision in section 9 requiring under certain circumstances a sale to pre-emptors is applicable to the Southern Pacific.

Complainant's argument in support of the answer does not submit easily to succinct statement. Its postulate is that the policy of Congress in regard to the public lands came to have its chief solicitude in the disposition of them to actual settlers at reasonable prices and that this policy was not overlooked even in the grants to railroads. And the policy dictated, it is said, the provision of section 9 of the grants to the Texas Pacific Railroad Company, and determines the insertion of a like provision in section 23 which concerns the grant to the Southern Pacific Company, though it is not inserted therein. We may grant, if a policy exists, that it may be used to resolve the uncertainty of a law, but it cannot be a substitute for a law. However, we do not find the uncertainty in sections 9 or 23 that complainant does, whether jointly or separately considered. Section 23 is complete in itself. The restrictions upon the grant it made that were deemed appropriate were expressed, and their expression excludes any other by a well known rule of construction.

Let us repeat: The Southern Pacific Company is authorized to construct a line of railroad in California with the same rights, grants, privileges and subject to the same limitations, restrictions and conditions as were granted to the company by the Act of July 27, 1866. And there could not have been oversight, nor the inadvertence of expressing one thing when another was meant. Yet this is practically the contention of complainant. Not the conditions of the act of 1866 are imposed on the grant, but the conditions imposed by section 9, conditions upon a different grant and a different company, is the contention, though complainant admits that—

"There is no question but that the language of section 23 segregated from *the act, of which it is a part, and construed alone, supports the contention of the appellees."

The language gains, we think, not loses in strength from its location. It makes evident that there was a conscious contrast of provision between the grants and the companies.

Decree affirmed.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1918

(248 U. S. 540)

No. —. Original. Ex parte In the matter of James FROHWERK, petitioner. Dec. 16, 1918. Motion for leave to file petition for a writ of mandamus herein denied.

No. —. Original. Ex parte In the matter of James Thompson MUIR, Master, etc., petitioner. Dec. 16, 1918. Motion for leave to file petition for a writ of prohibition or a writ of mandamus herein granted, and a rule to show cause awarded returnable Monday, January 6, next. Leave granted counsel for the British Embassy to file a printed brief herein and to take part in the oral argument.

(243 U. S. 594)

No. 81. Truth A. MILNER, Executrix, etc., et al., appellants, v. The UNITED STATES. Dec. 16, 1918. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 228 Fed. 431, 143 C. C. A. 13. Messrs. Adrian C. Ellis, Jr., of Salt Lake City, Utah, and William C. Prentiss, of Washington, D. C., for appellants. Mr. Assistant Attorney General Kearful, for the United States. Dismissed, pursuant to the sixteenth rule, on motion of Mr. Assistant Attorney General Kearful for the appellee.

(248 U. S. 593)

No. 88. D. W. ROUSNEY, plaintiff in error, v. M. L. PATTERSON. Dec. 16, 1918. In Error to the Supreme Court of the State of Oklahoma. For opinion below, see 159 Pac. 636. Mr. Milton Brown, of Oklahoma City, Okl., for plaintiff in error. Dismissed with costs, pursuant to the tenth rule.

(248 U. S. 593)

No. 320. Emanuel BALTZER et al., plaintiffs in error, v. The UNITED STATES of America. Dec. 16, 1918. In error to the District Court of the United States for the District of South Dakota. Mr. Joe Kirby, of Sioux Falls, S. D., for plaintiffs in error. Mr. Solicitor General King, for the United States. Judgment reversed, upon confession of error; and cause remanded for further proceedings in accordance with law, on motion of Mr. Solicitor General King for the defendant in error.

(248 U. S. 593)

No. 321. William J. HEAD, plaintiff in error, v. The UNITED STATES of America. Dec. 16, 1918. In error to the District Court of the United States for the District of South Dakota. Mr. Joe Kirby, of Sioux Falls, S. D., for plaintiff in error. Mr. Solicitor General King, for the United States. Judgment reversed, upon confession of error; and cause remanded for further proceedings in accordance with law, on motion of Mr. Solicitor General King for the defendant in error.

(248 U. S. 539)

No. 347. John E. READE, appellant, v. The UNITED STATES of America et al. Dec. 16, 1918. Appeal from the District Court of the United States for the District of Arizona. Mr. O. T. Richey, of Tucson, Ariz., for appellant. The Attorney General, for the United States.

PER CURIAM. Affirmed upon the authority of Ex parte Mirzan, 119 U. S. 584, 7 Sup. Ct. 341, 30 L. Ed. 513; Riggins v. United States, 199 U. S. 547, 26 Sup. Ct. 147, 50 L. Ed. 303; In re Lincoln, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. Ed. 984. See Ex parte Glasgow, 223 U. S. 709, 32 Sup. Ct. 519, 56 L. Ed. 623.

(248 U. S. 539)

No. 493. H. C. DRAPER, plaintiff in error, v. GEORGIA, FLORIDA & ALABAMA RAILWAY COMPANY. Dec. 16, 1918. In error to the Court of Appeals of the State of Georgia. For opinion below, see 95 S. E. 16. Mr. Hollins N. Randolph, of Atlanta, Ga., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, § 2, 39 Stats. at L., 726 (Comp. St. 1916, § 1214).

(248 U. S. 540)

No. 630. J. W. FERGUSON et al., appellants, v. BABCOCK LUMBER & LAND COMPANY. Dec. 16, 1918. Appeal from the United States Circuit Court of Appeals for the Fourth Circuit. For opinion below, see 252 Fed. 705 which affirms decree 243 Fed. 623. See, also, 250 Fed. 1020. Mr. Mark W. Brown, of Asheville, N. C., for appellants. Mr. John Franklin Shields, of Philadelphia, Pa., for appellee.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 123 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. 1916, § 1120]); Stevenson v. Fain, 195 U. S. 165, 25 Sup. Ct. 6, 49 L. Ed. 142; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; St. Anthony's Church v. Pennsylvania R. R. Co., 237 U. S. 575, 577, 35 Sup. Ct. 729, 59 L. Ed. 1119; Delaware, Lackawanna & Western R. R. Co. v. Yurkonis, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397.

(248 U. S. 581)

Nos. 742 and 743. John J. SHEA, petitioner, v. The UNITED STATES. Dec. 16, 1918. For opinions below, see 251 Fed. 433, 440. Messrs. Edmond H. Moore, of Youngstown, Ohio, and Sherman T. McPherson and Edward P. Moulinier, both of Cincinnati, Ohio, for petitioner. Messrs. Alexander C. King, Sol. Gen., of Atlanta, Ga., and Claude R. Porter, Asst. Atty. Gen., for the United States. Petitions

for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(248 U. S. 581)

No. 747. Henry C. HALL, Administrator, etc., petitioner, v. William A. PAINE et al. Dec. 16, 1918. For opinion in Supreme Judicial Court of Massachusetts, see 119 N. E. 664. Mr. William R. Sears, of Boston, Mass. (Messrs. Britton & Gray, of Washington, D. C., and Sherman L. Whipple and Alexander Lincoln, both of Boston, Mass., of counsel), for petitioner. Messrs. Robert M. Morse and William P. Evarts, both of Boston, Mass., for respondents. Petition for a writ of certiorari to the Superior Court of the State of Massachusetts denied.

(248 U. S. 581)

No. 749. Nels O. HULTBERG, petitioner, v. Frideborg A. ANDERSON. Dec. 16, 1918. For opinion below, see 247 Fed. 273, 159 C. C. A. 367. Messrs. Silas H. Strawn, of Chicago, Ill., David Ritchie, of Salina, Kan., and Walter H. Jacobs and Harris F. Williams, both of Chicago, Ill., for petitioner. Messrs. Charles Blood Smith, of Topeka, Kan., and Axel Chytraus, John J. Healy, and E. Allen Frost, all of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(248 U. S. 581)

No. 750. Ex parte In the matter of Cloyd H. Duncan, petitioner. Dec. 16, 1918. For opinion below, see 249 Fed. 155. Mr. Cloyd H. Duncan, in pro. per. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(248 U. S. 582)

No. 769. RICHLAND STEAMSHIP COMPANY, petitioner, v. BUFFALO DRY DOCK COMPANY. Dec. 16, 1918. Messrs. Harvey D. Goulder and Thomas H. Garry, both of Cleveland, Ohio, for petitioner. Mr. Thomas C. Burke, of Buffalo, N. Y. (Messrs. Hermon A. Kelley and George W. Cottrell, both of Cleveland, Ohio, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. For opinion below, see 254 Fed. 668.

(248 U. S. 594)

No. 91. The YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY et al., plaintiffs in error, v. D. A. McNEILL, as Administrator of W. G. McNeill, deceased. Dec. 17, 1918. In error to the Supreme Court of the State of Mississippi. For opinion below, see 72 South. 7. Messrs. Edward Mayes, of Jackson, Miss., and Charles N. Burch, of Yazoo, Miss., for plaintiffs in error. Mr. John B. Brunini, of Vicksburg, Miss., for defendant in error. Dismissed with costs, on authority of the plaintiffs in error.

(248 U. S. 544)

No. —. Original. Ex parte In the matter of Sam SYLVESTER, petitioner. Dec. 23, 1918. Motion for leave to file a petition for a writ of habeas corpus denied.

(248 U. S. 542)

No. 60. Herbert M. SEARS, plaintiff in error, v. INHABITANTS OF THE TOWN OF NAHANT, etc. Dec. 23, 1918. In error to the Superior Court of the State of Massachusetts. For opinion in Supreme Judicial Court of Massachusetts, see 221 Mass. 437, 109 N. E. 370. Mr. Burton E. Eames, of Boston, Mass., for plaintiff in error. Messrs. Arthur D. Hill and Robert G. Dodge, both of Boston, Mass., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) McCain v. Des Moines, 174 U. S. 168, 181, 19 Sup. Ct. 644, 43 L. Ed. 936; Western Union Tel. Co. v. Ann Arbor R. R. Co., 178 U. S. 239, 243, 20 Sup. Ct. 867, 44 L. Ed. 1052; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; Norton v. Whiteside, 239 U. S. 144, 147, 36 Sup. Ct. 97, 60 L. Ed. 186; (2) Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Empire State-Idaho Mining Co. v. Hanley, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; Brolan v. United States, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544; (3) Consolidated Turnpike Co. v. Norfolk, etc., R. Co., 228 U. S. 596, 599, 33 Sup. Ct. 605, 57 L. Ed. 982; Cuyahoga River Power Company v. Northern Realty Co., 244 U. S. 300, 304, 37 Sup. Ct. 643, 61 L. Ed. 1153; Bilby et al. v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701.

(248 U. S. 543)

No. 61. Frederick R. SEARS et al., plaintiffs in error, v. INHABITANTS OF THE TOWN OF NAHANT, etc. Dec. 23, 1918. In error to the Supreme Court of the State of Massachusetts. For opinion in Supreme Judicial Court of Massachusetts, see 221 Mass. 435, 109 N. E. 373. Mr. Burton E. Eames, of Boston, Mass., for plaintiffs in error. Messrs. Robert G. Dodge and Arthur D. Hill, both of Boston, Mass., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) McCain v. Des Moines, 174 U. S. 168, 181, 19 Sup. Ct. 644, 43 L. Ed. 936; Western Union Tel. Co. v. Ann Arbor R. R. Co., 178 U. S. 239, 243, 20 Sup. Ct. 867, 44 L. Ed. 1052; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; Norton v. Whiteside, 239 U. S. 144, 147, 36 Sup. Ct. 97, 60 L. Ed. 186; (2) Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Empire State-Idaho Mining Co. v. Hanley, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; Brolan v. United States, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544; (3) Consolidated Turnpike Co. v. Norfolk, etc., R. Co., 228 U. S. 596, 599, 33 Sup. Ct. 605, 57 L. Ed. 982; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 304, 37 Sup. Ct. 643, 61 L. Ed. 1153; Bilby et al. v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701.

(248 U. S. 540)

No. 211. The BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, plaintiff in error, v. The UNITED STATES of America. Dec. 23, 1918. In error to the

United States Circuit Court of Appeals for the Sixth Circuit. For opinion below, see 242 Fed. 420, 155 C. C. A. 196. Mr. George Hoadly, of Cincinnati, Ohio, for plaintiff in error. The Attorney General, for the United States.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, § 2, 39 Stat. L. 726 (Comp. St. 1916, § 1214).

(248 U. S. 542)

No. 525. WESTERN UNION TELEGRAPH COMPANY, appellant, v. NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY COMPANY. Dec. 23, 1918. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit. For opinion below, see 250 Fed. 207. Mr. William L. Clay, of Savannah, Ga., for appellant. Mr. Henry C. Peeples, of Atlanta, Ga., and Claude Waller, of Nashville, Tenn., for appellee.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) a. Section 128 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. 1916, § 1120]); Louisville and Nashville R. R. Co. v. Western Union Telegraph Co., 237 U. S. 300, 35 Sup. Ct. 598, 59 L. Ed. 965; b. Equitable Assurance Co. v. Brown, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; Deming v. Carlisle Packing Co., 226 U. S. 102, 33 Sup. Ct. 80, 57 L. Ed. 140; Consolidated Turnpike v. Norfolk, etc., Ry. Co., 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; (2) Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1, 24 L. Ed. 708; Western Union Telegraph Co. v. Ann Arbor R. R. Co., 178 U. S. 239, 20 Sup. Ct. 867, 44 L. Ed. 1052; Western Union Telegraph Co. v. Pennsylvania R. R. Co., 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; Western Union Telegraph Co. v. Richmond, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710; Louisville & Nashville R. R. Co. v. Western Union Telegraph Co., 237 U. S. 300, 35 Sup. Ct. 598, 59 L. Ed. 965. See Western Union Telegraph Co. v. Louisville and Nashville R. R. Co., 244 U. S. 649, 37 Sup. Ct. 743, 61 L. Ed. 1371. See, also, Western Union Telegraph Co. v. Louisville & Nashville R. R. Co., 248 U. S. 532, 39 Sup. Ct. 18, 63 L. Ed. —, dismissed per curiam November 4, 1918.

(248 U. S. 594)

No. 548. Conrad KORNMAN, plaintiff in error, v. The UNITED STATES of America. Dec. 23, 1918. In error to the District Court of the United States for the District of South Dakota. Mr. Joe Kirby, of Sioux Falls, S. D., for plaintiff in error. Mr. Solicitor General King, for the United States. Judgment reversed upon confession of error, and cause remanded for further proceedings, on motion of Mr. Solicitor General King for the defendant in error.

(248 U. S. 541)

No. 576. GEORGIA STATE BOARD OF EXAMINERS OF OPTOMETRY et al., plaintiffs in error, v. Kennon MOTT. Dec. 23, 1918. In error to the Supreme Court of the State of Georgia. For opinion below, see 95 S. E. 867.

Mr. James K. Hines, of Atlanta, Ga., for petitioners. Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, § 2, 39 Stat. L. 726 (Comp. St. 1916, § 1214). See Marshall v. Dye, 231 U. S. 250, 34 Sup. Ct. 92, 58 L. Ed. 206; Stewart v. Kansas City, 239 U. S. 14, 36 Sup. Ct. 15, 60 L. Ed. 120.

(248 U. S. 541)

No. 634. Ernest E. RICHARDS and Nugent J. Flynn, partners, etc., et al., plaintiffs in error, v. Mina M. OAKLEY. Dec. 23, 1918. In error to the Supreme Court of the State of Missouri. For opinion below, see 204 S. W. 505. Mr. John G. Park, of Kansas City, Mo., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Consolidated Turnpike Co. v. Norfolk, etc., R. R. Co., 228 U. S. 596, 599, 33 Sup. Ct. 605, 57 L. Ed. 982; Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300, 37 Sup. Ct. 643, 61 L. Ed. 1153; Bilby et al. v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701; (2) Goodrich v. Ferris, 214 U. S. 71, 81, 29 Sup. Ct. 580, 53 L. Ed. 914; Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Empire State-Idaho Mining Co. v. Hanley, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; Brolan v. United States, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544.

(248 U. S. 594)

No. 4. The UNITED STATES, plaintiff in error, v. Harvey C. SHAUVER. Jan. 7, 1919. In error to the District Court of the United States for the Eastern District of Arkansas. For opinion below, see 214 Fed. 154. Mr. Solicitor General King, for the United States. Mr. E. L. Westbrooke, of Jonesboro, Ark., for defendant in error. Dismissed, on motion of Mr. Solicitor General King for the plaintiff in error.

(248 U. S. 544)

No. 97. F. A. HOOPER, Myron T. Dusbury, C. C. Hartke, et al., plaintiffs in error in W. S. KINGSBURY, as surveyor general and ex officio register of the State land office of the State of California. Jan. 7, 1919. In error to the District Court of Appeal, First Appellate District of the State of California. For opinion below, see 25 Cal. App. 192, 143 Pac. 89. Mr. Charles C. Boynton, of Oakland, Cal., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Messenger v. Kingsbury, 158 Cal. 611, 112 Pac. 65; People v. California Fish Co., 166 Cal. 576, 138 Pac. 79; People et al. v. Banning Co., 166 Cal. 635, 138 Pac. 101; (2) Equitable Life Assurance Society v. Brown, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co., 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, 137, 34 Sup. Ct. 874, 58 L. Ed. 1245; (3) Campbell v. Wade, 132 U. S. 34, 10 Sup. Ct. 9, 33 L. Ed. 240; Gonzales v. French, 164 U. S. 338, 345, 17 Sup. Ct.

102, 41 L. Ed. 548; *Banning Co. v. California*, 240 U. S. 142, 154, 36 Sup. Ct. 338, 60 L. Ed. 569.

(248 U. S. 544)

No. 98. *Frank H. AYERS, Norman O. Anderson, William A. Anderson, et al.*, plaintiffs in error, v. *W. S. KINGSBURY*, as surveyor general and ex officio register of the State land office of the State of California. Jan. 7, 1919. In error to the District Court of Appeal, First Appellate District of the State of California. For opinion below, see 25 Cal. App. 183, 143 Pac. 85. Mr. Charles C. Boynton, of Oakland, Cal., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) *Messenger v. Kingsbury*, 158 Cal. 611, 112 Pac. 65; *People v. California Fish Co.*, 166 Cal. 576, 138 Pac. 79; *People et al. v. Banning Co.*, 166 Cal. 635, 138 Pac. 101; (2) *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; *Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co.*, 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; *Manhattan Life Ins. Co. v. Cohen*, 234 U. S. 123, 137, 34 Sup. Ct. 874, 58 L. Ed. 1245; (3) *Campbell v. Wade*, 132 U. S. 34, 10 Sup. Ct. 9, 33 L. Ed. 240; *Gonzales v. French*, 164 U. S. 338, 345, 17 Sup. Ct. 102, 41 L. Ed. 548; *Banning Co. v. California*, 240 U. S. 142, 154, 36 Sup. Ct. 338, 60 L. Ed. 569.

(248 U. S. 545)

No. 99. *Edward H. CHAVELLE*, as trustee in bankruptcy of Washington Steel & Bolt Company, Bankrupt, appellant, v. *WASHINGTON TRUST COMPANY*. Jan. 7, 1919. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 226 Fed. 400, 141 C. C. A. 230. Mr. E. C. Hughes, of Seattle, Wash., for appellant. Mr. James B. Murphy, of Seattle, Wash., for appellee.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 4 of the act of Congress of January 28, 1915, c. 22, 38 Stat. 803, 804 (Comp. St. 1916, § 1120a). See, also, *John P. Schmitt and Martin Schmitt, etc., v. John Shadrach*, trustee, 248 U. S. 538, 39 Sup. Ct. 67, 63 L. Ed. —, decided November 25, 1918.

(248 U. S. 545)

No. 100. *Andy SUNDAY, David Sunday, Nicholas Sunday, et al.*, appellants, v. *Sidney T. MALLORY, Ed J. Brennan, Joseph H. Brennan, et al.* Jan. 7, 1919. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 237 Fed. 526, 150 C. C. A. 408. The Attorney General, for appellants. Mr. J. W. Zevely, of Muskogee, Okl., for appellees.

PER CURIAM. Reversed with costs, except as to the one-sixth interest conveyed by Andy Sunday as to which judgment is affirmed, upon the authority of *Brader v. James*, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591; *Talley v. Burgess*, 246 U. S. 104, 38 Sup. Ct. 287, 62 L. Ed. 600. And see *David v. Youngken (C. C. A.)* 250 Fed. 208; *Harris v. Bell (C. C. A.)* 250 Fed. 209.

(248 U. S. 545)

No. 105. *J. W. SELSOR*, plaintiff in error, v. *THE STATE of Louisiana*. Jan. 7, 1919. In error to the Supreme Court of the State of Louisiana. For opinion below, see 73 South. 270. Mr. A. L. Alexander, of Shreveport, La., for plaintiff in error. Mr. Harry P. Gamble, of New Orleans, La., for the State of Louisiana.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) the act of Congress of March 1, 1913, c. 90, 37 Stat. at L. 699 (Comp. St. 1916, § 8739); (2) *Seaboard Air Line Ry. v. North Carolina*, 245 U. S. 298, 303, 38 Sup. Ct. 96, 62 L. Ed. 299; *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, 325, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845.

(248 U. S. 546)

No. 108. *MAGNOLIA BANK*, plaintiff in error, v. *THE BOARD OF SUPERVISORS OF PIKE COUNTY, Mississippi*. Jan. 7, 1919. In error to the Supreme Court of the State of Mississippi. For opinion below, see 111 Miss. 857, 72 South. 697. Messrs. Edward Mayes and Robert B. Mayes, both of Jackson, Miss., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, § 2, 39 Stat. at L. 726 (Comp. St. 1916, § 1214).

(248 U. S. 546, 583)

No. 109. *ILLINOIS CENTRAL RAILROAD COMPANY* and *James Stone and W. E. Stone*, sureties, plaintiffs in error, v. *L. A. ANDERSON*. Jan. 7, 1919. In error to the Supreme Court of the State of Mississippi. For opinion below, see 72 South. 157. Messrs. Blewett Lee and Robert V. Fletcher, both of Chicago, Ill., and Robert B. Mayes, of Jackson, Miss., for plaintiffs in error. Messrs. Julian C. Wilson and Walter P. Armstrong, both of Memphis, Tenn., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, § 2, 39 Stat. at L. 726 (Comp. St. 1916, § 1214). Petition for writ of certiorari denied.

(248 U. S. 595)

No. 122. *Bluford WILSON et al.*, receivers, etc., plaintiffs in error, v. *Neal GODBY*. Jan. 7, 1919. In error to the Appellate Court for the Second District of the State of Illinois. For opinion below, see 203 Ill. App. 612. Dismissed per stipulation.

(248 U. S. 546)

No. 233. *Thomas D. ROBINSON*, plaintiff in error, v. *Wesley STEELE and John C. Kennedy*. Jan. 7, 1919. In error to the Supreme Court of the State of Washington. For opinion below, see 95 Wash. 154, 163 Pac. 486, which affirms 91 Wash. 268, 157 Pac. 845, on rehearing. Mr. Julian C. Dowell, of Washington, D. C., for plaintiff in error. Mr. William F. Hall, of Washington, D. C., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of

the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, § 2, 39 Stat. at L., 726 (Comp. St. 1916, § 1214).

(248 U. S. 547)

No. 350. **AMERICAN PACKING COMPANY**, plaintiff in error, v. **Paul LUKETA** and **Sam Luketa**. Jan. 7, 1919. In error to the Supreme Court of the State of Washington. For opinion below, see 98 Wash. 6, 167 Pac. 87. Mr. **Alpheus Byers**, of Seattle, Wash., for plaintiff in error. Mr. **Benj. S. Ohnick**, of Seattle, Wash., for defendants in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, § 2, 39 Stat. at L., 726 (Comp. St. 1916, § 1214).

(248 U. S. 583)

No. 752. **Joseph P. O'TOOLE** et al., petitioners, v. **Robert L. MEYSENBERG** et al. Jan. 7, 1919. For opinion below, see 251 Fed. 191. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(248 U. S. 583)

No. 762. **Charles FAISON** et al., petitioners, v. **Forrest ADAIR** et al. Jan. 7, 1919. For opinion below, see 96 S. E. 871. Petition for a writ of certiorari to the Supreme Court of the State of Georgia denied.

(248 U. S. 583)

No. 771. **James S. YEATES**, petitioner, v. **The UNITED STATES** of America. Jan. 7, 1919. For opinion below, see 254 Fed. 60.

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(248 U. S. 583)

No. 772. **Charles T. WILLIAMS**, petitioner, v. **The UNITED STATES** of America. Jan. 7, 1919. For opinion below, see 254 Fed. 52. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(248 U. S. 584)

No. 773. **PONTIAC, OXFORD & NORTHERN RAILROAD COMPANY** et al., petitioners, v. **The MICHIGAN RAILROAD COMMISSION** et al. Jan. 7, 1919. For opinion below, see 203 Mich. 258, 168 N. W. 927. Petition for a writ of certiorari to the Supreme Court of the State of Michigan denied.

(248 U. S. 584)

No. 781. **BOSCH MAGNETO COMPANY**, petitioner, v. **Samuel W. RUSHMORE**. Jan. 7, 1919. For opinion below, see 255 Fed. 465. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(248 U. S. 595)

No. 292. **BLUEFIELDS STEAMSHIP COMPANY**, Limited, to the use of **Elmer E. Wood**, ancillary receiver, plaintiff in error, v. **UNITED FRUIT COMPANY**. Jan. 9, 1919. In error to the United States Circuit Court of Appeals for the Third Circuit. For opinion below, see 243 Fed. 1. Mr. **William L. Hughes**, of New Orleans, La., for plaintiff in error. Messrs. **Moorfield Storey** and **Robert G. Dodge**, both of Boston, Mass., for defendant in error. Dismissed, per stipulation.

(248 U. S. 405)

COCHNOWER v. UNITED STATES.

(Argued and Submitted Dec. 16, 1918. Decided Jan. 13, 1919.)

No. 80.

1. OFFICERS ⇐3—CREATION OF OFFICE—LEGISLATIVE POWER.

Creation of offices and the assignment of their compensation is a legislative function.

2. OFFICERS ⇐94—FIXING COMPENSATION—LEGISLATIVE POWER.

Delegation of the legislative function of fixing the compensation of officers must have clear expression or implication.

3. CUSTOMS DUTIES ⇐60—COMPENSATION OF INSPECTORS — CHANGE — STATUTE — "INCREASE" AND "FIX."

Act March 4, 1909, § 2, authorizing the Secretary of the Treasury to "increase" and "fix" compensation of inspectors of customs, as he may think advisable, not to exceed a certain amount, gives no power to decrease compensation; "fix" being controlled by "increase."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fix; Increase.]

Appeal from the Court of Claims.

Claim by James H. Cochnower against the United States. Petition was dismissed by the Court of Claims (51 Ct. Cl. 461), and plaintiff appeals. Reversed and remanded.

Messrs. William E. Russell, of New York City, and L. T. Michener, of Washington, D. C., for appellant.

Messrs. Assistant Attorney General Thompson and Harvey D. Jacob, of Washington, D. C., for the United States.

*Mr. Justice McKENNA delivered the opinion of the Court.

Appeal from the Court of Claims involving the construction of an act of Congress passed March 4, 1909, c. 314, 35 Stat. 1065, entitled "An act fixing the compensation of certain officials in the custom service, and for other purposes." This case is concerned particularly with section 2, which provides as follows:

"That the Secretary of the Treasury be, and he is hereby, authorized to *increase* and *fix* [italics ours] the compensation of inspectors of customs, as he may think advisable, not to exceed in any case the rate of six dollars per diem, and in all cases where the maximum compensation is paid no allowance shall be made for meals or other expenses incurred by inspectors when required to work at unusual hours."

The Court of Claims construed the provision as authorizing the Secretary to decrease the salary of inspectors and dismissed Cochnower's petition that presented a claim for the difference between the salary at which he

was serving and that from which he was reduced by the Secretary, in contest of the Secretary's power. From the judgment of the court (51 Ct. Cl. 461) this appeal was taken.

Cochnowers petition shows that he served in the customs service in various capacities and at various salaries, which he details, from 1879 to June 13, 1908, when he was appointed day inspector at \$5 per diem, at which rate he served until July 1, 1910, when he was reduced to \$4 per diem, at which rate he is now serving.

The case is one simply of statutory construction and depends primarily on the words "increase and fix" which we have italicized in our quotation of section 2. In opposition to the Court of Claims' view of them, counsel for Cochnower have indulged in a wide range and have been elaborate in citation and review of prior legislation and the decisions of the courts upon it. Counsel for the government have confined themselves to narrower limits and even urge that the argument based on "long continued and contemporaneous construction * * * is irrelevant for the reason that section 8 of the said Act of 1909 repealed all laws and parts of laws inconsistent" with it, and that its obvious purpose was to relieve the Secretary from whatever construction might have been put upon his acts or those of his predecessors under previous legislation. In other words, as we understand the government, the Act of 1909 is to stand by itself and was intended to be and must be taken as the measure of the Secretary's power after its enactment; that it could not be limited or opposed by prior legislation, for that had been repealed; nor by prior practices, for they had been superseded, and a new rule of authority and practice pronounced. We may accept this as the gauge of the government and consider how far the act is a grant of authority to the Secretary.

[1-3] Primarily we may say that the creation of offices and the assignment of their compensation is a legislative function. *Glavey v. United States*, 182 U. S. 595, 21 Sup. Ct. 891, 45 L. Ed. 1247; *United States v. Andrews*, 240 U. S. 90, 36 Sup. Ct. 349, 60 L. Ed. 541. And we think the delegation of such function and the extent of its delegation must have clear expression or implication. The Act of 1909 does give a power to the Secretary, but the power is not absolute; it is expressed with qualification. The government's contention makes it absolute, having no limit but the discretion of the Secretary. The contention gives the qualification no purpose, makes it simply a confusion or clumsiness of words. But why are they to be so regarded? Congress did not have to disguise its purpose or furtively accomplish it. And if Congress accidentally fell into the equivocal, the resulting uncertainty

*408 must be resolved by the application of the simple rule of considering all the words of a statute in their proper dependence. Reverting then to the statute, we discover that it was at pains to *express clearly the power to "increase." If it had been intended to give the power to "decrease"—an accurately opposite power—it would have been at equal pains to have explicitly declared it; and thus the unlimited discretion in the Secretary contended for by the government would have been simply and directly conferred and not left to be guessed from a circumlocution of words or to be picked out of a questionable ambiguity. We say questionable ambiguity because its existence can be readily disputed. If it exists at all it exists in the word "fix" in the collocation "fix the compensation." But the instant signification of the word is the opposite of change—it declares stability and confirmation—and, giving it this sense, it is the natural complement of the power to increase, establishes the increase (fixes it) thereafter as the legal compensation. And this, we think, is the proper construction, direct, intelligible and adequate.

It is, however, urged that the act implies minimum and maximum salaries, especially of inspectors, and also the power of classification of inspectors. We are not called upon to dispute it. The fact or the power does not enlarge the authority to increase salaries into an authority to decrease them. The power given can otherwise be accommodated.

We think, therefore, that the Court of Claims erred in dismissing the petition and its judgment is reversed and the case remanded for further proceedings in conformity with this opinion.

So ordered.

(248 U. S. 413)

CORDOVA v. GRANT.

(Submitted Dec. 18, 1918. Decided Jan. 13, 1919.)

No. 104.

COURTS  385(6)—SUPREME COURT—ERROR TO DISTRICT COURT—JURISDICTION—SUIT INVOLVING CONSTRUCTION OF TREATY.

Suit to try title to land in Texas between present and former bed of Rio Grande, District Court's jurisdiction of which was based on diversity of citizenship, *held*, notwithstanding allegation in answer as to treaties contracting for boundary commission with exclusive jurisdiction, not to involve construction or validity of treaty, so as to allow it to be brought directly to Supreme Court for review.

In Error to the District Court of the United States for the Western District of Texas.

Action by Walter B. Grant, sole executor of Frank B. Cotton, deceased, against Cande-

laria Cordova. Judgment for plaintiff, and defendant brings error. Writ dismissed.

Mr. F. G. Morris, of El Paso, Tex., for plaintiff in error.

Messrs. Walter B. Grant, of Boston, Mass., and T. J. Beall, of El Paso, Tex., for defendant in error.

*Mr. Justice HOLMES delivered the opinion of the Court.

This is an action of trespass to try title to land in Texas lying between the present and former bed of the Rio Grande. The plaintiff (the present defendant in error) alleged that his testator and those under whom the latter claimed had held the land under color of title from the State of Texas for the several statutory periods of limitation, and that the defendant unlawfully entered when the plaintiff had the legal title in possession as devisee. The jurisdiction of the District Court was based upon diversity of citizenship. The defendant pleaded that the plaintiff's title depended upon whether the land was within the United States, and that that depended upon whether the Rio Grande, established as the boundary in 1852, had changed its channel in such a way as to continue to be the boundary or not—the land in question having been upon the Mexican side of the river in 1852 and now being on the side of the United States. The defendant *went on to allege that while the United States now exercises a de facto jurisdiction over the territory where the land lies, it does so with the admission by treaty and diplomatic correspondence that the boundary is unsettled, and that "the treaties and acts of the respective governments placing said boundary disputes within the jurisdiction of certain special authorities, of which this court must take judicial notice, must necessarily have deprived the courts of each of said republics of jurisdiction," etc. On this ground it was prayed that the Court either dismiss the case or stay the trial until the boundary should be established. Subject to this the defendant pleaded not guilty and the ten years statute of limitation of Texas. The plaintiff demurred to the plea to the jurisdiction as showing on its face that the United States and Texas were exercising de facto jurisdiction over the land; set up that it was agreed between the United States and Mexico that Mr. Wilbur Keblinger should decide what lands in the disputed territory were proper subjects of litigation in the courts of the United States and of Texas, that he had decided this land to be such, and that his finding had been acquiesced in by both governments. He further alleged that the Government of the United States always had claimed and now claims the land as belonging to the United States, and he denied all the defendant's allegations of fact.

*419 It was agreed that the patents from the State of Texas under which the plaintiff claimed bounded the grants on the Rio Grande, and that if the additions now in controversy had been made by accretion, they belonged to the plaintiff. It also was admitted, and agreed that the Court in deciding upon the demurrer might notice, that the United States, the State of Texas and the County and City of El Paso were then and for many years before exercising government control and political jurisdiction over the property in question and that the United States and *State had enforced their laws over the whole of the same. It was agreed further that the Court might take notice of the correspondence between the Secretary of State, the Mexican Ambassador and Keblinger, the opinion of the Boundary Commission, and the action of the United States thereon. It appeared from the documents that the United States, while admitting that the boundary line was in question between the two countries, never had admitted any derogation of its de facto jurisdiction over the tract; that it had suggested to the Federal Courts that as a matter of comity they should not put into execution writs of ejectment, etc., against persons alleging Mexican titles, but that it found it necessary to limit this comity so as to exclude from it persons who had no prima facie Mexican titles in order to stop occupation by squatters who were taking advantage of the Government's forbearance. Keblinger was appointed to determine what persons showed a prima facie title. He decided against the defendant and with the sanction of the Government informed the plaintiff that the Government would not object if he should proceed.

The District Court sustained the demurrer to the plea to the jurisdiction and the only color of right to bring the case to this Court by direct appeal consists in a suggestion that the construction of a treaty is involved.

*420 The decision of a court that it has jurisdiction on the ground taken by the demurrer simply means that the Court finds the Government in fact asserting its authority over the territory and will follow its lead. It does not matter to such a decision that the Government recognizes that a foreign power is disputing its right and that it is making efforts to settle the dispute. The reference to Keblinger and his finding are important only as showing that there is no present requirement of comity to refrain from exercising the jurisdiction which in any event the Courts possess. Jurisdiction is power and matter of fact. *The United States has that power and the Courts may exercise their portion of it unless prohibited in some constitutional way.

If the passage quoted from the answer is sufficient to open the contention that treaties had contracted for the establishment of a

boundary commission with exclusive jurisdiction and so had prohibited the Courts from dealing with the question, neither the validity nor the construction of any treaty was drawn in question; or if an attenuated question can be discovered it is no more than formal. A commission sat under the last of the treaties and its action was rejected by the Government as abortive. As the Government had withdrawn its suggestion of comity so far as the present case is concerned, there was no reason why the Court should not proceed to trial, and there is no reason why the present writ should not be dismissed as it was in *Warder v. Loomis*, 197 U. S. 619, 25 Sup. Ct. 799, 49 L. Ed. 909, and in *Warder v. Cotton*, 207 U. S. 582, 25 Sup. Ct. 259, 52 L. Ed. 350. It follows that some other questions argued cannot be discussed.

Writ of error dismissed.

(248 U. S. 446)

SOUTHERN PAC. CO. v. STEWART.

(Submitted Dec. 20, 1918. Decided Jan. 18, 1919.)

No. 89.

1. CARRIERS ⇨218(3)—LIMITING LIABILITY—NOTICE OF CLAIM.

Stipulation in contract of interstate shipment of cattle, conditioning carrier's liability for injuries on written notice of claim in 10 days after unloading, is valid.

2. CARRIERS ⇨218(11)—NOTICE OF CLAIM—WAIVER.

Circumstances as to knowledge of injuries by carrier or its agent, held not to show waiver of written notice of claim within 10 days after unloading, stipulated in contract of interstate shipment of cattle as condition of carrier's liability for injuries.

Mr. Justice McKenna and Mr. Justice Clarke dissenting.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Action by Frank R. Stewart against the Southern Pacific Company. Judgment for plaintiff was affirmed by the Circuit Court of Appeals (147 C. C. A. 630, 233 Fed. 956), and defendant brings error. Reversed and remanded.

See, also, 245 U. S. 359, 562, 38 Sup. Ct. 130, 203, 62 L. Ed. 345, 472.

*Messrs. Henley C. Booth, of San Francisco, Cal., William R. Harr, Charles H. Bates, and C. F. R. Ogilby, all of Washington, D. C., and William F. Herrin, of San Francisco, Cal., for plaintiff in error.

Messrs. P. H. Hayes and Thomas Armstrong, Jr., both of Phoenix, Ariz., for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Stewart sued for damages sustained in transit by dairy cows delivered July 1, 1913, to plaintiff in error for shipment over its railroad from California to Phoenix, Arizona, under a "live stock shipping order contract and bill of lading" signed both by himself and it, which, among other things, provided:

"Second party [the shipper] hereby further agrees that in case any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by second party on the freight claim agent of first party in writing, within ten days after unloading of the live stock; and that in event of failure so to do all claims for loss or damage in the premises are hereby expressly waived, released and made void, and it is also expressly agreed by second party that the amount to be by him claimed for each animal as described herein, so lost or damaged, shall be adjusted on basis of value at time and place of shipment, not exceeding the declared value as hereinbefore set forth, and on which *declared value the rate or rates of transportation hereinbefore named by first party are based, and in no event is there to be any recovery from first party or its lessors for any loss of or damage to said live stock, from whatsoever cause arising in excess of the declared value hereinbefore set forth."

As one ground of defense the company relied upon non-compliance with the above-quoted provision. In reply the shipper alleged and at the trial introduced evidence tending to establish facts and circumstances as follows:

He admitted that the cattle were unloaded and received by him July 5, 1913, at Phoenix and that he made no written claim for loss or damage upon any agent of the carrier within ten days thereafter. But he denied that he could have given notice of his claim within such time or that he had waived or released it.

He alleged that on July 4, 1913, and subsequently the carrier had full knowledge of injuries sustained by the cattle; that they were unloaded into its stock-pens at Yuma July 4, 1913, and prior to reloading five died; that they remained in the stock-pens there without shelter or protection nine hours, under care of carrier's agents; that upon reloading it provided an additional car for sick and crippled cows; that at various points en route the train officials received inquiries from other railroad officials as to conditions and after arrival at Phoenix one of the crippled animals remained several days in a car; that immediately after unloading at Phoenix and daily until October 21, shipper and the railroad agents were in communication relative to damages sustained; that the nature and extent of injuries to cows which arrived at destination alive made it impossible to determine within ten days the extent of damage sustained; and that a number of cattle

died many days after their arrival at Phoenix.

He further alleged that about October 21, 1913, after repeated efforts to determine the damages, shipper made *demand in writing for \$1,570 and on December 15th, as soon as he was able to ascertain nature and extent of the injuries, made written demand for \$2,695; that the carrier had repeatedly waived requirement for demand within ten days by recognizing the shipper's right to recover something and attempting to settle and compromise; and that subsequent to October 21st carrier through its claim agents had twice attempted to adjust with the shipper the loss and damage sustained.

The trial court refused to direct a verdict in defendant's favor. Among other things, it said to the jury:

"I charge you as a matter of law that if you believe the defendant or its agents or employes did know that five or more of the cattle died while in transit, and also believe that the defendant was negotiating with the plaintiff for a settlement of his claim, and that the defendant knew that the cattle had been injured as alleged in the plaintiff's complaint, then the plaintiff was relieved and released from the giving of such notice of loss or injury within ten days as required by the said provisions of said contracts."

The Circuit Court of Appeals affirmed a judgment entered upon verdict for the shipper July 3, 1916 (233 Fed. 956, 147 C. O. A. 630), and, in the course of its opinion, said:

"There was proof tending to sustain all the facts so alleged in the [plaintiff's] reply. We think, therefore, that the court below committed no error in instructing the jury that in view of the evidence, if they found it to be true, the plaintiff was relieved and released from giving notice within the ten days."

We have jurisdiction and the motion to dismiss based upon another view is denied. See *Southern Pacific Co. v. Stewart*, 245 U. S. 359, 38 Sup. Ct. 130, 62 L. Ed. 345, and 245 U. S. 562, 38 Sup. Ct. 203, 62 L. Ed. 472.

[1, 2] Considering the principles and conclusions approved by our opinions in *St. Louis, I. Mt. & So. Ry. Co. v. Starbird*, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. Ed. 917, and *Erie R. R. Co. v. Stone*, 244 U. S. 332, 37 Sup. Ct. 633, 61 L. Ed. 1173 (announced since the judgment below), and the cases therein cited, no extended discussion is necessary *to show that upon the facts here disclosed the stipulation between the parties as to notice in writing within ten days of any claim for damages was valid. And we also think those opinions make it clear that the circumstances relied upon by the shipper are inadequate to show a waiver by the carrier of written notice as required by the contract.

The trial court erred in giving to the jury the instruction quoted above; and it should

have granted the carrier's request for a directed verdict.

The judgment of the court is reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

Mr. Justice McKENNA and Mr. Justice CLARKE dissent.

(248 U. S. 450)

COHN v. MALONE.

(Argued and Submitted Dec. 18, 1918. Decided. Jan. 13, 1919.)

No. 96.

1. BANKRUPTCY $\Leftrightarrow$ 143(12)—LIFE INSURANCE POLICIES—RIGHTS OF TRUSTEE.

The cash surrender value of policies on bankrupt's life, the beneficiaries in which he could change, is property which he could have transferred prior to bankruptcy, so that right thereto passed to the trustee.

2. INSURANCE $\Leftrightarrow$ 587 — LIFE INSURANCE — CHANGE OF BENEFICIARY.

Civ. Code Ga. 1910, § 2498, relative to life insurance, providing assured may direct the money to be paid to any of various classes, and on such direction, given and assented to by insurer, no other person can defeat it, does not prevent insured, after such a direction, making a change in beneficiary as authorized by the policy.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

In the matter of the bankruptcy of A. S. Cohn. Petitions by R. A. Malone, trustee in bankruptcy, to superintend and revise decrees denying his right to policies on the life of bankrupt, were granted, and the decrees reversed, by the Circuit Court of Appeals (236 Fed. 882, 150 C. C. A. 144), and bankrupt brings certiorari. Affirmed.

*Messrs. J. R. Pottle, of Albany, Ga., George S. Jones, of Macon, Ga., James McIntosh, of New York City, and J. W. Kieve and I. J. Hofmayer, both of Albany, Ga., for petitioner.

Messrs. Sam S. Bennet, of Albany, Ga., Alexander Akerman and Charles Akerman, both of Macon, Ga., and John D. Pope and H. A. Peacock, both of Albany, Ga., for respondent.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

In 1902 and 1905 the bankrupt took out two policies on his life in the Penn Mutual Life Insurance Company, loss under one payable to his "executors, administrators or assigns," under the other to his sister and brother with full power in the assured "while

this policy is in force and not previously assigned, to change the present beneficiary or beneficiaries." By formal written instruments dated July 15, 1910, he assigned both policies to his wife "if she outlives me, otherwise to my estate, with full power to the insured to change the beneficiary or surrender this policy to said company at any time, this to be done by instrument in writing under his hand and seal to be recorded at the home office of the company."

[1, 2] While both policies were in the bankrupt's possession, the trustee demanded them in order that their cash surrender value might be secured and distributed under Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544 (Comp. St. §§ 9585-9656). The bankrupt defended upon two grounds: First, that the cash surrender value was not property which could have been transferred by him prior *to bankruptcy; and, second, that the assignment to his wife could not be defeated by the trustee because protected by section 2498, Georgia Code 1910, which provides:

"The assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and upon such direction given, and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent."

The Circuit Court of Appeals held both grounds of defense bad. 236 Fed. 882, 150 C. C. A. 144. As to the first its ruling accords with the doctrine recently announced in *Cohen v. Samuels*, 245 U. S. 50, 38 Sup. Ct. 36, 62 L. Ed. 143. In respect of the second that court declared:

"Nothing in the terms of the statute, especially when they are considered in the light of the circumstances of its enactment, indicates that it had any other purpose or effect than to deny to any one other than the assured himself the power to defeat a direction by him to pay to his personal representative, or to his widow, or to his children, or to his assignee, the money payable in a life policy issued to him. The provision does not purport to make every such direction by the assured irrevocable by him, or to invalidate a stipulation in a life policy giving the assured the right to change the beneficiary at any time during the continuance of the policy. The statute puts a direction by the assured to pay to his widow on the same footing as one to pay to his assignee. If a policy is assigned as security for a debt which the assured pays during his life, certainly the statute is not to be given the effect of putting it out of the power of the assured to change the beneficiary upon the reassignment of the policy to him by the satisfied creditor. Nothing in its terms justifies giving it a different operation or effect in the case of a direction to pay to the widow. We are not of opinion that the provision quoted had the effect of conferring on the *bankrupt's wife, as the result of her having been named as the beneficiary, a vested and indefeasible interest in

policies by the terms of which the beneficiaries could be changed by the bankrupt at any time."

And we approve its conclusion.

Petitioner has not complained here of the action below concerning a third policy, issued by the New York Life Insurance Company.

The judgment of the Circuit Court of Appeals is

Affirmed.

(248 U. S. 453)

CAVANAUGH et al. v. LOONEY, Attorney General of Texas, et al.

(Argued and Submitted Dec. 19, 1918. Decided Jan. 13, 1919.)

No. 107.

1. INJUNCTION 85(2)—FEDERAL COURTS—PROCEEDINGS OF STATE OFFICERS.

While federal courts may enjoin proceedings by state officials under act violative of federal Constitution, it should not be done, except in a case reasonably free from doubt, and when necessary to prevent great and irreparable injury.

2. INJUNCTION 135—PRELIMINARY INJUNCTION—REFUSAL—DISCRETION.

Preliminary injunction against proceedings by regents of state university to condemn land, on the ground of state law authorizing taking without due process and denying equal protection of laws, held properly denied, in the exercise of wise discretion; allegation of irreparable loss and damage appearing fanciful, in view of detailed circumstances.

Appeal from the District Court of the United States for the Northern District of Texas.

Suit by Mary Cavanaugh and another against Ben F. Looney, Attorney General of the State of Texas, and others. Preliminary injunction was denied, and plaintiffs appeal. Affirmed.

*154 Mr. Joseph Manson McCormick, of Dallas, Tex., for appellants.

*Messrs. B. F. Looney and C. M. Cureton, both of Austin, Tex., for appellees.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

The University of Texas is a state institution under immediate control of officers known as regents, appointed by the Governor, with its principal educational departments in Travis and Galveston counties. An act of the Legislature, approved August 30, 1911 (S. B. No. 20, c. 6, General Laws Texas) undertook to authorize the regents to purchase or condemn through proceedings in the district courts such lands within those counties as they might deem expedient for extension of campus or other university purposes. Appellants have long owned and used

as a residence homestead twenty-six acres in Travis county desirable as an addition to the university grounds. Having failed in their efforts to purchase, the regents were about to meet and ask the Attorney General to institute proceedings to condemn this entire tract. Thereupon appellants instituted this proceeding against them and the Attorney General in the United States District Court seeking to restrain their threatened action—

"on the ground [among others] that said law conflicts with the Constitution of the United States, in that the defendants are thereby pretendedly authorized to take plaintiffs' property without due process of law, and plaintiffs are thereby deprived of the equal protection of the laws."

They alleged invalidity of the act because in conflict with both state and federal Constitutions and averred:

"That unless restrained by writ from this honorable court, the said defendants constituting the board of regents of the University of Texas will, at their next meeting aforesaid, request the Attorney General to file a petition in the district court of Travis county for the condemnation of their property or a part thereof under said pretended act, and that the said Attorney General, unless so restrained, will comply with said request of the board of regents, acting under said purported act, and that the filing of such petition will cause irreparable loss and damage to your petitioners by impounding their property in court pending the disposition of said proceeding and will cloud the title thereto and prevent the vending of same or any part thereof."

The challenged act provides: That if the regents cannot agree with the owners for purchase they shall request the Attorney General to file petition in the district court of the county, describing the land, stating purpose for which desired, and praying that its value be ascertained and decree be entered vesting title thereto in the state; that upon filing such petition the owner shall be cited as in other civil causes; that at the first term thereafter the cause shall be tried by a jury upon a single issue as to the value of the land and the decision of such jury shall be final—provided there shall be a right of appeal as in other civil cases; that when the value has been ascertained and the court satisfied therewith it shall enter a decree vesting title but not until such amount together with all reasonable costs and expenses including reasonable attorney's fees shall be paid to the owner or into court for his benefit.

It is alleged that the act of 1911 especially offends the Constitution of Texas because a local law passed without the required notice; and that it is bad under both federal and state Constitutions because (1) It delegates

to the board of regents power to determine what property is reasonably necessary for the purposes mentioned and forbids inquiry concerning this by the court; (2) it forbids inquiry into the damages to the remainder of a tract where a part only is taken; and (3) it permits the state to acquire fee simple title to property which thereafter may be sold. It is further alleged that appellants' property is so situated that to take a part would necessarily cause serious damage to the remainder.

A special court assembled as provided by section 266, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. § 1243]), denied application for preliminary injunction without opinion and allowed this direct appeal.

[1] It is now settled doctrine—

"that individuals, who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a federal court of equity from such action." *Ex parte Young*, 209 U. S. 123, 155, 156, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165, 166, 167, 30 Sup. Ct. 286, 54 L. Ed. 430; *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278, 293, 33 Sup. Ct. 312, 57 L. Ed. 510; *Truax v. Raich*, 239 U. S. 33, 37, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; *Greene v. Louis & Interurban R. R. Co.*, 244 U. S. 499, 506, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

But no such injunction "ought to be granted unless in a case reasonably free from doubt," and when necessary to prevent great and irreparable injury. *Ex parte Young*, supra, 209 U. S. 166, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable.

[2] When considered in connection with established rules of law relating to the power of eminent domain, complainants' allegation of threatened "irreparable loss and damage" appear fanciful. The detailed circumstances negative such view and rather tend to support the contrary one. Nothing indicates that any objections to the validity of the statute could not be presented in an orderly way before the state court where defendants intended to institute condemnation proceedings; and if by any chance the state courts should finally deny a federal right the appropriate and adequate remedy by review here is obvious. Exercising a wise discretion we think the court below properly denied an injunction. Upon the record it was not called

upon to inquire narrowly into the disputable points urged against the statute. No more are we.

The judgment of the court below is Affirmed.

(248 U. S. 420)

UNITED STATES v. HILL.

(Argued Nov. 5 and 6, 1918. Decided Jan. 13, 1919.)

No. 357.

1. COMMERCE — 33 — "INTERSTATE COMMERCE" — LIQUOR ON PASSENGER'S PERSON.

Transportation of liquor on the person of a passenger from one state to another is "interstate commerce," within the regulatory power of Congress.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. COMMERCE — 33 — INTERSTATE COMMERCE — REED AMENDMENT.

Reed Amendment (part of section 5 of Act March 3, 1917 [Comp. St. 1918, §§ 8739a, 10387a-10387c]), declaring a punishment for one causing liquor to be transported in interstate commerce, except for certain purposes, into a state whose laws prohibit its manufacture or sale there for beverage purposes, providing that nothing therein shall authorize shipment of liquor into a state contrary to its laws, held, in view of the prior *Wilson* and *Webb-Kenyon* Acts (Comp. St. §§ 8738, 8739), not intended merely to aid the state law, but to apply to liquor which a person was bringing in for his own consumption, as allowed by the state law.

3. COMMERCE — 55 — REGULATION BY CONGRESS — PROHIBITION.

Power of Congress to regulate commerce may in proper cases take the character of prohibition.

4. COMMERCE — 8(1) — CONFLICTING STATE AND FEDERAL LAWS.

Congress having exercised its authority in a matter within its control, conflicting state laws must give way.

Mr. Justice McReynolds and Mr. Justice Clarke dissenting.

In Error to the District Court of the United States for the Southern District of West Virginia.

Demurrer to and motion to quash an indictment against Dan Hill for transportation of intoxicating liquor in violation of the Reed Amendment were sustained, and the United States brings error. Reversed.

Mr. Assistant Attorney General Frierson, for the United States.

*Mr. Justice DAY delivered the opinion of the Court.

This is a writ of error bringing in review under the Criminal Appeals Act March 2,

1907, c. 2564, 34 Stat. 1246 (Comp. St. § 1704) the judgment of the District Court of the United States for the Southern District of West Virginia sustaining a demurrer and motion to quash an indictment against one Dan Hill. The indictment charged that Hill on the 20th of November, 1917, being in the state of Kentucky, there intended to go and be carried by means of a common carrier, engaged in interstate commerce, from the state of Kentucky into the state of West Virginia, and intended to carry upon his person, as a beverage, for his personal use, a quantity of intoxicating liquor, to wit, one quart thereof, into the state of West Virginia, and did in the state of Kentucky purchase and procure a quantity of intoxicating liquor, to wit, one quart thereof, contained in bottles, and did then and there board a certain trolley car, being operated by a common carrier corporation engaged in interstate commerce, and by means thereof did cause himself and the said intoxicating liquor, then upon his person, to be carried and transported in interstate commerce into the state of West Virginia. It is charged that Hill violated the Act of Congress approved March 3, 1917, commonly known as the Reed Amendment, by thus carrying in interstate commerce from Kentucky to West Virginia a quantity of intoxicating liquor as a beverage for his personal use, the manufacture and sale of intoxicating liquors for beverage purposes being then prohibited by the laws of the state of West Virginia; further that the intoxicating liquor was not ordered, purchased, or caused to be transported for scientific, sacramental, medicinal, or mechanical purposes.

The Reed Amendment is a part of section 5 of the Post Office Appropriation Act approved March 3, 1917, 39 Stat. 1058, 1069, c. 162 (Comp. St. 1918, § 8739a) and reads as follows:

"* * * Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: Provided, that nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state. * * *

The ground of decision, as appears by the opinion of the District Court, was that the phrase, "transported in interstate commerce," as used in the act, was intended to mean and apply only to liquor transported for commercial purposes. This conclusion was reached from a construction of the act when read in the light of other legislation of Congress upon the subject of interstate transportation of liquor. Attention was called to the terms of the Wilson Act of Aug. 8, 1890, c. 728, 26

Stat. 313 (Comp. St. § 8738), providing that intoxicating liquors transported into any state or territory, or remaining therein for use, consumption, sale or storage, shall be subject on the arrival therein to the operation of the laws of the state or territory enacted in the exercise of the police power. Reference was also made to the subsequent legislation known as the Webb-Kenyon Act of March 1, 1913, c. 90, 37 Stat. 699 (Comp. St. § 8739), prohibiting the shipment and transportation of intoxicating liquor from one state into another state when such liquor is intended to be received, possessed, sold or used in violation of the laws of such state. Advertence was made to the fact that the provisions of both the Wilson and Webb-Kenyon Acts apply broadly to the interstate transportation of liquors whether for commercial use or otherwise. It was concluded that Congress in the enactment of the Reed Amendment intended to aid the local law of the state by preventing shipment of intoxicating liquors in interstate commerce when intended for commercial purposes; and as the law of West Virginia permits any person to bring into the state not more than one quart of liquor, in any period of thirty days, for personal use, Congress did not intend to prohibit interstate transportation of such liquors not intended to be used for commercial purposes. We are of opinion that this is a too narrow construction of the Reed Amendment.

[1] The Constitution confers upon Congress the power to regulate commerce among the states. From an early day such commerce has been held to include the transportation of persons and property no less than the purchase, sale and exchange of commodities. *Gibbons v. Ogden*, 9 Wheat. 1, 188, 6 L. Ed. 23; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 5 Sup. Ct. 826, 29 L. Ed. 158. "Importation into one state from another is the indispensable element, the test, of interstate commerce." *International Text-book Co. v. Pigg*, 217 U. S. 91, 107, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; *The Lottery Case*, 188 U. S. 321, 345, 23 Sup. Ct. 321, 47 L. Ed. 492. The transportation of one's own goods from state to state is interstate commerce, and, as such, subject to the regulatory power of Congress. *Pipe Line Cases*, 234 U. S. 548, 560, 34 Sup. Ct. 956, 58 L. Ed. 1459. The transportation of liquor upon the person of one being carried in interstate commerce is within the well-established meaning of the words "interstate commerce." *United States v. Chavez*, 228 U. S. 525, 532, 33 Sup. Ct. 595, 57 L. Ed. 950.

[2, 3] Congress in the passage of the Reed Amendment must be presumed to have had, and in our opinion undoubtedly did have, in mind this well-known and often declared meaning of interstate commerce. It had already provided in the Wilson Act for state

control over liquor after its delivery to the consignee in interstate commerce. In the Webb-Kenyon Act it had prohibited the shipment of liquor in interstate commerce where the same was to be used in violation of the law of the state into which it was transported. In the passage of the Reed Amendment it was intended to take another step in legislation under the authority of the commerce cause (article 1, § 8, cl. 3). The meaning of the act must be found in the language in which it is expressed, when, as here, there is no ambiguity in the terms of the law. The order, purchase, or transportation in interstate commerce, save for certain excepted purposes, is forbidden. The exceptions are specific and are those for scientific, sacramental, medicinal, or mechanical purposes; and in the proviso it is set forth that nothing contained in the act shall authorize interstate commerce shipments into a state contrary to its laws.

West Virginia is a state in which the manufacture and sale of intoxicating liquors for beverage purposes is prohibited. If the act is within the constitutional authority of Congress, it follows that the indictment charged an offense within the terms of the law. That Congress possesses supreme authority to regulate interstate commerce subject only to the limitations of the Constitution, is too well established to require the citation of the numerous cases in this court which have so held. Congress may exercise this authority in aid of the policy of the state, if it sees fit to do so. It is equally clear that the policy of Congress acting independently of the states may induce legislation without reference to the particular policy or law of any given state. Acting within the authority conferred by the Constitution it is for Congress to determine what legislation will attain its purposes. The control of Congress over interstate commerce is not to be limited by state laws. Congress, and not the states, is given the authority to regulate interstate commerce. When Congress acts, keeping within the authority committed to it, its laws become by the terms of the Constitution itself the supreme laws of the land.

"This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere." *Minnesota Rate Cases*, 230 U. S. 352, 399, 33 Sup. Ct. 729, 739 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18), and previous decisions of this court therein cited.

The power of Congress, it is true, is to regulate commerce, which is ordinarily accom-

plished by prescribing rules for its conduct. That regulation may take the character of prohibition, in proper cases, is well established by the decisions of this court. *Lottery Case*, supra; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364; *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1916E, 905; *Caminetti v. United States*, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168; *Clark Distilling Co. v. Western Maryland Railroad Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845; *Hammer v. Dagenhart*, 247 U. S. 251, 270, 271, 38 Sup. Ct. 529, 62 L. Ed. 1101.

*That Congress has this authority over the transportation of liquor in interstate commerce, we entertain no doubt. In the recent case of *Clark Distilling Co. v. Western Maryland Railroad Co.*, supra, this subject was given full consideration. That case involved the constitutionality of the Webb-Kenyon Law, prohibiting the shipment of liquors into states to be used therein in violation of the local law. While such was the particular case before the court, the authority of Congress to make regulations of its own was directly involved, and its authority over interstate commerce in intoxicating liquors was clearly stated and definitely recognized. After discussing the power of Congress over such shipment in interstate commerce, and affirming the ample power possessed by Congress over the subject-matter in view of its characteristics, this court said:

" * * * We can see no reason for saying that although Congress in view of the nature and character of intoxicants had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power; or, in other words, stating the necessary result of the argument from a concrete consideration of the particular subject here involved, that because Congress in adopting a regulation had considered the nature and character of our dual system of government, state and nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce co-operation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution."

In view of the authority of Congress over the subject-matter, and the enactment of pre-

vious legislation embodied in the Wilson and Webb-Kenyon Laws, we have no question that Congress enacted this statute because of its belief that in states prohibiting the sale and manufacture of intoxicating liquors for beverage purposes the facilities of interstate commerce should be denied to the introduction of intoxicants by means of interstate commerce, except for the limited purposes permitted in the statute which have nothing to do with liquor when used as a beverage. That the state saw fit to permit the introduction of liquor for personal use in limited quantity in no wise interferes with the authority of Congress, acting under its plenary power over interstate commerce, to make the prohibition against interstate shipment contained in this act. It may exert its authority, as in the Wilson and Webb-Kenyon Acts, having in view the laws of the state, but it has a power of its own, which in this instance it has exerted in accordance with its view of public policy.

[4] When Congress exerts its authority in a matter within its control, state laws must give way in view of the regulation of the subject-matter by the superior power conferred by the Constitution. *Seaboard Air Line Rwy. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *St. Louis, etc., R. R. Co. v. Hesterly*, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. 1031; *St. Louis, etc., R. R. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; *Minnesota Rate Cases*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

It follows that the District Court erred in sustaining the demurrer and motion to quash, and its judgment is

Reversed.

* Mr. Justice McREYNOLDS dissenting.

When Hill carried liquor from Kentucky into West Virginia for his personal use he did only what the latter state permitted. Construed as forbidding this action because West Virginia had undertaken to forbid manufacture and sale of intoxicants, the Reed Amendment in no proper sense regulates interstate commerce, but is a direct intermeddling with the state's internal affairs. Whether regarded as reward or punishment for wisdom or folly in enacting limited prohibition, the amendment so construed, I think, goes beyond federal power; and to hold otherwise opens possibilities for partial and sectional legislation which may destroy proper control of their own affairs by the several states.

If Congress may deny liquor to those who live in a state simply because its manufacture is not permitted there, why may not this be done for any suggested reason—e. g. because

the roads are bad or men are hanged for murder or coals are dug. Where is the limit?

The Webb-Kenyon Law, upheld in *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, is wholly different from the act here involved. It suspends as to intoxicants moving in interstate commerce the rule of freedom from control by state action which the courts infer from congressional silence or failure specifically to regulate. "The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." *Bowman v. Chicago, etc., Railway Co.*, 125 U. S. 465, 508, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *Leisy v. Hardin*, 135 U. S. 100, 119, 10 Sup. Ct. 681, 34 L. Ed. 128. In plain terms, it permits state statutes to operate and thereby negatives any inference drawn from silence. The Reed Amendment as now construed is a congressional fiat imposing more complete prohibition wherever the state has assumed to prevent manufacture or sale of intoxicants.

Mr. Justice CLARKE concurs in this dissent.

(243 U. S. 457)

COON v. KENNEDY.

(Argued Dec. 11, 1918. Decided Jan. 13, 1919.)

No. 398.

COURTS ⇐391(1)—SUPREME COURT—JURISDICTION—ERROR TO STATE COURT.

Decision of the highest state court, denying relief under New Jersey workmen's compensation act for drowning in navigable waters, holding that Act Oct. 6, 1917, § 1 (Comp. St. 1918, § 991 [3]), saving to claimants rights and remedies under the workmen's compensation law of any state, was inapplicable, being passed after the accident, and that the rights of parties depended on the maritime laws, *held* not one allowing review by the national Supreme Court, on writ of error, under Act Sept. 6, 1916, § 2 (Comp. St. § 1214).

In Error to the Court of Errors and Appeals of the State of New Jersey.

Proceeding by Rebecca Coon for compensation under the New Jersey Workmen's Compensation Act, opposed by James Kennedy. Judgment for defendant was affirmed by the Court of Errors and Appeals of New Jersey (103 Atl. 207), and petitioner brings error. Writ dismissed.

Mr. James D. Carpenter, Jr., of Jersey City, N. J., for plaintiff in error.

Mr. Isidor Kalisch, of Newark, N. J., for defendant in error.

Memorandum opinion by Mr. Justice McREYNOLDS.

THIS writ of error runs to a judgment of the Court of Errors and Appeals of New Jersey filed March 4, 1918, 103 Atl. 207, denying relief to Rebecca Coon, who *sued to recover under the New Jersey Workmen's Compensation Act (P. L. 1911, p. 134), on account of her husband's death by drowning in the navigable waters of that state while employed as a fireman on a tugboat.

The court held that as the accident occurred August 4, 1915, the Act of Congress approved October 6, 1917 (40 Stat. L. c. 97, § 1, p. 395 [Comp. St. 1918, § 991, subd. 3]), "saving * * * to claimants the rights and remedies under the workmen's compensation law of any state," was inapplicable, and that under the doctrine announced in *Southern Pacific Company v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, the rights of the parties depended upon the maritime law of the United States.

There was no decision against the validity of a treaty or statute of or an authority exercised under the United States, nor in favor of the validity of a statute of or an authority exercised under a state challenged because of repugnance to the Constitution, treaties or laws of the United States. Consequently, under the Act of September 6, 1916 (39 Stat. L. c. 448, § 2, p. 726 [Comp. St. § 1214]), the writ of error was improperly sued out and must be

Dismissed.

(248 U. S. 377)

ALLANWILDE TRANSPORT CORPORATION v. VACUUM OIL CO. SAME v. PIDWELL. THE ALLANWILDE.

(Argued Dec. 12, 1918. Decided Jan. 13, 1919.)

Nos. 449, 450.

1. SHIPPING — 152 — PREVENTION OF CARRIAGE—RETENTION OF FREIGHT—CONTRACT.

Provision of charter party, there stipulated to be embodied in bill of lading: "Freight to be prepaid net on signing bill of lading. * * * Freight earned, retained and irrevocable, vessel lost or not lost"—justifies carrier in retaining prepaid freight; vessel being forced by injuries from storm to return to port, and second departure being rendered impossible by embargo laid against sailing vessels bound for war zone.

2. SHIPPING — 115 — PREVENTION OF CARRIAGE—EMBARGO.

The condition from embargo laid against sailing vessels bound for the war zone, which would necessarily continue so long as the submarine menace, the cause of its imposition, was so far permanent as to relieve the carrier from further obligation to carry.

3. SHIPPING — 112 — PREVENTION OF CARRIAGE—DUTY TO CARRY BY OTHER VESSEL.

Carriage contracted to be done by sailing vessel being prevented by embargo against sailing vessels bound for the war zone, the carrier was not bound to transport by a vessel not subject to the embargo.

Certificate from the United States Circuit Court of Appeals for the Third Circuit.

Libels by the Vacuum Oil Company and by A. W. Pidwell, respectively, against the sailing vessel *Allanwilde*; the *Allanwilde* Transport Corporation, claimant. Decrees for libelants, and cases taken to the Circuit Court of Appeals, which certifies questions. Questions answered in the affirmative.

Messrs. Oscar D. Duncan, Courtland Palmer, and Russell T. Mount, all of New York City, for *Allanwilde* Corporation.

Mr. John C. Prizer, of New York City, for Vacuum Oil Co. and Pidwell.

*Mr. Justice McKENNA delivered the opinion of the Court.

The questions in the cases arise upon libels filed against the *Allanwilde* to recover prepaid freight for the transportation of certain goods and merchandise to designated ports in Europe.

The solution of the questions turns upon (1) the asserted prevention of the adventure by a storm at sea which the vessel encountered, requiring her return to port for repairs, and (2) afterwards by the restraining power of the government.

On November 1, 1917, the *Allanwilde*, owned by the *Allanwilde* Transport Corporation, was seized upon libels filed by the Vacuum Oil Company and A. W. Pidwell, respectively, each of which had shipped certain goods to be carried from New York to Rochefort, France.

In May, 1917, the Oil Company chartered the vessel to carry a cargo of oil in barrels at the rate of \$16.50 a barrel (changed afterwards to \$15.25).

The charter party contained inter alia the following provisions:

"* * * Freight to be prepaid net on signing bills of lading in United States gold or equivalent, free of discount, commission, or insurance. Freight earned, retained and irrevocable, vessel lost or not lost."

On August 25, the oil having been loaded, the vessel issued a bill of lading containing inter alia the following provision:

"All conditions and exceptions of charter party are to be considered as embodied in this bill of lading."

Pidwell was permitted to ship certain kegs of nails on the vessel, and on August 15 a bill of lading was issued to him. Inter

alia it provided that the carrier should not be liable for loss, damage, delay or default "by causes beyond the carrier's reasonable control; * * * by arrest or restraint of governments, princes, rulers, or peoples; * * * by prolongation of the voyage. * * *

It is provided in paragraph 5 of the bill of lading that:

"Full freight to destination, whether intended to be pre*paid or collected at destination, and all advance charges * * * are due and payable to (the Allanwilde Transport Corporation) upon the receipt of the goods by the latter * * * and any payment made * * * in respect of the goods * * * shall be deemed fully earned and due and payable to the carrier at any stage before or after loading of the service hereunder without deduction (if unpaid), or refund in whole or in part (if paid), goods or vessel lost or not lost, or if the voyage be broken up. * * *

In pursuance of the contracts thus attested the oil and the nails were shipped on the Allanwilde and the freight was paid in advance—\$49,745.50 for the oil and \$3,128.00 for the nails.

The vessel was seaworthy and properly manned and equipped, and set sail September 11. After she had been out about 14 days and was about 500 miles from New York she encountered a storm so severe that her boats were carried away and she sprang a leak so threatening that the water in her hold was three or four feet deep and was gaining on the pumps. Thereupon the master properly decided that he must seek a port of refuge for safety and repair. Halifax was about 500 miles away, but in that direction the wind was against him, while it was favorable for New York, and on this account as well as for other good reasons he headed for New York, where he arrived on October 5, having been out 24 days. Repairs were undertaken at once, the cargo remaining on board meanwhile.

"On September 28, while the vessel was at sea, the government decided to refuse clearance thereafter to any sailing vessel bound for the war zone. The master did not know of this condition until the vessel returned to New York; he received no information from the shore after September 11. The repairs being finished, the vessel attempted to resume her voyage, but clearance *was refused, and none could be obtained in spite of her efforts to induce the government to modify its stand. Toward the end of October the shippers were notified by the carrier to unload their goods, and this they did, but under protest and reserving their rights. Afterwards the oil was forwarded by steamship, but at a higher rate of freight and under other charges. What became of the nails after they were unloaded does not appear.

"The vessel declined to refund the freight to either shipper, and the libels were filed to recover not only the prepaid freight but also damages for failure to carry. On each libel the District Court entered a decree for the prepaid

freight alone, refusing recovery for the other damages."

Upon these facts the Circuit Court of Appeals have certified four questions, two in each libel, as follows:

"1. Was the adventure frustrated, and was the contract evidenced by the charter party and by the bill of lading issued to the Oil Company dissolved, so as to relieve the carrier from further obligation to carry the oil?

"2. Whatever answer may be given to the first question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?

"3. Was the adventure frustrated, and was the contract evidenced by the bill of lading issued to Pidwell dissolved, so as to relieve the carrier from further obligation to carry the nails?

"4. Whatever answer may be given to the third question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?"

A copy of the charter party and copies of the bills of lading are attached to the certificate and also the official bulletin refusing clearance to "sailing vessels destined to proceed through the war zone."

The argument of counsel upon the elements of the ques*tions is quite extensive, ranging through all of the ways in which contracts can be dissolved or their performance excused by the agreement of the parties or prevented by some supervening cause independent of the parties and dominating their convention. We do not think it is necessary to follow the argument through that range. It may be brought to the narrower compass of the charter party and the bills of lading.

[1-3] The physical events and what they determined are certified. First, there was the storm, compelling the return of the ship to New York to avert greater disaster; then the action of the government precluding a second departure. Does the contract of the parties provide for such situation and take care of it, and assign its consequences? The charter party provides, as we have seen, that "Freight to be prepaid net on signing bills of lading. * * * Freight earned, retained and irrevocable, vessel lost or not lost." And it is provided that this provision is, with other provisions, "to be embodied" in the bill of lading. They seem necessarily, therefore, deliberately adopted to be the measure of the rights and obligations of shipper and carrier. Let us repeat: the explicit declaration is—"Freight to be prepaid net on signing bills of lading. * * * Freight earned, retained and irrevocable, vessel lost or not lost." The provision was not idle or accidental. It is easy to make a charge of injustice against it if we consider only the defeat of the voyage and the noncarriage of the cargo. But there are opposing considerations. There were

expected hazards and contingencies in the adventure, and we must presume that the contract was framed in foresight of both and in provision for both. We cannot step in with another and different accommodation. It is urged, however, that there is no provision in the contract (charter party and bill of lading) of the Oil Company excepting "restraints of princes, rulers and peoples" and that, therefore, the carrier was *not relieved from its obligation by the refusal of clearance to sailing vessels. And it is further urged that such embargo was at most but a temporary impediment and the cargo should have been retained until the impediment was removed or transported in a vessel not subject to it. We cannot concur in either contention. The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. The Kronprinzessin Cecilie, 244 U. S. 12, 37 Sup. Ct. 490, 61 L. Ed. 960.

There is no imputation of bad faith. The carrier demonstrated an appreciation of its obligations and undertook their discharge. It was stopped, first by storm, and then prevented by the interdiction of the government. In neither situation was it inactive. It quickly repaired the effects of the former and protested against the latter, joining with the shipper in an earnest effort for its relaxation. It gave up only when the impediment was found to be insurmountable.

The answer to the other contention is that the contract regarded the Allanwilde, a sailing ship, not some other kind of ship or means. The Tornado, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747; The Kronprinzessin Cecilie, supra.

The bill of lading in No. 450 is even more circumstantial. It provided that—

"Full freight to destination, whether intended to be prepaid or collect at destination * * * shall be deemed fully earned and due and payable to the carrier at any stage before or after loading of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid), goods or vessel lost or not lost, or if the voyage be broken up."

And there is exemption *from liability "for any loss, damage, delay or default * * * by arrest or restraint of government, princes, rulers, or peoples. * * *"

The questions certified are therefore answered in the affirmative.

So ordered.

(243 U. S. 387)

THE GRACIE D. CHAMBERS.

INTERNATIONAL PAPER CO. v. THE GRACIE D. CHAMBERS.

(Argued Dec. 12 and 13, 1918. Decided Jan. 13, 1919.)

No. 479.

SHIPPING —152—PREVENTION OF CARRIAGE—RETENTION OF FREIGHT—CONTRACT.

That the vessel did not break ground for the voyage, an embargo being laid, did not prevent retention of prepaid freight, bill of lading providing for its payment on shipment of goods, and right to retain it; carriage being prevented by causes beyond carrier's control.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Libel by the International Paper Company against the schooner Gracie D. Chambers; Florence G. Payne, claimant. Judgment for libellant was reversed by the Circuit Court of Appeals (253 Fed. 182), and libellant brings certiorari. Affirmed.

Mr. William C. Cannon, of New York City, for petitioner.

Mr. Robinson Leech, of New York City, for respondent.

* Mr. Justice McKENNA delivered the opinion of the Court.

Libel in admiralty on the schooner Gracie D. Chambers, her tackle, etc., to recover the sum of \$5,845 prepaid freight on a cargo of paper loaded on the schooner for shipment from New York to Bordeaux, France, by the International Paper Company. Judgment went for libellant in the District Court. It was reversed by the Circuit Court of Appeals by a divided court (253 Fed. 182). To this action this writ is directed.

The facts as found by the Circuit Court of Appeals are as follows:

"September 14, 1917, the schooner Gracie D. Chambers began to load a general cargo in the port of New York, *to be delivered at Bordeaux. Between September 27 and 29 the libellant Paper Company shipped 120 tons of print paper.

"September 28, at 4:25 p. m., the Treasury Department at Washington telegraphed the collector at the port of New York to withhold clearance of all sailing vessels, any part of whose voyages would bring them within the danger zone. There was no official publication of this embargo, but it was put into effect beginning September 29, by the refusal of clearance to such vessels as they applied for them. Both the shippers and the shipowners had heard rumors of the embargo as early as October 1.

"October 3 the schooner moved out to an anchorage at the Red Hook Plats, to save wharfage charges and to await clearance.

"October 4 the freight was paid against delivery of the bill of lading.

"October 5 the master applied to the collector for clearance, which was refused. He then applied to the authorities at Washington to except this schooner from the embargo, on the ground that she had begun to load before the order was made. Refusal to allow an exception in her favor was not definitely and finally made until October 10. Subsequently the cargo was discharged and the owners refused to return the prepaid freight.

"The bill of lading contained the following provisions:

" 'Restraints of princes and rulers excepted.'

" 'Freight for the said goods to be prepaid in full without discount retained and irrevocably, ship and/or cargo lost or not lost.' "

The case was submitted with Nos. 449 and 450, 248 U. S. 377, 39 Sup. Ct. 147, 63 L. Ed. 312, and its primary question is, as there, the sufficiency of the clauses in the bill of lading as a defense. In those cases we decided that the bill of lading expressed the contract of the parties and hence determined their rights and liabilities. And it is the safer reliance, the accommodation of all the circumstances that induced it. It was for the parties to consider them and to accept their estimate is not to do injustice but accord to each the due of the law determined by their own judgment and convention, which represented, we may suppose, what there was of advantage or disadvantage as well in the rates as in the risks.

It is asserted, however, that the vessel in this case did not break ground and that this fact distinguishes the case from Nos. 449 and 450. The fact does not deflect the principle of those cases. It was not made to depend upon the fact of breaking ground, but upon the bills of lading which provided for the payment of freight upon the shipment of the goods and the right to retain it though the goods were not carried, their carriage being prevented by causes beyond the control of the carrier.

Therefore, upon the authority of those cases, the judgment of the Circuit Court of Appeals in this case is affirmed.

So ordered.

(248 U. S. 392)

THE BRIS.

STANDARD VARNISH WORKS v. THE BRIS.

(Argued Dec. 13, 1918. Decided Jan. 13, 1919.)

No. 745.

SHIPPING — 152 — PREVENTION OF CARRIAGE — RETENTION OF FREIGHT — CONTRACT.

Vessel being prevented from carrying shipment of varnish to war zone by failure of shipper to procure license, required by President's

proclamation, for exportation, carrier could retain prepaid freight under contract, declaring it is to be considered as earned on shipment of goods, and is to be retained by vessel's owners if there be a forced interruption or abandonment of voyage, and exempting carrier from loss by restraint of princes, rulers, and peoples.

On Certificate from the United States Circuit Court of Appeals for the Second Circuit.

Libel by the Standard Varnish Works against the Steamship Bris; Rederiaktiebolaget, claimant. Judgment for libellant, and case taken to Circuit Court of Appeals, which certifies questions (254 Fed. 987) Questions answered in the affirmative.

Messrs. Julius J. Frank and Everett F. Wheeler, both of New York City, for Standard Varnish Works.

Mr. Clarence Bishop Smith, of New York City, for The Bris.

*Mr. Justice McKENNA delivered the opinion of the Court.

This case was submitted with Nos. 449 and 450, 248 U. S. 377, 39 Sup. Ct. 147, 63 L. Ed. 312, and No. 479, 248 U. S. 387, 39 Sup. Ct. 149, 63 L. Ed. 318, being a suit in admiralty, as they were, to recover prepaid freight upon a shipment of articles of merchandise which were not carried to destination, the carriage having been prevented by action of the government. Judgment was rendered for libellant and the case taken to the Circuit Court of Appeals.

The case is here on certificate from that court (254 Fed. 987), induced, as the court recites, by its decision in the case of International Paper Co. v. The Schooner Gracie D. Chambers (No. 479), to review which a certiorari has been granted by this court.

The facts as certified are these:

"On August 17, 1917, varnish belonging to libellant was shipped by it in the port of New York for Gothenburg, Sweden, upon the steamship Bris, consigned to the Allmänna Svenska Elektriska A. B. Westeras, and the agents for said ship thereupon delivered to libellant a bill of lading, of which a copy is annexed hereto, which formed a contract between libellant and claimant in reference to said goods. Particular reference is made to clause 6, clause 7 and the next to last clause of the bill of lading. The libellant paid in advance the freight mentioned in said bill of lading. At the time of said shipment, shippers were required to obtain export licenses from the British government on cargo of this class, and were also required by the United States Statutes to obtain export licenses from the United States government in connection with such articles as the President should, by proclamation, designate. At the time that said shipment was made the President had designated certain articles as to which licenses *must be thus procured when destined for Gothenburg, Sweden, but varnish was not included among them. At the time of shipment,

the libelant presented a license which it had procured from the British government. On August 27, 1917, the President made a further proclamation, effective August 30, 1917, whereby shippers of varnish and all other cargo destined for Gothenburg, Sweden, were required to procure licenses before the same could be exported. The libelant thereupon made application for such a license, and the claimant held its vessel in port until October 8th, to see if such licenses could be procured, before beginning the discharge of the cargo. Unless shipments were accompanied by the aforesaid licenses they were not allowed by the men-of-war belonging to the Allies to proceed to destination. On or about October 8th the United States, acting through the Exports Administrative Board, refused the application for a license to transport the goods mentioned in the libel, and other cargo destined for Gothenburg, and claimant thereupon began to unload the cargo of the *Bris* and concluded the discharge on October 22, 1917. The claimant continued ready and willing to carry said cargo forward if a license therefor were obtained by libelant. The libelant took redelivery of the cargo at the port of shipment and made a demand upon the claimant that the claimant should return the freight paid, which demand was refused. The question aforesaid is as follows:

"1. Did the bill of lading contract justify the carrier, under the facts stated, in refusing to refund the prepaid freight?"

Clause 6 of the bill of lading is as follows:

"* * * Prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the vessel's owners, vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere. * * *"

The material parts of clause *7 are as follows:

"Also, in case the ship shall be prevented from reaching her destination by * * * war * * * or the hostile act of any power," the master may wait until the impeding obstacle be removed "or discharge the goods into any depot or at any convenient port or bring her cargo back to port of shipment where the ship's responsibility shall cease. * * *"

Clause 2 should be considered. It exempts the carrier from loss by certain causes or "by arrest and restraint of princes, rulers or peoples."

We think the case is within the principle of the decision of the cases submitted with it. In this case, however, it is urged that the clause relied on by the ship to justify the retention of the advance of freight does not contain the word "irrevocable" and that upon that word stress was put by the Circuit Court of Appeals and presumably by this court. The word undoubtedly is one of intensity but its absence does not remove the meaning or intention of its associates. Their declaration is that "prepaid freight is to be

considered as earned on shipment of the goods and is to be retained by the vessel's owners, vessel or cargo lost or not lost." The declaration is clear, and, in anxiety of purpose, uses some tautology. The words "prepaid freight is to be considered as earned" declare a completed right and carried the power of retention without the expression of the latter. And the expression of the right and the power cannot be put aside. Counsel, however, would make them purposeless and would consider the bill of lading as if they were not contained in it, and urges that the only effect of the refusal of clearance to the ship was the "commercial frustration of the adventure" working a dissolution of the contract, absolving from performance but requiring the restitution of the payments that were made as the consideration of performance.

We are not insensible to the appealing force of the contentions nor to the strength of the argument advanced *to support them, but the contract determines against them and the reasons for assigning to it that effect we have given in our opinions in the other cases.

We, therefore, answer the questions certified in the affirmative.

So ordered.

(248 U. S. 429)

DETROIT UNITED RY. CO. v. CITY OF DETROIT.

(Argued Dec. 9 and 10, 1918. Decided Jan. 13, 1919.)

No. 666.

1. MUNICIPAL CORPORATIONS 696 — EXPIRATION OF STREET RAILROAD FRANCHISE—REMOVAL OF TRACKS.

A city may compel a street railway company to remove its tracks from streets, its franchises for which have expired.

2. CARRIERS 12(10)—STREET RAILROADS—CHARGES—ORDINANCES—CONNECTING LINES.

Ordinance of city of Detroit of August 9, 1918, as to street car fares and transfers held to apply to entire street railway system, consisting of several lines, franchises for some of which were still in force, while those for others had expired.

3. CARRIERS 12(10)—STREET RAILROADS—CHARGES—ORDINANCES—CONNECTING LINES.

A section of an ordinance, explicitly fixing fares for trips over two or more street car lines, whether or not franchise lines, and limiting maximum charge, without charge for transfers, held, in view of definition in another section of a continuous trip as a journey from one point to another in the city, whether on one

car line or by transfers from car to car or line to line, not modified, except where trips are wholly on franchise lines, by such other section, providing that the ordinance shall not be construed as an attempt to impair the obligation of any valid contract, but shall apply to and govern all such street railway passenger traffic in the city, except where it is governed by contract.

4. CARRIERS ⚡12(5) — CONSTITUTIONAL LAW ⚡298(2)—STREET RAILROADS ⚡66 —EXPIRATION OF FRANCHISE—REQUIRING SERVICE—COMPENSATION.

Though after the franchises for some of the lines of a street railway company have expired, the city can require the tracks of such lines to be removed, it cannot require continuance of service thereon on terms not allowing a reasonable return on investment, as this would amount to denial of due process of law.

5. STREET RAILROADS ⚡24(12)—FRANCHISE —ORDINANCE REQUIRING SERVICE.

For a city after the franchise of some of the lines of a street railway company have expired to pass an ordinance to continue in force for a year unless sooner repealed, with penalties for its violation, for continued operation of the company's system, with fares and transfers over the various lines, whether or not having a franchise, amounts to a grant to the company for further operation of the system, during the life of the ordinance.

6. CARRIERS ⚡12(9)—CONSTITUTIONAL LAW ⚡135—OBLIGATION OF CONTRACT—STREET RAILROAD FRANCHISE—ORDINANCE.

The obligation of the franchise contract for a line of a street railway company, fixing the fare on such line at five cents without transfer, is impaired, in the case of a continuous trip beginning on a non-franchise line and extending over it and a franchise line, by an ordinance requiring all such service for five cents.

Mr. Justice Clarke, Mr. Justice Holmes, and Mr. Justice Brandeis dissenting.

Appeal from the District Court of the United States for the Eastern District of Michigan.

Suit by the Detroit United Railway Company against the City of Detroit. Application for temporary injunction was denied, and bill dismissed, and complainant appeals. Reversed.

Mr. Elliott G. Stevenson, of Detroit, Mich., for appellant.

Messrs. Allan H. Frazer and Richard I. Lawson, both of Detroit, Mich., for appellee.

* Mr. Justice DAY delivered the opinion of the Court.

The Detroit United Railway Company brought this action in the United States District Court for the Eastern District of Michigan to enjoin the city of Detroit from enforcing the provisions of an ordinance regulating street railway fares in that city. The

ordinance was passed August 9, 1918. It is printed in the margin.¹

*The bill attacks the ordinance upon two constitutional grounds: First, that it impairs the obligation of the company's existing contracts; second, that it is confiscatory and hence deprives the company of its property without due process of law. The suit came on for hearing before the district judge upon an application for a temporary injunction, the judge denied the application and upon his own motion dismissed the bill.

The question upon this appeal is: Did the

¹ An ordinance to fix and establish maximum rates of fares and charges which may be exacted and received by persons, corporations or partnerships operating street railways for the carriage of passengers within the city of Detroit, and to fix a penalty for the violation thereof.

It is hereby ordained by the people of the city of Detroit:

Section 1. No person, partnership or corporation operating a street railway on the streets of the city of Detroit, for the carriage of passengers for hire, shall charge more than five cents for a single ride, or six tickets for twenty-five cents, per person for one continuous trip within the city over any line which is now operated or shall hereafter be operated without a franchise fixing the rate of fare.

Sec. 2. No such person, partnership or corporation shall charge a higher rate of fare upon any line now or hereafter operated under a franchise contract than is fixed by such franchise.

Sec. 3. Between the hours of 5 and 6:30 a. m. and 4:45 and 5:45 p. m. tickets in strips of eight for twenty-five cents shall be sold on all cars on all lines except where such sale would be contrary to the terms of a franchise contract, which tickets shall entitle the holder to the same rights between said hours as the payment of a five-cent fare would.

Sec. 4. Where a trip is over two or more lines, whether franchise lines or not, the maximum fare shall be five cents, and no transfer fee shall be exacted which raises the total charge to more than five cents or six for twenty-five cents.

Sec. 5. A continuous trip means one journey from point to point within the city, whether the same is made upon one car or one line or by means of transferring from car to car or from line to line. Each such person, partnership or corporation, and the officers, agents, servants and employes thereof, shall, upon demand, furnish proper transfers to carry into effect the provisions of this section. The provisions of this ordinance shall not be construed as an attempt to impair the obligation of any valid contract, but shall apply to and govern all such street railway passenger traffic in the city, except where the same is governed by the provisions of such contract.

Sec. 6. Any such person, partnership or corporation which shall violate the provisions of this ordinance, or shall attempt to do so, and any officer, agent, servant or employe who shall order or direct any such violation or attempted violation of the provisions of this ordinance, shall be guilty of an offense, and upon conviction shall be fined not to exceed five hundred dollars, or imprisoned in the Detroit House of Correction for not to exceed ninety days, or shall be both fined and imprisoned in the discretion of the court, for each violation.

Sec. 7. This ordinance is passed for the public welfare in the case of an emergency involving the peace, health and safety of the people of the city, and it is ordered to take immediate effect. It may be amended or repealed at any time by the common council of the city of Detroit. Unless so amended or repealed it shall remain in force for one year from August 9, 1918.

bill, taking its allegations to be true, state grounds for relief to which the company was entitled upon the facts set forth? The action of the District Court was equivalent to sustaining a demurrer to the bill.

* The bill alleges that the complainant company is the owner of all the street railways in the city of Detroit, constituting a system of tracks of upwards of 270 miles. The sources of title of the company are set forth in the bill, and shown by many exhibits. It is sufficient for the present purpose to say: That the system consists of a considerable mileage of tracks upon which the franchises have expired; upon other portions of the system there are unexpired franchises, some of them derived from villages in which the roads were constructed, which villages were subsequently incorporated into the city. That from December 1, 1917, its system was operated, except the so-called three-cent lines, upon terms as follows: Five-cent cash fares for each passenger carried on or over its lines, including so-called universal transfers, with workmen's tickets, eight for twenty-five cents, between certain hours, and on the so-called three-cent lines a cash fare of five cents, with eight tickets for twenty-five cents between certain hours; good only on such three-cent lines with the privilege of a transfer on payment of a five-cent cash fare, and also with the privilege of purchase of six tickets for twenty-five cents, also good between certain hours. It is averred that afterwards it became necessary to increase rates of fare. The bill recites the demand of the employes of the company for increased wages, which was refused; that a submission of the controversy was made to the War Labor Board; that the board after a hearing awarded a substantial increase of wages, and recommended an increase in passenger fares to enable the company to meet this cost. The bill alleges that the increase made by the War Labor Board amounted to about \$2,000,000 per annum. The company petitioned the city for an increase of rates of fare, and this petition was denied.

On August 7, 1918, the company put in force a schedule of its own, making single fares six cents, with ten tickets for fifty-five cents, cash fare or tickets good on connecting or inter*secting lines within the city. It is contended that this action of the company was without legal authority. Whether this was authorized or not, is not an issue involved in this case, and we express no opinion concerning it. The matters involved in this bill concern the validity of the ordinance passed August 9, 1918.

It is further alleged that Detroit is a city of a population exceeding 750,000; that it is an industrial city with much the larger part of its male population employed in industrial plants within and adjacent to the city; that the operation of the company's railway sys-

tem was the only means of transportation of such employes from their homes to their places of employment; and that the interruption of the operation of the company's system, or the separation in operation of the franchise from the non-franchise lines, would paralyze the industrial and business life of the city, throw thousands of its residents out of employment, and result in shutting down its industrial plants and factories. Allegations follow, setting forth the value of the company's property, and stating that the effect of the ordinance, if enforced, will be to require the operation of the company's system at a deficit, and, consequently, with no return on the investment.

[1, 2] The learned District Judge answered the contention of the company by holding, in substance, that as to the non-franchise lines the remedy of the company was to abandon the service and take its property from the city streets, and that as to the franchise lines the exception of the fifth section of the ordinance saved the company's contract rights from impairment. There can be no question that it was within the city's power to compel the company as to its non-franchise lines to remove its tracks from the streets of the city. This was settled in Detroit United Railway Co. v. Detroit, 229 U. S. 39, 33 Sup. Ct. 697, 57 L. Ed. 1056. The city did not do so. Instead of taking such action it passed the ordinance in controversy, providing for the continued operation of the company's system. This ordinance has application to the entire street railway system. In section 1 it provides that no more than five cents shall be charged for a single ride, or six tickets for twenty-five cents, for one continuous trip through the city over any line operated without a franchise. Section 2 purports to preserve the right to charge franchise rates when fixed by contract. Section 3 provides for fares, eight tickets for twenty-five cents, except when such fares are contrary to contract rights. Section 4 provides that where a trip is over two or more lines, whether franchise or not, the maximum fare shall be five cents, or six tickets for twenty-five cents, and no transfers shall be exacted which raise these rates of fare. Section 5 defines a continuous trip to mean a journey from one point in the city to another, whether on one car line or by means of transfers, and the company is required to furnish transfers to carry the provisions of the ordinance into effect. It is further provided that the ordinance is not to be construed as an attempt to impair the obligation of any valid contract, but shall apply to all street railway passenger traffic in the city except when the same is governed by the provisions of a contract. Section 6 provides for fines or imprisonment for violations of the provisions of the ordinance. Section 7 provides that the ordinance shall be in effect for

the term of one year from August 9, 1918, unless sooner amended or repealed.

[3, 4] The allegations of the bill, which for the present purposes must be taken as true, are ample to the effect that the enforcement of this ordinance will result in a deficit to the company. We cannot construe the exception of section 5, having reference to existing franchise contracts, in such way as to modify the requirements of section 4 which in explicit terms fixes the fares for trips over two or more lines whether franchise lines or not, and limits the maximum fare without charge for transfers. This must be read in view of the definition of a continuous *trip in section 5 as meaning a journey from one point to another point in the city whether the same is made on one car line or by means of transfers from car to car or from line to line. The exception in section 5 can have no further effect consistently with the other provisions of the ordinance, particularly those of section 4, than to regulate fares where trips are wholly upon franchise lines. A principal ground upon which the bill was dismissed by the District Court was the view of the learned judge that the power to compel the company to remove its tracks from the streets involving the non-franchise roads included the right to fix terms of continued operation upon such lines, whether remunerative or not. We cannot agree with this view. In our opinion the case in this respect is ruled in principle by *Denver v. Denver Union Water Co.*, 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649. In that case the franchise of a water company had expired, and the city might have refused the further use of the streets to the company. Instead of doing this it passed an ordinance fixing rates and requiring certain duties of the company. We held that in that situation the company was entitled to make a reasonable return upon its investment. So here, the city might have required the company to cease its service and remove its tracks from the non-franchise lines within the city. Instead of taking this course the city enacted an ordinance for the continued operation of the company's system, with fares and transfers for continuous trips over lines composing the system whether the same had a franchise or not. This action contemplated the further operation of the system, and fixed penalties for violations of the ordinance. By its terms the ordinance is to continue in force for the period of one year, unless sooner amended or repealed. This was a clear recognition that until the city repealed the ordinance the public service should continue, with the use of the streets essential to carry on further service. Within the principles of the **Denver Case* this service could not be required without giving to the company, thus affording it, a reasonable return upon its investment. In the *Denver Case* we said:

"The very act of regulating the company's rates was a recognition that its plant must continue, as before, to serve the public needs. The fact that no term was specified is, under the existing circumstances, as significant of an intent that the service should continue while the need existed as of an intent that it should not be perpetual."

In the present case the service upon the terms fixed in the ordinance is continued for a year, the city reserving the right to repeal the ordinance at any time.

[5] It is clear that the city might have taken a different course by requiring the company to remove its tracks from the non-franchise lines; it elected to require continued maintenance of the public service; doubtless because it was believed that it was necessary in the existing conditions in the city to continue for a time at least the right of the railway company to operate its lines. This amounted to a grant to the company for further operation of the system, during the life of the ordinance. For this public service it was entitled to a fair return upon its investment. Elements to be taken into consideration in valuing the property of the company in estimating a fair return are not involved in this case. If the allegations of the bill are true, and for present purposes they must be so regarded, the continued operation of the railroad system of the company upon the fares fixed in the ordinance will result in a deficit, and deny to the company due process of law within the meaning of the federal Constitution.

[6] As rates of fare are fixed on some of the existing franchise lines at five cents without transfers, it would follow as to continuous trips over such franchise and non-franchise lines, such trips comprehending much of the trans*portation required, the latter lines would be without compensation for the service rendered. Furthermore, when a continuous trip begins on a non-franchise line and is over a franchise line and a non-franchise line, the former having the right to charge five cents for a trip over it, the effect would be to impair the obligation of the franchise contract. *Detroit United Railway v. Michigan*, 242 U. S. 252, 37 Sup. Ct. 87, 61 L. Ed. 268.

In our view the allegations of this bill for the purposes of the demurrer sufficiently alleged violations of the Constitution of the United States in the action of the city in passing and enforcing the ordinance in controversy. The District Court should have entertained the bill, heard the application for a temporary injunction, and proceeded to a hearing and determination of the case in due course.

Reversed.

Mr. Justice CLARKE dissenting.

The relation between the city and the railway company, when the ordinance which the

court holds unconstitutional was passed, was this:

The company owned three classes of tracks, viz.:

(a) Those in the business and residence streets most productive of traffic, constituting the greater part of the lines of the company. Its authority to maintain these tracks expired in 1909-1910, and they are designated in the record as "non-franchise lines." It will be convenient to refer to the streets in which these lines are located as "non-franchise streets."

(b) Tracks designated as "three-cent franchise lines" (Exhibit T), also largely in business and important residence streets. The company had franchises for these lines under which it was obliged to sell eight tickets for twenty-five cents good from 5:45 a. m. to 8 o'clock p. m. and six tickets for twenty-five cents good during the *remainder of the twenty-four hours. Such tickets entitled the holders to transfer privileges only on all three-cent lines.

(c) Disconnected sections of track, of small mileage, in streets remote from the business parts of the city. For these lines the company had unexpired franchises granted by villages and townships before the extension of the city limits included them, which allowed a fare of five cents, in some places, in others five cents with transportation to the City Hall. The mileage of these grants varied from five miles to "six blocks" in length; they are described in the bill as lying, some to the north, others to the south, others to the east and others to the west of the city, as it was when the grants were made and, thus widely separated, they had no connection one with the other, except over non-franchise or three-cent franchise tracks. These are designated as "five-cent franchise lines."

It was stated at the bar by counsel for the city, and not questioned, that there were about 150 miles of non-franchise lines, about 65 miles of the three-cent franchise lines, and only 55 miles of five-cent franchise lines.

In their brief counsel for the company say that the larger part of the company's lines had been operated for several years prior to December, 1917, on what was known as the "day-to-day agreement" (and see *Detroit United Railway v. Detroit*, 229 U. S. 39, 42, 33 Sup. Ct. 697, 57 L. Ed. 1056), under which a rental was paid to the city for the use of the streets and the company was allowed to charge a cash fare of five cents or seven tickets for twenty-five cents, except during an hour and a half in the morning and one hour in the evening, when tickets sold eight for twenty-five cents were accepted. For these fares transfers were given over the entire lines of the company. Either party could withdraw from this arrangement at any time,

and in December, *1917, the company did withdraw from it and thereafter was allowed to charge, on other than its three-cent franchise lines, a cash fare of five cents, but with eight tickets for twenty-five cents, good for one and a half hours in the morning and for one hour in the evening. Universal transfers were allowed for these fares.

This arrangement continued until August 2, 1918, when, not satisfied, the company proposed to the city a five-cent fare with a charge of one cent for a transfer over all lines in the city one-fare zone, or, in the alternative, a six-cent fare with ten tickets for fifty-five cents and universal transfers, the franchise rates on the three-cent lines to continue, except that for the fares last named universal transfers would be given.

This proposal the city rejected, and thereupon the company, without any authority from the city, put into operation the second proposal above stated, allowing transfers over any connecting or intersecting line within the city limits. In response to this action of the railway company the city passed the ordinance which, for two reasons, the court has held invalid, viz.:

(1) Over certain of the franchise lines a five-cent rate of fare without transfers was provided for in the grants, and because section 4 of the ordinance required transportation "where the trip is over two or more lines, whether franchise lines or not," without transfer charge, it is held that, if this provision were enforced, the effect would be to impair such five-cent franchise contracts and that the ordinance is therefore void.

(2) Interpreting the ordinance as a grant to the company of the right to operate its lines, franchise and non-franchise, at rates which the bill alleges to be non-compensatory, the court holds it invalid because it would deprive the company of its property without due process of law.

The case must be considered on the allegations of the *bill as if on demurrer and my reasons for dissenting from both of these conclusions of the court are as follows:

As to the first. It is not anywhere alleged in the bill that the "five-cent franchise lines" (no complaint is made as to the three-cent lines) can be operated separately and profitably or that less income would be realized from them if operated under the terms of section 4 in conjunction with the non-franchise lines than if they were operated as separate properties, if such thing be possible, charging the five-cent franchise rate without transfers. Without such an allegation it is pure conjecture to say that the company would suffer loss and that its contract would be impaired by giving effect to section 4. He who would strike down a law must show that the alleged unconstitutional feature injures him and operates to deprive him of rights protected by the

federal Constitution. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 534, 34 Sup. Ct. 359, 58 L. Ed. 713.

But the bill not only fails to allege that the railway company would suffer loss from giving effect to section 4, but it states facts which render it highly probable, if not entirely clear, that it would benefit by it.

All five-cent franchise lines appear from the bill to be as we have said, outlying, of limited mileage, and so wholly disconnected one from the other that it would not be practicable to operate them profitably, if at all, except in connection with non-franchise lines. The record shows that in the past they have been so operated, with mutual transfers, and both of the proposals of the company made to the city on August 2, 1918, contemplated such operation. In the absence of allegation to the contrary, the reasonable inference from this description of the five-cent franchise lines and this practice with respect to them is, that it is not practicable to operate them profitably as separate properties and that whatever value there is in them must be realized by operating them jointly with the non-franchise lines, with mutual transfers, and that the company would be benefited, and not injured, by being permitted to so operate them under section 4.

But, should this section 4 be construed to prescribe a rate for transfer over franchise lines?

The first section, as printed in the margin of the court's opinion prescribes a charge "for one continuous trip within the city over any line which is now operated or shall hereafter be operated, without a franchise fixing the rates of fare."

Clearly this is intended not to apply to the franchise lines.

The second section declares that the charge over franchise lines shall not be greater than is fixed in the franchise.

This plainly contemplates allowing the full franchise rate where one exists.

Section 3 provides for the special or "workmen's" tickets, but carefully excepts from its application "all lines * * * where such sale would be contrary to the terms of the franchise contract."

Section 5 in terms declares:

"The provisions of this ordinance shall not be construed as an attempt to impair the obligation of any valid contract, but shall apply to and govern all such street railway passenger traffic in the city, except where the same is governed by the provisions of such contract."

Thus we have in the ordinance a declaration that the rate prescribed shall apply only to non-franchise lines, that the franchise rate shall apply on all franchise lines, that special ticket rates shall not apply where they conflict with franchise rates, and in addition there is the general declaration that the city

council is intending to deal with non-franchise lines only, and that the ordinance shall not be so construed as to impair franchise contracts.

To this we must add that, it is clear that, excluding the five-cent franchise lines, this section 4 would still have a large and indisputably valid application to both non-franchise and franchise lines. The ordinance was designed to apply to 150 miles of non-franchise lines, extending in all directions throughout the city, and to regulate transfers between various parts of these lines. In addition to this, the three-cent franchise lines are greater in extent and much more important than the five-cent franchise lines. From December, 1917, to August 2, 1918, transfers were allowed over all of the non-franchise lines and between the five-cent and three-cent franchise lines and the non-franchise lines upon payment of the fare prescribed in section 4—five-cent fare, or six tickets for twenty-five cents—and it was plainly the primary purpose of the section to continue this rate and practice and not to permit the charge to be increased to six cents, as contemplated in the proposal of the company to the city of August 2, 1918. No complaint is made of the application of the section to the three-cent franchise lines.

All of this is overlooked by the court, and, laying hold of the possible loss to the company (wholly improbable as we have seen) through the application of the section to the five-cent lines, the entire ordinance is struck down as unconstitutional.

This judicial power of declaring laws unconstitutional is of so high and delicate a character that it has been often declared by this court that it would exercise it only in clear cases. *Fletcher v. Peck*, 6 Cranch, 87, 128, 3 L. Ed. 162; *Fairbank v. United States*, 181 U. S. 283, 21 Sup. Ct. 648, 45 L. Ed. 862. Every possible presumption is in favor of a statute, and this continues until the contrary is shown beyond a rational doubt. *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. Ed. 496. The violation of the Constitution must be "proved beyond all reasonable doubt." *Ogden v. Saunders*, 12 Wheat. 213, 270, 6 L. Ed. 606; *Nicol v. Ames*, 173 U. S. 509, 515, 19 Sup. Ct. 522, 43 L. Ed. 786.

But if it be assumed that the application of section 4 would result in loss to the company and would impair its five-cent franchise contracts, even then it would seem that the section should be annulled only in so far as it might be applied to such grants and that the remainder, which is not assailed, should be permitted to stand, under the rule of this court applied from *Bank of Hamilton v. Dudley*, 2 Pet. 492, 526, 7 L. Ed. 496, to *St. Louis & Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265, that if only part of an act be unconstitutional the

provisions of that part may be disregarded and full effect given to the remainder, if severable from the unconstitutional part of the act, as it clearly is in this case.

Coming now to the second and more fundamental ground, on which the court proceeds to its conclusion. It is held that the ordinance contemplates the continued operation of the non-franchise lines, and therefore, applying the novel doctrine of the *Denver Union Water Company Case*, 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649, that it is a grant which, if given effect, would necessarily deprive the company of its property without due process of law, since the allegations of the bill are that it would be non-compensatory.

We are now dealing, not with an alleged attempt on the part of the city to require the company to operate its five-cent and its three-cent franchise lines at a loss, but with an offer to it of a right to operate the lines in the non-franchise streets, in which it has no rights, in conjunction with its other lines at what is alleged to be a non-compensatory rate for the entire system. The right of the company to operate the five-cent and three-cent lines was complete without the ordinance and the operation of them, as separate properties, was quite unaffected by it.

In defining the relation between the city and the company as it was before the ordinance, which is declared invalid, was passed, the court holds, as it must (229 U. S. 39, 33 Sup. Ct. 697, 57 L. Ed. 1056), that the company had no rights in the non-franchise streets, and that the city had the right to order its tracks taken out of them.

*This being the legal relation between the two parties, the company, on August 2, 1918, made its proposal for increased fares, which was rejected by the city. This proposal, when followed by rejection, obviously did not change the relation of the parties from what they were before it was made.

Thereupon the city made its counterproposal by tendering the ordinance rates to the company, which promptly rejected them. It seems equally clear that this proposal and the rejection of it did not change the relations of the parties and that they continued precisely as they were before and as they were defined in the opinion of the court—the railway company without any rights whatever in the non-franchise streets. But not so says the court, for the reason that the ordinance implies that the lines are to be operated and, under the *Denver Case*, it must therefore be interpreted as a grant (contrary it would seem to *Blair v. Chicago*, 201 U. S. 400, 463, 26 Sup. Ct. 427, 50 L. Ed. 801), and, since it is alleged that the rates prescribed are non-compensatory, it is an invalid grant.

If it be conceded that the ordinance is in terms a grant, yet since every grant implies

and requires a grantee, when the company refused to accept it the grant necessarily failed. It is obvious and elementary that no person or corporation can be made a grantee against his or its will. *Kent, Commentaries* (13th Ed.) vol. 4, p. 455, note (b). Thus, again, even on the assumption of the court, it would seem that the ordinance failed to change the relations of the parties from what they were before.

The conclusion of the District Court that this case can be distinguished from the *Denver Water Company Case*, and therefore is not to be ruled by it, seems sound, but the distinction need not be discussed.

The application of the principle of that case to this one must result in depriving the city of the power to treat with the company for terms for the operation of the tracks *which it owns in the streets in which its franchises have expired and in which this court has decided it has no rights whatever, except upon terms as favorable to the company as it would be entitled to if it had a valid and continuing grant to operate in them. The utmost that can be claimed for the ordinance is that it suffers the company to use streets which it could not use at all without it—for the company to use them in any other way than as thus permitted would be unlawful. Yet this mere offer of this naked privilege, in terms revocable at will, and rejected by the company, is held to give a constitutional right and at the same time to so violate that right as to render the ordinance invalid. I cannot bring myself to understand how, except by sheer assertion of power, even the apparent justice of the result which it is hoped thus to obtain can be made the basis for creating a constitutional right where no right whatever existed before the passing of this rejected ordinance.

If the management of the company was misinformed as to the effect of the expiring of its franchises, as seems probable (229 U. S. 39, 33 Sup. Ct. 697, 57 L. Ed. 1056), or if it underestimated the difficulties in the way of securing an extension of them, the result, as declared by this court in the case just cited, was to deprive the company of all legal rights in the non-franchise streets, and while its misfortune may be regretted the apparent hardship of the situation is no valid ground for raising a constitutional right in favor of one of the parties, which will result in depriving the other party of an advantage which has lawfully come to it. Substantial justice is more likely to result from trusting to the sense of fairness of a community in dealing with such cases than from imposing upon a city a contract which a court shall make for them. The language used by Mr. Justice Holmes, when dissenting in the *Denver Case*, 246 U. S. 196, 38 Sup. Ct. 284, 62 L.

Ed. 649, is sharply applicable to this case, *mutatis mutandis*:

*136 "We must assume that the Water Company *may be required, within a reasonable time, to remove its pipes from the streets. *Detroit United Railway v. Detroit*, 229 U. S. 39, 46 [33 Sup. Ct. 697, 57 L. Ed. 1056]. * * * In view of that right of the city, which, if exercised, would make the company's whole plant valueless as such, the question recurs whether the fixing of any rate by the city could be said to confiscate property on the ground that the return was too low. * * * The ordinance of the city could mean no more than that the company must accept the city's rates or stop—and as it could be stopped by the city out and out, the general principle is that it could be stopped unless a certain price should be paid."

For the reasons thus stated, I think that the ordinance is valid, and that the judgment of the District Court should be affirmed, and therefore I am compelled to dissent from the opinion and judgment of the court.

I am authorized to say that Mr. Justice HOLMES and Mr. Justice BRANDEIS concur in this opinion.

(248 U. S. 458)

J. HOMER FRITCH, Inc., et al. v. UNITED STATES.

(Argued and Submitted Nov. 19, 1918. Decided Jan. 20, 1919.)

No. 64.

COURTS ⇐385(1)—DISTRICT COURTS—DIRECT REVIEW BY SUPREME COURT — CLAIMS AGAINST UNITED STATES.

Judgments of the District Courts, in the exercise of the power conferred on them, concurrently with the Court of Claims, by the Tucker Act of March 3, 1887, to decide claims against the United States, are reviewable exclusively and directly by the Supreme Court, and this remedy is unaffected by the general distribution of appellate power by Judiciary Act 1891, or by the Judicial Code; implications of repeal being prevented by sections 294, 295, thereof (Comp. St. §§ 1271, 1272), and Tucker Act, § 4 (Comp. St. § 1574), being excepted from the repealing clause.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Action by J. Homer Fritch, Incorporated, and others, against the United States. Judgment for the United States was affirmed by the Circuit Court of Appeals (234 Fed. 608, 148 C. C. A. 374; 236 Fed. 133, 149 C. C. A. 343), and plaintiffs bring error. Reversed and remanded, with directions.

*138 Mr. Assistant Attorney General Frierson, for the United States.

* Messrs. Edward J. McCutchen, Ira A. Campbell, and A. Crawford Greene, all of San Francisco, for plaintiff in error.

Mr Chief Justice WHITE delivered the opinion of the Court.

Liability of the United States for the hire of a ship for two charter periods was asserted. The trial court allowed recovery for one period and rejected it for the other and the court below affirmed its action. The case is here because of alleged error committed in not allowing for both. The government insists that we have no jurisdiction because the judgment of the trial court was exclusively susceptible of being reviewed directly by this court; hence, that the court below had no jurisdiction and we must reverse and remand with directions to dismiss for want of jurisdiction. The contention is well founded, and we might content ourselves with referring to the authorities by which its correctness is conclusively established. As, however, some contrariety of opinion on the question is manifested in the decisions of the lower federal courts resulting either from a misconception of the governing principle upon which the right of direct review rests, or, it may be, caused by previous decisions of this court which if unexplained may continue to be the source of misconception, we briefly review and dispose of the subject from an original point of view.

*When the United States made claims against it justiciable by conferring authority upon the Court of Claims to entertain and decide them, the grant was accompanied by a provision giving this court direct and exclusive jurisdiction to review the judgments of the Court of Claims rendered in the exercise of the new power given. When by the Tucker Act (Act March 3, 1887, c. 359, 24 Stat. 505) authority was conferred upon the Circuit and District Courts of the United States to exert, concurrently with the Court of Claims, the power to decide claims against the United States, the question arose whether the judgments of those courts rendered in the exercise of such jurisdiction were reviewable exclusively and directly by this court.

Determining the principle by which the question was to be solved, it was decided that in the absence of express provision or necessary implication to the contrary, the judgments of courts of the United States rendered as the result of the new power would be subject to be reviewed only by the exclusive method theretofore provided for the Court of Claims. Applying the principle of interpretation thus announced to the Tucker Act, it was held that judgments of the courts of the United States in suits against the United States under that act were reviewable only directly by this court. *United States v. Davis*, 131 U. S. 36, 9 Sup. Ct. 657, 33 L. Ed. 93.

Early after the adoption of the Judiciary Act of 1891 (Act March 3, 1891, c. 517, 26

Stat. 826) it was settled that the purpose of that act was to generally provide for and distribute the appellate power of the courts of the United States. *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893; *Lau Ow Bew v. United States*, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; *Bank v. Peters*, 144 U. S. 570, 12 Sup. Ct. 767, 36 L. Ed. 545; *Hubbard v. Soby*, 146 U. S. 56, 13 Sup. Ct. 13, 36 L. Ed. 886. Subsequent to such decisions there was pending in this court a case brought by the plaintiff below by direct appellate proceedings to review the judgment of a Circuit Court of *the United States, rejecting a claim against the United States sued upon in that court as a court of claims. On submission of a motion to dismiss or affirm, made by the United States without brief or argument by the appellant, the case was dismissed for want of jurisdiction, based upon authorities which were cited, establishing that the purpose of the act of 1891 was to distribute the appellate power of the courts of the United States—a ruling which implied that direct review by this court of judgments in suits against the United States rendered by the courts of the United States as courts of claims was taken away by the Act of 1891. *Ogden v. United States*, 148 U. S. 390, 13 Sup. Ct. 602, 37 L. Ed. 493.

In the next year the case of *Chase v. United States*, 155 U. S. 489, 15 Sup. Ct. 174, 39 L. Ed. 234, was decided. It came to this court on a direct writ of error to a Circuit Court of the United States, acting as a court of claims, to review a judgment rendered against the United States. Jurisdiction was disputed, not upon the ground that the power to review such a judgment by direct appeal no longer existed because of the act of 1891, but upon the sole ground that procedure by writ of error instead of appeal had been mistakenly resorted to. The contention was held unsound, jurisdiction was taken, and the case was decided.

It is to be conceded that, either because of the implication resulting from the ruling in *Ogden v. United States*, supra, or because of what was deemed to be the controlling force of the accepted doctrine of the distribution of appellate power made by the act of 1891, the opinion obtained in some of the lower federal courts that the direct review by this court of judgments of courts of the United States acting as courts of claims, which prevailed under the Tucker Act, no longer existed, and that possibly these impressions continued to make themselves manifest until the error upon which they rested was demonstrated by the decision of this court in *Reid v. United States*, 211 U. S. 529, 29 Sup. Ct. 171, 53 L. Ed. 313.

*In that case, acting upon the theory that the effect of the distribution of appellate power made by the act of 1891 controlled

the previously existing right to review judgments of the courts of the United States acting as courts of claims, a case was brought directly to this court under the assumed authority of the act of 1891, which case, because of its amount, would not have been susceptible of being brought here under the right to review as existing prior to the act of 1891. The case therefore rendered it necessary to decide whether the general distribution of appellate power made by the act of 1891 had replaced the right to review previously existing as to judgments of the courts of the United States rendered under the power to dispose of claims against the United States. It was decided that it had not, and that the exceptional remedy by direct and exclusive review as to the exceptional jurisdiction to entertain claims against the United States remained unaffected by the general distribution of appellate power made by the act of 1891.

It is true, indeed, that in the *Reid Case*, as it was also true in the *Chase Case*, no reference was made to the previous ruling in *Ogden v. United States*, virtually holding to the contrary; but, as we have previously pointed out, there was nothing on the face of the opinion in that case to direct attention to the fact that it concerned the continued existence of the exceptional jurisdiction to review judgments resulting from the exercise of the exceptional power to entertain claims against the United States, since on the face of the opinion and the authorities which were referred to, that case dealt only with the operation of the act of 1891 upon the general distribution of appellate power. And when the subject is scrutinized, there can be no room whatever for difference of opinion that the effect of the ruling in *Reid v. United States* was to overrule the *Ogden Case*. That result is made, if possible, more clearly manifest by the application of the ruling in *the *Reid Case* made by this court in subsequent cases. *Atchison, Topeka & Santa Fé Railway Co. v. United States*, 225 U. S. 640, 32 Sup. Ct. 702, 56 L. Ed. 1236; *United States v. Hvoslef*, 237 U. S. 1, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286; *Thames & Mersey M. I. Co. v. United States*, 237 U. S. 19, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087; *United States v. Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 35 Sup. Ct. 499, 59 L. Ed. 825; *United States v. W. R. Cress*, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746; *United States v. Achilles Kelly*, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746; *Tweedie Trading Co. v. United States*, 245 U. S. 645, 38 Sup. Ct. 9, 62 L. Ed. 529.

But it is true to say that in the case of *United States v. Buffalo Pitts Co.*, 234 U. S. 228, 34 Sup. Ct. 840, 58 L. Ed. 1290, decided subsequent to the decision of the *Reid Case*, the jurisdiction of the Circuit

Court of Appeals to review the action of a District Court when sitting as a court of claims was recognized by entertaining and deciding appellate proceedings to review the action of the Circuit Court of Appeals in such case. It is to be observed, however, that in that case no question whatever was raised as to the jurisdiction, and in view of the ruling in the Reid Case, to which no reference was made, the action of this court in the Buffalo Pitts Case must be regarded as a mere inadvertent assumption of jurisdiction rather than as a decision that such jurisdiction existed.

It is now insisted however that, granting the conclusive effect of the Reid Case, it is here inapplicable because decided before the adoption of the Judicial Code by which, it is contended, a change was made taking away the exceptional power to directly review which is here in question. The contention disregards the necessary result of the rulings in the cases just referred to, decided since the Reid Case, some of which disposed of controversies governed by the Judicial Code, and where the proposition now relied upon as to the assumed operation of that act was directly pressed in argument.

Aside from this view, however, the proposition disregards the plain context of sections 294 and 295 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1167 [Comp. St. §§ 1271, 1272]), which were clearly intended to prevent implications of repeal, or change of legislative intent, like the one here relied upon. United States v. Cress, 243 U. S. 316, 331, 37 Sup. Ct. 380, 61 L. Ed. 746. But it is said that the contention as to the change made by the Code is not based upon implication but upon the fact that section 9 of the Tucker Act (Comp. St. § 1172) was expressly repealed by the Judicial Code, thus removing the very groundwork upon which the continued right in this court to exclusively review judgments of the courts of the United States when sitting as courts of claims was held to continue after the Tucker Act. The assumption however is fallacious, since it overlooks the fact that section 4 of the Tucker Act (Comp. St. § 1574) was excepted from the repealing clause and that its provisions are wholly incompatible with the proposition now relied upon. And this again brings the proposition back to the mere assertion that the ruling as to the Tucker Act made in United States v. Davis, and that as to the act of 1891 made in the Reid Case, must now be disregarded.

As it results that the contention of the United States as to the want of jurisdiction in the court below was well founded, the judgment of the Circuit Court of Appeals must be and it is

Reversed and the cause remanded to that court with directions to dismiss for want of jurisdiction.

(243 U. S. 465)

LA TOURETTE v. McMASTER, State Ins. Com'r.

(Submitted Dec. 19, 1918. Decided Jan. 20, 1919.)

No. 114.

1. INSURANCE ⚡3—INSURANCE BROKERS—REGULATION.

An insurance broker who by Act S. C. March 2, 1916 (29 St. at Large, p. 676), is made representative of insured, and who is also representative of the insurer, is, like the business of insurance of which he is an instrument of consummation, clothed with a public interest, and so subject to the regulating power of the state.

2. CONSTITUTIONAL LAW ⚡275(1)—INSURANCE ⚡4—DUE PROCESS—REGULATION OF INSURANCE BROKERS.

Act S. C. March 2, 1916 (29 St. at Large, p. 676), regulating qualification of an insurance broker, being passed in the exercise of a power of government, and having relation to that power, does not deprive one desiring to engage in the business of his liberty and a property right in violation of the due process clause of the Fourteenth Amendment.

3. COURTS ⚡366(1) — FEDERAL COURTS — FOLLOWING STATE COURT'S INTERPRETATION OF STATUTE.

A federal court must accept the state court's interpretation of a statute of the state.

4. CONSTITUTIONAL LAW ⚡207(2) — PRIVILEGES AND IMMUNITIES.

Act S. C. March 2, 1916 (29 St. at Large, p. 676) § 2, allowing insurance broker's license only to residents of the state who have been licensed insurance agents of it for two years, interpreted by distinguishing between "citizens" and "residents" as applying as well to citizens of the state as to citizens of other states, does not discriminate in violation of Const. U. S. art. 4, § 2.

In Error to the Supreme Court of the State of South Carolina.

Petition of Philip La Tourette to the Supreme Court of South Carolina, for mandamus to Fitz Hugh McMaster, State Insurance Commissioner, was dismissed (104 S. C. 501, 89 S. E. 398), and petitioner brings error. Affirmed.

Messrs. John L. McLaurin, of Bennettsville, S. C., and Wendell P. Barker, of New York City, for plaintiff in error.

Messrs. Thomas H. Peeples and C. N. Sapp, both of Columbia, S. C., and Fred H. Dominick, of Newberry, S. C., for defendant in error.

*Mr. Justice McKENNA delivered the opinion of the Court.

An act of South Carolina approved March 2, 1916 (29 St. at Large, p. 676), entitled "An act to provide for the licensing of insurance brokers," defines in its first section an insurance broker "to be such person as shall be licensed by the insurance commissioner to represent citizens" of the state in placing insurance with insurers in the "state or in any other state or country." And it is provided in section 2 of the act, among other conditions, that only such persons may be licensed as are residents of the state and have been licensed insurance agents of the state for at least two years.

La Tourette offered to comply with all of the provisions of the act, but could not comply with the requirement of section 2, he being, as he alleged, a resident and citizen of New York; and he attacked the requirement by a petition in the Supreme Court of the state by which he charged it to be a violation of the Constitution of the state and of section 2 of article 4 and the Fourteenth Amendment of the Constitution of the United States in that he, a citizen of New York, was denied the privileges and immunities granted to citizens of the state of South Carolina and deprived of liberty and property without due process of law. He further alleged that the commissioner had refused to issue a license to him and prayed that he be required to do so.

The insurance commissioner, by the Attorney General of the state and other counsel, demurred to the petition, asserting as the ground thereof that the requirement of the act was a legal exercise of the police power of the state and that La Tourette was not deprived of any privilege or immunity secured to citizens of other states by the Constitution of the United States. The court sustained the demurrer and dismissed the petition, and to that action this writ of error is directed.

The pleadings and the action of the court indicate the question in the case, and, it would seem, the elements of it, but they are not clearly segregated in the argument of counsel. They seem to be (1) That La Tourette is deprived of his liberty and a property right by the act of the state in violation of the due process clause of the Fourteenth Amendment. (2) That the act discriminates against citizens of other states in favor of citizens of the state of South Carolina in violation of section 2, article 4, of the Constitution of the United States.

[1, 2] 1. This contention depends upon the character of the business of insurance, and it was decided in *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, to be clothed with a public interest and subject, therefore, to the regulating power of the

state. And it necessarily follows that, as insurance is affected with a public interest, those engaged in it or who bring about its consummation are affected with the same interest and subject to regulation as it is. A broker is so engaged—is an instrument of such consummation. The statute makes him the representative of the insured. He is also the representative of the insurer (*Hooper v. California*, 155 U. S. 648, 657, 15 Sup. Ct. 207, 39 L. Ed. 297), and his fidelity to both may be the concern of the state to secure. As said by the Supreme Court of the state (104 S. C. 501, 89 S. E. 398):

"It is important for the protection of the interests of the people of the state that the business should be in the hands of competent and trustworthy persons."

And we may say that this result can be more confidently and completely secured through resident brokers, they being immediately under the inspection of the commissioner of insurance.¹ The motive of the statute, therefore, is benefit to insurer and insured and the means it provides seem to be appropriate.

"But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise." It is enough if the legislation be passed in the exercise of a power of government and has relation to that power. *Rast v. Van Deman & Lewis*, 240 U. S. 342, 365, 366, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455, and cases cited; also *Bunting v. Oregon*, 243 U. S. 426, 437, 37 Sup. Ct. 435, 61 L. Ed. 830, Ann. Cas. 1918A, 1043.

[3, 4] 2. This contention, that is, that the act discriminates against citizens of other states and thereby offends the Constitution of the United States, is La Tourette's ultimate reliance, and to it his counsel devote their entire argument. The state replies its power over insurance and that the legislation it justifies extends to its agents and is best executed when they are residents of the state. This view we have sustained, and manifestly to declare the legislation illegal

¹ Sec. 3. Such insurance broker shall exercise due care in the placing of insurance and shall procure from the supervising official in the state or county in which the home office of the insurer is located a certificate to the effect that the insurer is safe and solvent and is authorized to do business. He shall furnish the insured a statement showing the financial condition of the insurer and such other information as the insured may require. He shall report to the insurance commissioner in detail the amount of insurance placed and the premiums paid therefor, and shall pay to the insurance commissioner the additional license fee herein provided. He shall submit to the insurance commissioner within thirty days after December 31 of each year an annual report of his transactions, and his books, papers and accounts shall at all times be open to the inspection of the insurance commissioner or a deputy appointed by him.

is to put a restraint upon a power that has practical justifications.

The illegality of the act is, however, earnestly urged and that it is a "trade regulation" and recognizes "the business, trade or occupation of an insurance broker as proper and legitimate," and yet denies to La Tourette, a citizen of New York, the right to engage in it and thereby abridges the privileges and immunities that he has as a citizen. The contention is expressed and illustrated in a number of ways, and the privilege of a citizen is defined to be "the right to pursue and obtain happiness and safety" and "to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others," and that whatever rights a state grants to its own citizens are the measure within its jurisdiction of the rights of the citizens of other states, and for these propositions the Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394, and Butchers' Union v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585, are cited. Other cases are also cited in illustration. We do not dispute the propositions, and to see if they determine against the act under review we must turn to its words, as did the Supreme Court of the state, whose interpretation of them we must accept. It said, speaking by Mr. Justice Hydrick:

"A citizen of any state of the Union who is a resident of this state and has been a licensed insurance agent of this state for at least two years may obtain a broker's license; on the other hand, a citizen of this state, who is not a resident of the state and has not been a licensed insurance agent of this state for two years, may not be licensed. No discrimination is made *on account of citizenship. It rests alone on residence in the state and experience in the business."

And the court further said:

"Citizenship and residence are not the same thing, nor does one include the other. Cummings v. Wingo, 31 S. C. 427, 435, 10 S. E. 107, and authorities cited. But our conclusion is not rested upon the mere use of the word 'residents'; for no doubt it might appear from the purpose and scope of an act that 'residents' was used in the sense of 'citizens.' If so, the court would so construe it; and in no event would the court sanction an evasion of the purpose and intent of this wise and wholesome provision of the Constitution based on mere verbiage. But there is nothing in the act to suggest any such intention. On the contrary, the words 'residents' and 'citizens' are both used, and each apparently in its ordinary legal sense, which is well defined and understood, making a distinction which is substantial in its purpose and one that is sanctioned by the highest judicial authority."

The court thus distinguishes between citizens and residents and decides that it is the purpose of the statute to do so and, by doing

so, it avoids discrimination. In other words, it is the effect of the statute that its requirement applies as well to citizens of the state of South Carolina as to citizens of other states, residence and citizenship being different things.

Judgment affirmed.

(248 U. S. 471)

POSTAL TELEGRAPH-CABLE CO. v. TONOPAH & TIDEWATER R. CO. WESTERN UNION TELEGRAPH CO. v. BALTIMORE & O. R. Co. POSTAL TELEGRAPH-CABLE CO. v. CHICAGO GREAT WESTERN R. R.

(Argued Jan. 7 and 9, 1919. Decided Jan. 20, 1919.)

Nos. 130, 217, and 404.

TELEGRAPHS AND TELEPHONES — 32—REGULATION—"EXCHANGE" OF SERVICES WITH CARRIER.

Act June 18, 1910, § 7, amending section 1 of the act to regulate commerce (Comp. St. § 8563), by bringing telegraph, telephone, and cable companies within the act, with a proviso that nothing in the act shall be construed to prevent such companies from entering into contracts with common carriers, for the exchange of service, allows "exchange," which is barter, and carries with it no implication of reduction to money, as a common denominator, of services off the line as well as on it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Exchange.]

In Error to the Supreme Court, Appellate Division, First Department of the State of New York.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

Three cases—one an action by the Postal Telegraph-Cable Company against the Tonopah & Tidewater Railroad Company, in which there was judgment for defendant, affirmed by the Supreme Court of New York (176 App. Div. 910, 162 N. Y. Supp. 1140), and plaintiff brings error; another a suit by the Baltimore & Ohio Railroad Company against the Western Union Telegraph Company, in which decree for plaintiff (241 Fed. 162) was affirmed by the Circuit Court of Appeals (242 Fed. 914, 155 C. C. A. 502), and defendant appeals; and the third a suit by the Chicago Great Western Railroad against the Postal Telegraph-Cable Company, in which decree for defendant (245 Fed. 592) was reversed by the Circuit Court of Appeals (249 Fed. 664), and defendant appeals. Affirmed.

Messrs. Jacob E. Dittus and Ode L. Rankin, both of Chicago, Ill., and Bynum E. Hinton, of Washington, D. C., for Postal Telegraph-Cable Co.

*Mr. Rush Taggart, of New York City, for Western Union Telegraph Co.

Mr. Ralph M. Shaw, of Chicago, Ill., for Chicago Great Western R. R.

Messrs. J. Du Pratt White and Roberts Walker, both of New York City, for Baltimore & O. R. Co.

Mr. Charles W. Needham, of Washington, D. C., for Interstate Commerce Commission (by leave).

Mr. Justice HOLMES delivered the opinion of the Court.

The first of these cases, Postal Telegraph-Cable Co. v. Tonopah & Tidewater Railroad Co., was a suit in the Municipal Court of the City of New York for services rendered to the Railroad Company. The defendant set up that the services consisted of the sending of telegrams relating to the defendant's business and were covered by a contract such as usually is made between railroads and telegraphs, under which such telegrams were to be sent free of specific charge. The question raised was the validity of the agreement. The Court decided that it was valid and judgment for the defendant was affirmed on appeal, 176 App. Div. 910, 162 N. Y. Supp. 1140. The next case in number, The Western Union Telegraph Co. v. The Baltimore & Ohio Railroad Co., was brought by the Railroad Company in the District Court of the United States for the Southern District of New York and sets up a similar contract, which the Telegraph Company now refuses to perform in consequence of a ruling of the Interstate Commerce Commission. It prays a declaration of the validity of the contract and specific performance. The plaintiff obtained a decree in the District Court, 241 Fed. 162, which was affirmed by the Circuit Court of Appeals, 242 Fed. 914. The last of the three cases, Postal Telegraph-Cable Co. v. Chicago Great Western Railroad, was another bill in equity, brought by the Railroad Company in the District Court of the United States for the Northern District of Illinois upon a similar contract, to prevent a multiplicity of suits by the Telegraph Company like that first above mentioned, to have the validity of the contract declared, and to obtain a decree that it be performed. The defendant prevailed in the District Court, 245 Fed. 592, but the decision was reversed by the Circuit Court of Appeals, and there the plaintiff obtained a decree, 249 Fed. 664. The only question upon which our decision is sought is the validity of the agreements, which are so far alike as to present a single issue here.

The contracts elaborately provide for the reciprocal rights of the companies, for a di-

vision of expenses between the railroad and telegraph, for the use by the telegraph of the railroad's right of way for its poles, for monthly payment of a certain sum by the telegraph, and then agree, this being the point now material, that up to a certain amount calculated at the regular day rates of the telegraph, it should deliver free of charge messages pertaining to the railroad business to any points on its system on or beyond the railroad lines, and that up to an amount calculated in similar manner the railroad should transport the materials, supplies and employes of the telegraph, needed for the construction, maintenance or renewal of the telegraph lines whether on or off the lines of the road. The latest ruling of the Interstate Commerce Commission is that these contracts for an exchange of service while *valid for services on the line are invalid as to services off the line, which last, it is held, must be charged for by the railroad upon the basis of its published rates and by the telegraph upon that of its charges reasonably charged to other customers for similar services. The Commission construes in this way a proviso added to section 1 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379) by an amendment of June 18, 1910, c. 309, § 7, 36 Stat. 544 (Comp. St. § 8563). This amendment brought telegraph, telephone and cable companies within the act but also inserted a proviso "that nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts, with common carriers, for the exchange of services." The question more specifically stated is whether the construction adopted by the Commission is right.

We do not see how that construction can be got from the words of the act. The words are general and as certainly allow services off the line as services on it to be exchanged. In fact they do so almost in terms by allowing common carriers to exchange with cable companies. This being obvious, it is said that while the abstinence of the act from preventing exchanges covers the whole ground, the exchange of services off the line must be on the terms that we have stated, which makes the act as to them merely a superfluous permission to settle accounts periodically instead of paying for each transaction in cash. But "exchange" is barter and carries with it no implication of reduction to money as a common denominator. It contemplates simply an estimate, determined by self interest, of the relative value and importance of the services rendered and those received. This is admitted with regard to services on the line, and if so whatever services can be exchanged can be exchanged in the same way. We cannot follow the argument from Santa Fé, Prescott & Phoenix Ry. Co. v. Grant Brothers Construction Co., 228 U.

*475 S. 177, 33 Sup. Ct. 474, 57 L. Ed. 787, that the exchange properly *so called should be confined to cases where the common carrier is not acting as such. That seems to us a perverse conclusion from a proviso permitting "common carriers" to exchange.

Nothing is gained by referring to the provisions in other sections or to those of the section to which the proviso is attached, for the provision is that nothing in the act, in whatever section it may occur, shall be twisted into preventing the exchange. The passion for equality sometimes leads to hollow formulas and the attempt to bring these arrangements under the head of undue preferences and the like hardly seems a natural result of the statute. No one knows which of the two would be found to be preferred as having the best of a very complex bargain. All the great benefits derived on one side are the consideration for all those conferred upon the other. The railroad and the telegraph have grown together in mutual dependence and we are told that contracts of this sort for long terms have been nearly universal for fifty years. The contracts had been called to the attention of Congress repeatedly by the Commission, which, in December, 1906, stated that, so far as it could see, the full performance of them by the carriers would not affect any public or private interest adversely. It held however that under the law as

it then stood contracts for services off the line were unlawful. 12 I. C. C. 10, 12. Then the Amendment of 1910 was passed, and passed, we must suppose, having the opinion of the Commission and the notorious long-standing form of existing contracts in view. The contracts are complex, as we have said, and entire. We cannot believe that an act which purported to allow them meant to break them up. The Commission seems not to have believed it in its first ruling upon the amended act.

Our opinion is confirmed by a consideration of the further additions to section 1, in 1910, allowing free passes to *be given to the employes of telegraph, telephone and cable lines, and by some further matters of detail referred to in the judgments of the Courts below of which we have cited the reports. The interdependence of the companies is very intimate, and the trouble that would be caused by a narrow construction of the act we believe would be great, with no advantage so far as we can see to any other users of the lines or roads. We do not go into more minute discussion because the result reached must stand on the plain words of the act, the meaning of which is confirmed rather than made doubtful by the circumstances in which the proviso was enacted and the events that had gone before.

Judgment and decrees affirmed.

(248 U. S. 476)

BANK OF CALIFORNIA, NATIONAL ASS'N, v. RICHARDSON, Treasurer of State of California.

(Submitted Oct. 14, 1918. Decided Jan. 27, 1919.)

No. 262.

1. TAXATION ☞10 — NATIONAL BANKS — STATE AUTHORITY.

Rev. St. § 5219 (Comp. St. § 9784), furnishes the exclusive rule governing state taxation as to national banks.

2. TAXATION ☞11 — NATIONAL BANKS — STOCK OWNED IN OTHER NATIONAL BANK.

Under Rev. St. § 5219 (Comp. St. § 9784), authorizing states to tax stock of national banks to the owners of the shares, one national bank may be taxed as stockholder of another such bank.

3. TAXATION ☞11 — NATIONAL BANKS — STOCK IN OTHER NATIONAL BANK AS ASSETS.

Rev. St. § 5219 (Comp. St. § 9784), merely authorizing states to tax stock of national banks to the owners of the shares, does not allow stock of one national bank owned by another such bank, and so taxed to it, to be considered as assets of the owner bank for purpose of taxing its stockholders on their shares.

4. TAXATION ☞10 — NATIONAL BANKS — STOCK OWNED IN STATE BANK.

A national bank, being subject to state taxation as a federal agency only to the extent authorized by Rev. St. § 5219 (Comp. St. § 9784), is not taxable as a stockholder of a state bank.

5. TAXATION ☞11 — NATIONAL BANKS — STOCK OWNED IN STATE BANK AS ASSETS.

Stock of a state bank owned by a national bank, but not taxable to it, is to be considered an asset of it, in determining the value of stock in it taxable under Rev. St. § 5219 (Comp. St. § 9784), to its stockholders.

Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke, dissenting.

In Error to the Supreme Court of the State of California.

Action by the Bank of California, National Association, against Friend William Richardson, State Treasurer of California. Judgment for defendant was affirmed by the Supreme Court of California (175 Cal. 813, 165 Pac. 152), and plaintiff brings error. Reversed and remanded.

Mr. E. S. Pillsbury, Mr. F. D. Madison, Mr. Oscar Sutro, and Mr. Alfred Sutro, all of San Francisco, Cal., for plaintiff in error.

Mr. U. S. Webb and Mr. Raymond Benjamin, both of San Francisco, Cal., for defendant in error.

*Mr. Chief Justice WHITE delivered the opinion of the Court.

Except as to real estate, which is taxed directly in the name of the owner, all the avail-

able resources of banks for the purposes of taxation are reached under the law of California, not by an immediate levy on the banks as the owner, but by annual assessment and tax thereon made by the State Board of Equalization against the stockholders of banks. The state law places the duty upon the banks to pay the tax assessed against their stockholders, with the obligation on the stockholders to repay, sanctioned by a right conferred upon the banks to sell the stock of any stockholder failing to refund.

The Bank of California, organized under the National Banking Law (Act June 3, 1864, c. 106, 13 Stat. 99) and established in San Francisco, commenced this suit to recover the amount of a tax, levied against its stockholders in 1915 under the law previously *stated, which it had paid under protest claiming that the tax was not only unlawful under the state law but illegal under the law of the United States governing the right of a state to tax national banks and their stockholders. The case is here to review a judgment denying the right to recover, on the ground that the tax had been lawfully exacted under both the law of the state and that of the United States.

The decision below, in so far as it rested upon the state law, is binding and we put that subject out of view. To understand the contentions as to the law of the United States requires a brief statement of the tax levied and the particulars in which it is complained of. The capital of the bank was \$8,500,000, evidenced by 85,000 shares of the par value of \$100 each. D. O. Mills & Company was a national bank established at Sacramento and the California Bank was a stockholder in that bank to the extent of 2,501 shares. The California Bank was also the owner of 1,001 shares of stock in the Mission Bank, a banking corporation organized under the state law and doing business in San Francisco. The Board of Equalization in 1915 fixed the value of all the assets of the California Bank at the sum of \$15,775,252.67. The Board included in the assets making up this amount the stock standing in the name of the California Bank, both in the D. O. Mills National Bank and in the Mission State Bank; the first, the Mills National Bank stock, being computed as worth \$625,546.30, and the second, the Mission State Bank stock, as worth \$121,916.50.

Upon these valuations, the Board assessed the California Bank as a stockholder in the D. O. Mills National Bank and as a stockholder in the Mission State Bank for the shares of stock which it held in those banks, valuing each at the sum previously stated. Besides, the stockholders of the California National were assessed for the value of the assets of that bank, including in the amount *the full value of the shares of stock owned by the

bank in the Mills National and Mission State Banks.

[1] The controversy grows out of the asserted illegality of the twofold tax levied on the assessments of the California Bank as a stockholder in the Mills National Bank and in the Mission State Bank. Its solution depends upon the effect of Rev. St. 5219 (Comp. St. § 9784), the text of which is in the margin.¹

Without considering some modifications made by the Act of February 10, 1868 (15 Stat. 34, c. 7 [Comp. St. § 9784]), which are negligible for the purposes of the questions before us, the section is but the reproduction of a provision of section 41 of the Act of June 3, 1864, dealing with the organization of national banks. 13 Stat. 99, 112. The forms of expression used in the section make it certain that in adopting it the legislative mind had in view the subject of how far the banking associations created were or should be made subject to state taxation, which presumably it was deemed necessary to deal with in view of the controversies growing out of the creation of the Bank of the United States and dealt with by decisions of this court. *McCulloch v. Maryland*, 4 Wheat. 316, 436, 4 L. Ed. 579; *Osborn v. Bank*, 9 Wheat. 738, 867, 6 L. Ed. 204; *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481.

*There is also no doubt from the section that it was intended to comprehensively control the subject with which it dealt and thus to furnish the exclusive rule governing state taxation as to the federal agencies created as provided in the section. All possibility of dispute to the contrary is foreclosed by the decisions of this court. *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705; *Mercantile National Bank v. New York*, 131 U. S. 138, 154, 7 Sup. Ct. 826, 30 L. Ed. 895; *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850; *Covington v. First National Bank*, 198 U. S. 100, 25 Sup. Ct. 562, 49 L. Ed. 963.

Two provisions in apparent conflict were adopted. First, the absolute exclusion of

power in the states to tax the banks, the national agencies created, so as to prevent all interference with their operations, the integrity of their assets, or the administrative governmental control over their affairs. Second, preservation of the taxing power of the several states so as to prevent any impairment thereof from arising from the existence of the national agencies created, to the end that the financial resources engaged in their development might not be withdrawn from the reach of state taxation, but on the contrary that every resource possessed by the banks as national agencies might in substance and effect remain liable to state taxation.

The first aim was attained by the nonrecognition of any power whatever in the states to tax the federal agencies, the banks, except as to real estate specially provided for, and, therefore, the exclusion of all such powers. The second was reached by a recognition of the fact that, considered from the point of view of ultimate and beneficial interest, every available asset possessed or enjoyed by the banks would be owned by their stockholders and would be, therefore, reached by taxation of the stockholders as such. Full and express power on that subject was given, accompanied with a limitation preventing its exercise in a discriminatory manner, a power which again *from its very limitation was exclusive of other methods of taxation and left, therefore, no room for taxation of the federal agency or its instrumentalities or essential accessories except as recognized by the provision in question.

[2] Let us come to consider whether the taxation in question was sanctioned by the Act of Congress as thus understood. We do so, first, from the point of view of the twofold tax which was based on the ownership by the California Bank of stock in the D. O. Mills National Bank, and, second, as to the taxes which resulted from the ownership by the California Bank of stock in the Mission State Bank.

In *Bank of Redemption v. Boston*, 125 U. S. 60, 8 Sup. Ct. 772, 31 L. Ed. 689, it was determined that the stock held by one national bank in another is governed by the power to tax stockholders given by the statute. Hence, the circumstance of the ownership of the stock by the California Bank in the D. O. Mills National Bank in no way defects the operation of the statute. This being the case, as the taxation of the California Bank as a stockholder in the Mills Bank conformed to the grant of power to tax stockholders of national banks, it results that the assessment for taxation made upon that basis was within the state authority and was rightly decided so to be.

[3] But the principle upon which this rests inevitably leads to the further conclusion, that the inclusion of the stock ownership of the California Bank in the Mills Bank as an

¹ "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

asset of the California Bank for the purpose of taxing the stockholders of the latter bank was a disregard of the provision as to taxing stockholders fixed by the statute.

Indeed, it is apparent that the use of the power conferred by the statute to tax the California Bank as a stockholder in the Mills National Bank and in addition to avail of such stock ownership for the purpose of taxing *the shareholders of the California Bank, was but to accept the statute on the one hand, and to exert on the other a power which could have no existence consistently with the statute. To say that the two taxes, the one levied on the bank as a stockholder in the Mills National Bank, and the other levied on the stockholders of the California Bank, were valid because a taxation of different persons, the California Bank on the one hand and the stockholders of the California Bank on the other, serves only to emphasize the plain disregard of the statute which would result from the enforcement of the taxes in question.

It is undoubted that the statute from the purely legal point of view, with the object of protecting the federal corporate agencies which it created from state burdens and securing the continued existence of such agencies despite the changing incidents of stock ownership, treated the banking corporations and their stockholders as different. But it is also undoubted that the statute for the purpose of preserving the state power of taxation, considering the subject from the point of view of ultimate beneficial interest, treated the stock interest, that is, the stockholder, and the bank as one and subject to one taxation by the methods which it provided.

Again, when the purposes of the statute are taken into view, the conclusion cannot be escaped that the transmutation of the stock interest of the California in the Mills Bank, into an asset of the California Bank subject to be taxed for the purpose of reaching its stockholders, is to overthrow the very fundamental ground upon which the taxation of stockholders must rest.

We do not stop to point out the double burden resulting from the taxation of the same value twice which the assessment manifested, as to do so could add no cogency to the violation of the one power to tax by the one prescribed method conferred by the statute and which was the sole measure of the state authority.

[4, 5] *Coming to consider the tax on the California National Bank as a stockholder in the Mission State Bank, different considerations are controlling, since the provisions of the statute and the ruling in the Bank of Redemption Case, supra, both in letter and spirit apply only to stock ownership by a national bank in another national bank. It, therefore, follows that as the California National Bank was subject to state taxation as

a federal agency only to the extent authorized by the statute, the taxation of that bank as a stockholder in the Mission State Bank was without the scope of the statute and beyond the power which it conferred.

But while this is true, it also follows that as the stock in the Mission Bank belonged to the California Bank and was part of its general assets embraced by the comprehensive power conferred to tax such assets in the absence of some provision of the statute to the contrary, which as we have seen, was the case with regard to the stock held in the D. O. Mills National Bank, the assessment of the stock in the Mission Bank as an asset of the California Bank against its stockholders was within the scope of the grant given by the statute and was, therefore, valid.

From what we have said, it follows that the court below erred in refusing to order the refunding of the sum paid for the taxes levied on the assessment made against the stockholders of the California Bank for the value of the stock held by that bank in the D. O. Mills National Bank, and which had been assessed against the California Bank as a stockholder in the Mills Bank; and further erred in so far as it refused to decree a refund of the amount paid for the tax levied on the California Bank as the result of the assessment on that bank as a stockholder in the Mission State Bank. In these particulars, therefore, its decree must be, and is reversed. Our order, therefore, is

Reverse and remand for further proceedings not inconsistent with this opinion.

*Mr. Justice PITNEY, dissenting.

Pursuant to the constitution and laws of California, the plaintiff in error, a national banking association located in that state, was required to pay the following three taxes for the year 1915:

(a) A tax upon the valuation of the shares of its own stock, assessed against the bank at its own request instead of being assessed in the names of its individual stockholders. Its shares are 85,000 in number, of the par value of \$100 each (\$8,500,000 in all), and were valued for taxation at the sum of \$15,775,252.67; a valuation which took into account all the assets of plaintiff in error except the assessed value of its real estate (excluded pursuant to the provisions of the state constitution). Included in the estimate were the sum of \$625,546.30, the valuation of 2,501 shares of stock of the Mills National Bank held by plaintiff in error, and the sum of \$121,916.52 for the value of 1,001 shares of the Mission Bank (a state bank), likewise held by plaintiff in error. It appears that the Bank of California prior to February 5, 1910, was a state bank, and on that date was converted into a national association; and, being at that time a stockholder of the two other banks, was permitted, under section

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5154, Rev. Stat. U. S. (Comp. St. § 9694), as it then stood, to continue to be such stockholder after becoming a national bank.

(b) A tax assessed directly against plaintiff in error as a stockholder in the Mills National, based upon the valuation already mentioned of 2,501 shares.

(c) A tax assessed directly against plaintiff in error as a stockholder in the Mission (state) Bank, based upon the above mentioned valuation of its 1,001 shares in that bank.

In an action brought by the California National against Richardson as state treasurer to recover a part of the taxes thus paid, the supreme court of the state, following its previous decision in *Bank of California v. Roberts, Treasurer*, 173 *Cal. 398, 160 Pac. 225, denied recovery, and the case is brought here upon the ground that the state constitution and laws, in conformity to which the taxes were assessed, are repugnant to section 5219 of the Revised Statutes of the United States.²

This court now holds that while the California National was taxable as a stockholder in the Mills National Bank (*Bank of Redemption v. Boston*, 125 U. S. 60, 8 Sup. Ct. 772, 31 L. Ed. 689), the other taxes imposed against plaintiff in error were repugnant to section 5219 in two respects: (1) In that the valuation of the Mills National shares ought to have been deducted from the estimate of the valuation of the California National shares in making an assessment against the stockholders of the latter bank; and (2) in that plaintiff in error, as a national bank, was not taxable at all as a stockholder in the state bank, and that the tax last mentioned above was altogether erroneous.

Upon the last point I understand the case to be controlled by the decision of this court in *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850, where it was held that section 5219 had the effect of exempting not only the operations and franchises but the property of the national banks from *state taxation, except as to their real estate. There are weighty considerations to the contrary, which seem not to have been called to the attention of the

court in that case—certainly are not adverted to in the opinion—but it would serve no useful purpose to bring them into the present discussion. Therefore I take it to be settled that under section 5219 a national bank may not be taxed by a state with respect to its ownership of shares in another corporation except shares in another national bank.

The supreme court of California, in the *Roberts Case* (173 Cal. 398, 405, 160 Pac. 225), held that since it was decided by this court in the case of *Bank of Redemption v. Boston* that section 5219 permits the taxation of the shares of a national bank in the hands of another national bank, a different rule could not be applied to the taxation of shares in a state bank owned by a national bank without violating that provision of section 5219 which prohibits the taxation of national bank shares at a greater rate than is assessed upon other moneyed capital. But this view seems to me untenable; it mistakes an exemption accorded to a particular holder of other moneyed capital for a restriction upon the rate of taxation that may be assessed upon other moneyed capital as a class of property. As we held in *Amoskeag Savings Bank v. Purdy*, 231 U. S. 373, 393, 34 Sup. Ct. 114, 122 (58 L. Ed. 274) the language of section 5219 "prohibits discrimination against shareholders in national banks and in favor of the shareholders of competing institutions, but it does not require that the scheme of taxation shall be so arranged that the burden shall fall upon each and every shareholder alike, without distinction arising from circumstances personal to the individual." The nontaxability of state bank shares in the hands of a national bank is attributable to the character of the national bank as a taxpayer, not to the quality of the state bank shares as an object of taxation.

And of course I agree that the California National was *taxable as a stockholder in the Mills National; it having been determined in *Bank of Redemption v. Boston*, 125 U. S. 60, 70, 8 Sup. Ct. 772, 31 L. Ed. 689, that section 5219 permits the taxation of a national bank owning shares of the capital stock of another national bank, by reason of that ownership, on the same footing with all other shareholders.

This brings us to the point of divergence.

I dissent from the conclusion that the taxation imposed directly upon the California National by reason of its ownership of Mills National shares entitled the stockholders of the former bank to have the estimated value of the Mills shares deducted from the estimate of their California shares.

I find no suggestion of a right to such deduction in the language of section 5219. It permits the inclusion of "all the shares * * * in the valuation of the personal property of the owner or holder of such shares," and leaves it to the legislature of each state to determine the manner and place

² Sec. 5219. "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

of taxing them, "subject only to the two restrictions" which are particularly mentioned; and therefore, by necessary implication, free from all other restrictions.

The opinion seems to adopt the view that to treat the Mills National shares as assets of the California National Bank amounts to imposing a "twofold tax," a "double burden," or "two taxes" upon a single property interest. But if there are two taxes it is only because there are two banks, the stock in each of which is valued separately because the ownership is separate and distinct.

It is said that section 5219 regards the ultimate beneficial interest and treats the interest of the stockholder and that of the bank as one. I cannot accept this view, for several reasons in addition to the implied exclusion of restrictions other than those expressly mentioned in the section.

*491 In the first place, the stockholder and the bank are entirely different entities, not merely in form but in substance; and this ought to be sufficient to rebut any inference that would rest upon an assumed identity in order to raise a limitation upon the already moderate scope of the scheme of taxation expressly prescribed.

In the second place, the property interest of the stockholder is, in a most substantial sense, different from that of the bank. The bank, if taxable with respect to its property, would be taxable upon all of its assets, saving any that might be expressly exempted. But the stockholders are in no proper sense the owners of the entire assets of the bank. Their interest, so far as they have any interest in the assets as such, is only in the residue that remains after payment of all outstanding liabilities. This is capable of enjoyment in possession only in the rare event of a winding-up and liquidation of the bank's affairs. Short of this, and as is true in the particular case of the California Bank, the interest of the stockholders is almost the opposite of a property interest in the assets themselves; it being confined to a right to have those assets employed in the current operations of a going concern of which they are only part proprietors, with the right to participate at proper intervals in the gains derived therefrom. Hence, while "book value"—that is, the excess of assets over outstanding liabilities—may be laid hold of, as it appears to have been laid hold of in this case, as a convenient mode of estimating the value of the stock interest, not only is it a matter of familiar knowledge that such an estimate is a mere approximation, but it is entirely clear that both in law and in the common experience of mankind the beneficial interest of the stockholder in the concerns of the bank is very substantially different from the beneficial interest of the bank in its assets.

Thirdly, the distinction has been constant-

ly recognized in the decisions of this court ever since the earliest establishment of the national banks. The court having in *the year 1862 decided that a state tax, imposed upon a bank according to the valuation of its capital and surplus as upon the property of individual citizens, was invalid in so far as it was based upon an investment in the stocks, bonds, and securities of the United States themselves exempt from taxation by the state (*Bank of Commerce v. New York City*, 2 Black, 620, 17 L. Ed. 451); and having held two years later that the same rule must be applied to a state tax imposed against a bank under another statute which made banks liable to "taxation on a valuation equal to the amount of their capital stock paid in or secured to be paid in, and their surplus earnings," etc. (*Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 793); the question was raised in the year 1865, in *Van Allen v. Assessors*, 3 Wall. 573, 584, etc., 18 L. Ed. 229, whether under section 41 of the National Bank Act of June 3, 1864 (13 Stat. 99, 112, c. 106), from which the present section 5219, Rev. Stat., is derived, a state possessed the power to authorize the taxation of shares of national banks in the hands of stockholders where the capital was wholly invested in stock and bonds of the United States. *Bank of Commerce v. New York City*, 2 Black, 620, and *Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 793, were referred to as calling for a negative answer; but the court sustained the tax upon the ground of the very distinction between the stockholders and the bank that is now under consideration, the language of the opinion being (3 Wall. 583, 584, 18 L. Ed. 229):

"The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. * * * The interest of the shareholder entitles him to participate in the net profits earned *by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the states, under the limitations prescribed."

In the same case, the court found in the context of the National Bank Act most cogent reasons for holding that Congress intended to permit the states to tax the entire interest of the stockholder, without regard

to the character of the investments held by the bank. After referring to certain of the provisions of the act respecting the amount of the capital stock, its division into shares, and the responsibility of the shareholders for the debts of the bank, the opinion proceeds as follows (3 Wall. 587-588, 18 L. Ed. 229):

"In view of these several provisions in which the term shares, and shareholders, are mentioned, and the clear and obvious meaning of the term in the connection in which it is found, namely, the whole of the interest in the shares and of the shareholders; when the statute provides, that nothing in this act shall be construed to prevent *all the shares* in any of the said associations, etc., from being included in the valuation of the personal property of any person or corporation in the assessment of taxes imposed by state authority, etc., can there be a doubt but that the term 'shares,' as used in this connection, means the same interest as when used in the other portions of the act? Take, for examples, the use of the term in the certificate of the numbers of shares in the articles of association, in the division of the capital stock into shares of one hundred dollars each; in the personal liability clause, which subjects the shareholder to an amount, and, in addition, to the amount invested in such shares; in the election of directors, and in deciding all questions at meetings of the stockholders, each share is entitled to one vote; in regulations of the payments of the shares subscribed; and, finally, in the list of shares kept for the inspection of the state assessors. In all these instances, it is manifest that the term as used means the entire interest of the shareholder; and it would be singular, if in the use of the term in the connection of state taxation, Congress intended a totally different meaning, without any indication of such intent. This is an answer to the argument that the *term*, as used here, means only the interest of the shareholder as representing the portion of the capital, if any, not invested in the bonds of the government, and that the state assessors must institute an inquiry into the investment of the capital of the bank, and ascertain what portion is invested in these bonds, and make a discrimination in the assessment of the shares. If Congress had intended any such discrimination, it would have been an easy matter to have said so. Certainly, so grave and important a change in the use of this term, if so intended, would not have been left to judicial construction. Upon the whole, after the maturest consideration which we have been able to give to this case, we are satisfied that the states possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations, within the limit prescribed by the act authorizing their organization."

This distinction between bank and shareholder has been recognized consistently in the decisions of this court from that time until the present. It will not be necessary to analyze the cases, since the principal ones (New York v. Commissioners, 4 Wall. 244, 258, 18 L. Ed. 344; National Bank v. Kentucky, 9 Wall. 353, 359, 19 L. Ed. 701; Far-

lington v. Tennessee, 95 U. S. 679, 687, 24 L. Ed. 558; Tennessee v. Whitworth, 117 U. S. 129, *136, 6 Sup. Ct. 645, 29 L. Ed. 830; Bank of Commerce v. Tennessee, 161 U. S. 134, 146, 16 Sup. Ct. 456, 40 L. Ed. 645; New Orleans v. Citizens' Bank, 167 U. S. 371, 402, 17 Sup. Ct. 905, 42 L. Ed. 202) were summarized and quoted from in the opinion of the court in Owensboro National Bank v. Owensboro, 173 U. S. 664, 677-682, 19 Sup. Ct. 537, 43 L. Ed. 850, where the distinction was employed to demonstrate the substantial want of equivalency either in law or in fact between a tax on the franchise or property of the bank, such as had been imposed by the state in that case, and a tax upon the shares of stock in the names of the shareholders, permitted by section 5219, Rev. Stat. U. S.

The solid basis of the distinction may be further emphasized by considering the practical effect of according to the stockholders of the California Bank, in the estimation of the value of their shares for the purpose of taxation, a deduction of the entire value of the stock held by this bank in the Mills National. This value, according to the admitted facts, is \$625,546.30, which is about 4 per cent. of \$15,775,252.67, the entire estimated value of the 85,000 shares of California National stock (excluding real estate from the computation). It is incorrect to take the latter sum as the value of all the assets of the California National. There is nothing in the record to show the value of its entire assets; but as the case comes before us as on a demurrer to plaintiff in error's own pleading, and since the \$15,775,252.67 represents but the excess of its assets over its outstanding liabilities, it is reasonable to assume that the entire assets are much greater; it being evident that there must be assets to counterbalance all outstanding liabilities, including especially the amounts due to depositors. Let us take, for illustration, the very moderate assumption that plaintiff in error's total assets were four times as much as its capital and surplus or, say \$63,000,000.* Of this amount, *the valuation of the Mills National stock is less than one per cent. In other words, applying the theory of the prevailing opinion, the fact that one per cent. of its total assets is in the form of shares in another national bank entitles its own stockholders to an abatement amounting to four times that percentage, or about 4 per cent., from the valuation of their stock-holding interest in the plaintiff in error's bank. And it is easy to see that, upon the same theory, if the shares held by one national bank in another were equal in value to the aggregate of its own shares, although constituting but a small fraction of its entire assets, its share-

* According to its Report of Resources and Liabilities at close of business September 2, 1915, plaintiff in error had total resources of \$67,396,982. Report of Comptroller of Currency, 1915, vol. 2, p. 585.

holders would escape taxation altogether, although participating in the profits of two banking institutions.

As we have seen, the decisions of this court establish that under section 5219 the holder of shares in a national bank is not entitled to have the estimate of their taxable value reduced by reason of the fact that the capital and surplus of the bank are invested in securities that are exempted from state taxation. It also is clear that while the section in terms permits the real property of the bank to be taxed against it, this does not entitle the shareholder to an allowance from the assessed value of his shares by reason of the fact that the bank is thus taxed. It is true that many of the states, when authorizing the taxation of real estate against the bank, make an allowance for this by deducting the value thus taxed when computing the amount at which the shares shall be taxed; but this is not because of any requirement in the federal statute. In *Commercial Bank v. Chambers*, 182 U. S. 556, 561, 21 Sup. Ct. 863, 45 L. Ed. 1227, this court expressly so held with respect to a claim for a deduction from the value of national bank shares because of real estate owned by the bank situate outside of the taxing state. In *People's Natl. Bank v. Marye* (C. C.) 107 Fed. 570, 579, it was held that section 5219 contemplates that the tax on real estate may be imposed independently *of the tax upon the shares of the stockholder (affirmed upon another ground, 191 U. S. 272, 24 Sup. Ct. 68, 48 L. Ed. 180). And in *Amoskeag Savings Bank v. Purdy*, 231 U. S. 373, 34 Sup. Ct. 114, 58 L. Ed. 274, we sustained a tax imposed upon a shareholder under a statute that, while not exempting the real estate of the bank situate in the same state, allowed no deduction of its value in the computation of the taxable value of the shares.

It seems to me that to allow a deduction

from the taxable value of national bank shares because the bank happens to hold stock in another national bank is not only contrary to the clear intent of section 5219, but is inconsistent with all previous decisions of this court bearing upon the point, especially those that have denied a similar deduction because of tax-exempt securities held by the bank, or because of real estate taxed against it.

Mr. Justice BRANDEIS and Mr. Justice CLARKE concur in this dissent.

(248 U. S. 497)

**BANK OF CALIFORNIA, NATIONAL
ASS'N, v. ROBERTS, Treasurer of
State of California.**

(Submitted Oct. 14, 1918. Decided Jan. 27, 1919.)

No. 115.

In Error to the Supreme Court of the State of California.

Action by the Bank of California, National Association, against E. D. Roberts, State Treasurer of California. Judgment for plaintiff was reversed by the Supreme Court of California (173 Cal. 398, 160 Pac. 225), and plaintiff brings error. Reversed and remanded.

Mr. E. S. Pillsbury, Mr. F. D. Madison, Mr. Alfred Sutro, and Mr. Oscar Sutro, all of San Francisco, Cal., for plaintiff in error.

*PER CURIAM. This case is controlled by the opinion in *Bank of California v. Richardson*, 248 U. S. 476, 39 Sup. Ct. 165, 63 L. Ed. 372, just decided. Indeed, it was submitted without briefs upon the briefs filed in that case. For the reasons stated in the previous case, therefore, the judgment here must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

(248 U. S. 498)

PIERCE OIL CORPORATION v. CITY OF HOPE.

(Submitted Jan. 16, 1919. Decided Jan. 27, 1919.)

No. 137.

1. CONSTITUTIONAL LAW — 296(2) — EXPLOSIVES — 3 — DUE PROCESS — STORING DANGEROUS OILS.

A state may, without violating the due process clause of the Fourteenth Amendment, prohibit storing of petroleum and gasoline in quantities within 300 feet of a dwelling in a city.

2. PLEADING — 214(5) — ALLEGATIONS ADMITTED BY DEMURRER — CONCLUSIONS.

Averment that ordinance is unnecessary and unreasonable is not admitted by demurrer, whether regarded as a conclusion of law or an allegation that facts exist that lead to that conclusion; only facts well pleaded being confessed.

3. PLEADING — 214(4) — ALLEGATIONS ADMITTED BY DEMURRER.

There are limits to the extent to which can be accepted, even on demurrer, such an allegation as that plaintiff's plant is safe and does not threaten the damages that led to passage of the ordinance, enforcement of which is sought to be enjoined, prohibiting storing of petroleum and gasoline within certain distance of a dwelling.

4. EXPLOSIVES — 3 — STORING DANGEROUS OILS.

Even if the necessarily general form of an ordinance prohibiting storing of petroleum and gasoline in quantities within certain distance of a dwelling embraces some innocent objects, that of itself is not enough to invalidate it or remove such an object from its grasp.

5. CONSTITUTIONAL LAW — 121(2) — IMPAIRING CONTRACT OBLIGATIONS — POLICE POWER.

That removal of petroleum and gasoline tanks to a certain place was at the city's request does not import a contract not to legislate if public welfare should require it; and such a contract, if made, would have no effect against subsequent ordinance prohibiting such a location.

In Error to the Supreme Court of the State of Arkansas.

Suit by the Pierce Oil Corporation against the City of Hope. Decree sustaining demurrer to the complaint was affirmed by the Supreme Court of Arkansas (127 Ark. 38, 191 S. W. 405), and plaintiff brings error. Affirmed.

Messrs. W. E. Hemingway, G. B. Rose, and J. F. Loughborough, all of Little Rock, Ark., John D. Johnson, of St. Louis, Mo., and V. M. Miles, of Little Rock, Ark., for plaintiff in error.

* Mr. Justice HOLMES delivered the opinion of the Court.

This is a complaint brought by the plaintiff

in error to enjoin the City of Hope from enforcing an ordinance that forbids the storing of petroleum, gasoline, &c. within three hundred feet of any dwelling, beyond certain small quantities specified. A demurrer to the complaint was sustained by the Supreme Court of the State. 127 Ark. 38, 191 S. W. 405. The plaintiff is engaged in the business of selling petroleum oil and gasoline and has tanks on the right of way of a railroad in the city, which it moved to that place at the city's request. The mode of construction is set forth and it is alleged that an explosion is impossible and that the presence of the tanks in no way endangers any buildings. The tanks are necessary for the business; the present position diminishes the cost of transferring oil from cars and cannot be changed without considerable expense and a reduction of the plaintiff's lawful profits. The plaintiff adds that it knows of no available place in the city where the tanks could be put and oil stored without violating the ordinance, that the ordinance is unnecessary and unreasonable, and that the enforcement of it will deprive the plaintiff of its property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States.

[1, 2] A long answer is not necessary. A state may prohibit the sale of dangerous oils, even when manufactured under a patent from the United States. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115. And it may make the place where they are kept or sold a criminal nuisance, notwithstanding the Fourteenth Amendment. *Mugler v. Kansas*, 123 U. S. *623, 8 Sup. Ct. 273, 31 L. Ed. 205. The power "is a continuing one, and a business lawful today may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good." *Dobbins v. Los Angeles*, 195 U. S. 223, 238, 25 Sup. Ct. 18, 21 (49 L. Ed. 169). The averment that the ordinance is unnecessary and unreasonable, if it be regarded as a conclusion of law upon the point which this Court must decide, is not admitted by the demurrer. If it be taken to allege that facts exist that lead to that conclusion, it stands no better. For if there are material facts of which the Court would not inform itself, as in many cases it would, *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 227, 29 Sup. Ct. 67, 53 L. Ed. 150, an averment in this general form is not enough. *Southern Ry. Co. v. King*, 217 U. S. 524, 534, 535, 30 Sup. Ct. 594, 54 L. Ed. 868. Only facts well pleaded are confessed.

[3-5] Then as to the allegation that plaintiff's plant is safe and does not threaten the damages that led to the ordinance being passed, there are limits to the extent to which such an allegation can be accepted, even on

demurrer; as in the old case of a plea that the defendant threw stones at the plaintiff molliter and that they fell upon him molliter, "for the judges say that one cannot throw stones molliter." 2 Rolle's Abr. 548, Trespass, (G) 8. As was well observed by the Court below "we may take judicial notice that disastrous explosions have occurred for which no satisfactory explanations have been offered. The unexpected happens." 127 Ark. 43, 191 S. W. 405. Indeed the answer admits some possible combustion but undertakes to limit its possible effects. If it were true that the necessarily general form of the law embraced some innocent objects, that of itself would not be enough to invalidate it or to remove such an object from its grasp. *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 204, 33 Sup. Ct. 44, 57 L. Ed. 184; *Hebe Co. v. Shaw*, Jan. 7, 1919, 248 U. S. 297, 39 Sup. Ct. 125, 63 L. Ed. 255. Whether circumstances might make an exception from this principle need not be considered here. *Reinman v. Little Rock*, 237 U. S. 171, 35 Sup. Ct. 511, 59 L. Ed. 900. It is enough to say that the allegations do not raise the question. The fact that the removal to the present situation was made at the city's request does not import a contract not to legislate if the public welfare should require it, and such a contract if made would have no effect. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Texas & New Orleans R. R. Co. v. Miller*, 221 U. S. 408, 414, 31 Sup. Ct. 534, 55 L. Ed. 789.

Decree affirmed.

(248 U. S. 501)

MT. ST. MARY'S CEMETERY ASS'N v. MULLINS.

(Argued Nov. 15 and 18, 1918. Decided Jan. 27, 1919.)

No. 56.

1. CONSTITUTIONAL LAW §290(1) — DUE PROCESS—SEWER ASSESSMENT.

A cemetery association is not deprived of due process of law by a holding that, notwithstanding sale of certain lots for burial purposes, it has title to the entire tract which is the subject of assessment for sewer construction.

2. MUNICIPAL CORPORATIONS §439 — SEWER CONSTRUCTION — BENEFIT SUPPORTING ASSESSMENT.

Unless an assessment for sewer construction is arbitrary and unreasonable, the extent of the benefit, essential to justify the assessment, is a matter within the control of the local authorities.

3. MUNICIPAL CORPORATIONS §450(4)—SEWER DISTRICT—DETERMINING EXTENT.

Whether a cemetery should be made a sewer district of itself, rather than included in a

larger district, is for decision of the local authorities, and their judgment is conclusive, in the absence of arbitrary action.

4. CONSTITUTIONAL LAW §233—EQUAL PROTECTION OF LAWS — SIMILARITY OF CONDITIONS.

Similarity of situation and conditions not being shown, a cemetery association cannot be said to be deprived of equal protection of the laws because its grounds were placed with other lands in a sewer district, while grounds of other such associations were placed in districts by themselves.

5. CONSTITUTIONAL LAW §290(3)—DUE PROCESS OF LAW—NOTICE AND HEARING—SEWER DISTRICTS.

Due process of law is not denied because prior to creation of sewer districts, authorized by legislative authority, owner of land included is not given notice or afforded opportunity to be heard; it having had full opportunity to be heard in judicial proceedings to enforce the tax bills levied, and its contentions of arbitrary action and lack of benefits being considered and decided.

In Error to the Supreme Court of the State of Missouri.

Suit by William C. Mullins against the Mt. St. Mary's Cemetery Association. Judgment for plaintiff was affirmed by the Supreme Court of Missouri (268 Mo. 691, 187 S. W. 1169), and defendant brings error. Affirmed.

*Mr. Wm. Moore and Mr. Clarence S. Palmer, both of Kansas City, Mo., for plaintiff in error.

Mr. Matthew A. Fyke, of Kansas City, Mo., for defendant in error.

Mr. Justice DAY delivered the opinion of the Court.

This suit was begun in the circuit court of Jackson county, Mo., to enforce the liens of tax bills upon land of the Mt. St. Mary's Cemetery Association. The tax bills were assessed in part payment of the cost of two district sewers constructed in a sewer district in Kansas City, Mo. The Mt. St. Mary's Cemetery Association is a corporation organized under the laws of the state of Missouri for the purpose of acquiring and maintaining a cemetery, subdividing it into lots, selling, disposing of, and managing the same. The net proceeds after providing for expenses and a maintenance fund are applied to the support of Catholic orphan asylums.

The case has been three times in the Supreme Court of Missouri. In 239 Mo. 681, 144 S. W. 109, it was held that the cemetery land was liable to assessment under the Constitution and laws of Missouri and the charter of Kansas City. In 259 Mo. 142, 168 S. W. 685, the court held that the land was chargeable with its share of the cost of constructing the sewer; that the holder of a lot in the cemetery had no title or interest

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in the lot except a mere easement or burial right subordinate to the ownership of the cemetery by the corporation; that the special tax bills were properly issued against the entire grounds of the cemetery; that fraud in *laying out the sewer district, if such there were, was not a defense to the action on the tax bills unless the alleged fraud was known to the contractor who did the work. In the third case, 268 Mo. 691, 187 S. W. 1169, the court affirmed a judgment in favor of Mullins against the Cemetery Association, holding that the presumption was in favor of the reasonableness of an ordinance which included a cemetery in the sewer district, and assessed its property with the cost of lateral sewers laid in the alleys and streets adjacent to the cemetery, and that such presumption must be satisfactorily overcome by proof in order to be defeated; that when it was shown that the sewer for which the tax bills were issued served to carry away the surface water in the cemetery, and there was no evidence that the sewers were not beneficial in the sanitation of the cemetery, it would be presumed that the city council was fully informed upon the subject, and that its ordinance was reasonable; that the tax, though large, must stand in the absence of a showing that it was unreasonable; that it was not reversible error to exclude evidence that the city in two other cases had made cemetery associations separate sewer districts in the absence of a showing that this was done under a state of facts like those then presented; that such assessments required no notice of the proceedings unless required by some charter, ordinance, or statutory provision; that the sewer tax bills could be issued against the land in its entirety, such ownership being in the Association.

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So far as the judgment of the Supreme Court of Missouri turns upon matters of state law it is conclusive. The final judgment is here upon writ of error because of the contention that it violates the Fourteenth Amendment to the federal Constitution in that its effect is to deprive the plaintiff in error of its property without due process of law, and to deny to it the equal protection of the laws. In passing upon the case the Supreme Court of Missouri, *in the decision under review, found that the sewer district contained about 407 acres; that the Cemetery Association owned about 34 acres of land in said district which was assessed for sewer purposes; that the effect of the sewers was to drain the surface water from some of the land of the Association; that there were no openings in the sewer pipes for house connections, but the evidence showed that such openings were often made by the plumbers when the connections were made; that the grading contractor in grading a street on the west side of the cemetery, made

a ten-foot fill near the northwest corner of the cemetery, and placed a ten-inch pipe so as to lead the water from the cemetery into the manhole at that point, thus preventing the formation of a pond; that there are two water-closets in the cemetery grounds not connecting with these sewers; that the Association has an eight-inch pipe about 400 feet long laid in the cemetery for the purpose of drawing the water to the west; that about one-half of the land in the cemetery had been disposed of in lots for burial purposes. Other facts, not essential to be considered in the disposition of the Federal questions were found.

[1] The plaintiff in error contends that it was deprived of its property without due process of law in as much as about one-half of the tract of 34 acres belonging to the Cemetery Association had before the assessment been conveyed for burial lots; that the assessment against the entire tract had the effect to impose a lien upon much of its property arbitrarily as the burial lots had been conveyed to others. But the Supreme Court of Missouri held that the fee in the title to the burial lots, which had been sold or leased, was still in the Association, with an easement of the right of burial in the lot purchasers. We see no deprivation of due process of law in this holding, making the ownership of the Association the subject of assessment. The right of burial, which was all that the lot purchasers or lessees *acquired, for obvious reasons could not be put upon the market and sold to pay assessments. The Association had a title which the court held might be and was the subject of assessment.

[2] It is urged that the Cemetery Association was not benefited by the assessment. But the court found, with evidence to support its conclusion, that the sewers served to carry away surface water; and that there was no evidence to show that the cemetery would not have been benefited as to sanitation as a result of the construction of the sewers. It is well settled that unless such assessment is arbitrary and unreasonable the extent of the benefit, essential to justify the assessment, was a matter within the control of the local authorities. *Spencer v. Merchant*, 125 U. S. 345, 356, 8 Sup. Ct. 921, 31 L. Ed. 763; *Wagner v. Baltimore*, 239 U. S. 207, 36 Sup. Ct. 66, 60 L. Ed. 230.

This case is not within the principle of *Myles Salt Co. v. Drainage District*, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. Ed. 392, where it was sought to embrace property in nowise benefited within the limits of a drainage district.

[3] It is contended that the Cemetery Association might have been made a sewer district of itself and not have been included in so large a district. Again, this was a matter for the local authorities to decide, and in

the absence of arbitrary action, their judgment is conclusive. *Spencer v. Merchant*, supra; *Wagner v. Baltimore*, supra; *Houck v. Little River District*, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. Ed. 266.

[4] The denial of equal protection of the laws is said to result from the fact that other cemetery grounds had been placed in districts by themselves. But the record fails to show similarity of situation and conditions. In the absence of arbitrary action the making of this assessment upon the district as constituted will be presumed to have been warranted by the circumstances of the case.

[5] It is insisted that no notice was given, or opportunity to be heard, prior to the creation of the sewer district, and, *therefore, due process of law was denied. These tax bills were levied upon districts the creation of which was authorized by legislative authority. The record discloses that the owner has had full opportunity to be heard, in judicial proceedings to enforce the tax, and its contentions of arbitrary action and lack of benefits conferred have been considered and decided. This is due process. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Embree v. Kansas City Road District*, 240 U. S. 242, 251, 36 Sup. Ct. 317, 60 L. Ed. 624.

This court has more than once declared that it does not interfere with the taxation and assessment laws of the states as violative of the Fourteenth Amendment unless the state's action has been palpably arbitrary or grossly unequal in its application to the persons concerned. In this case the assessment is a large one, but we are unable to find that the judgment sustaining it has had the effect to deprive the Cemetery Association of its property without due process of law, or has denied to it the equal protection of the laws.

Affirmed.

(248 U. S. 507)

UNITED STATES et al. v. NEW ORLEANS PAC. RY. CO. et al. (three cases).

(Argued Dec. 10 and 11, 1918. Decided Jan. 27, 1919.)

Nos. 164-166.

1. PUBLIC LANDS ⇨81(3) — RAILROAD GRANTS — WITHDRAWAL FROM ENTRY AND SALE.

Withdrawal from sale and entry by the Secretary of the Interior of land within the indemnity limits of the grant by Act March 3, 1871, in aid of railroad construction was ineffectual; the statute providing for it only as to land within the primary limits.

2. PUBLIC LANDS ⇨83—RAILROAD GRANT — CONFIRMATION TO ASSIGNEE—ACCEPTANCE.

The assignee of a land grant in aid of railroad construction having accepted the provisions

of Act Feb. 8, 1887, confirming to it, with certain exceptions and on certain conditions, the grant, was bound by its unfavorable provisions.

3. PUBLIC LANDS ⇨128—PATENTS—TRUSTS —SUIT BY UNITED STATES—"TO PROTECT."

The United States, by Act Feb. 8, 1887, confirming, with exceptions and on conditions, a railroad land grant to the assignee thereof, having undertaken to invest settlers coming within its provisions with the title to the lands in their possession, and also "to protect" them in that right, meaning that they were to receive a clear title, and having therein charged the Secretary of the Interior with the duty of adopting appropriate measures to that end, had such interest, by reason of its obligation to such settlers, as authorized it, when other means failed, to bring suit to declare a trust in favor of such settlers in lands patented to such assignee.

4. UNITED STATES ⇨133—SUIT BY—LACHES.

The defense of laches is not available, when the United States sues to enforce a public right or to protect a public interest, but when suit, though in its name, is for benefit of a private person, his laches may be interposed.

5. PUBLIC LANDS ⇨128—PATENTS—TRUSTS —LACHES.

Settlers on land within the limits of railroad land grant, having been in peaceable possession under equitable claim, and their claims having been sustained by land department, held not guilty of laches because of delay in resorting to equity to establish their claims against holders of legal title under patent, where the latter manifested no purpose to disturb them, or to assert any right against them.

6. PUBLIC LANDS ⇨89(3)—BONA FIDE PURCHASERS—NOTICE OF OCCUPANCY.

Act Feb. 8, 1887, confirming a railroad land grant to the assignee thereof, but excepting land occupied by actual settlers, being a public law, subsequent purchasers from the patentee assignee were not bona fide purchasers against occupying settlers.

7. PUBLIC LANDS ⇨80—WITHDRAWAL.

As to land patented to and sold by the assignee of a railroad land grant before Act Feb. 8, 1887, confirmed to the assignee the grant with exception of land occupied by actual settlers, the purchasers from such assignee took full title as against occupying settlers, whose occupancy commenced after the lands were withdrawn from entry and sale; such withdrawal preventing initiation of valid claim by settlement.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Three suits by the United States against the New Orleans Pacific Railway Company and others; Josephine Brown intervening in the first suit, William R. Turner in the second, and Stephen N. Grant in the third. Decrees for defendants were affirmed by the Circuit Court of Appeals (235 Fed. 841, 846, 149 C. C. A. 153, 158), and interveners and

the United States appeal. Reversed in part, and affirmed in part.

Mr. Assistant Attorney General Francis J. Kearful, for the United States.

Messrs. Mark Norris, of Grand Rapids, Mich., F. G. Hudson, of Monroe, La., and H. H. White, of Alexandria, La., for appellees.

*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

These suits are so related that they may be disposed of in a single opinion. Three tracts of land in Vernon parish, Louisiana, each containing 160 acres, are in controversy—one in each suit. All are in odd-numbered sections within the limits of the grant of March 3, 1871, to the New Orleans, Baton Rouge & Vicksburg Railroad Company (16 Stat. 573, c. 122)—one being within the primary and two within the indemnity limits. All were patented under the grant and afterwards sold by the patentee, the purchasers paying a fair price. Through successive sales the title under the patents was passed along to other purchasers. Whether the latter shall be decreed to hold the title in trust for certain homestead claimants whose claims are founded on settlements antedating the issue of the patents, and also the definite location of the road, is the matter in controversy.

The suits were brought by the United States, the defendants being the patentee and the present holders of the title under the patents. The relief prayed was that the patents be canceled, or, if that be not done, that the homestead claimants be decreed to be the equitable owners and that a trust in their favor be declared and enforced. Of *these alternative prayers, the latter was better suited to the case stated. By leave of the court the homestead claimants intervened, set forth their claims, alleged that the patentee and all the purchasers took the title with full notice of their claims, asserted that the title was held in trust for them and sought relief accordingly. Various defenses were set up in the answers, such as the lapse of the period prescribed for bringing suits to cancel patents, laches on the part of the homestead claimants and good faith on the part of the purchasers. On the final hearing the District Court entered a decree for the defendants in each of the suits, and this was affirmed in the Circuit Court of Appeals. 235 Fed. 841, 846, 149 C. C. A. 153, 158. The District Court did not make any specific finding of fact or assign any particular reason for its decree, and the Circuit Court of Appeals rested its decision on three grounds: (a) That in so far as the suits sought a cancellation of the patents they were barred because not brought within the time prescribed by law; (b) that, if a trust had arisen in favor of the homestead claimants, its enforcement was a matter in which the United States was

without interest or concern; and (c) that, if such a trust had arisen, it had become unenforceable by reason of inexcusable laches on the part of the homestead claimants.

The grant of March 3, 1871, was made to the New Orleans, Baton Rouge & Vicksburg Railroad Company, "its successors and assigns," to aid in the construction of a railroad from New Orleans to Shreveport, and embraced all the odd-numbered sections of public land within 20 miles (the primary limits) on each side of the road, subject to enumerated exceptions, one of which excluded any land to which a pre-emption or homestead claim may "have attached" at the time the line of the road was definitely located. In lieu of the excepted lands others in odd-numbered sections within prescribed indemnity limits were to be selected. When- ever, and as often as, 20 *consecutive miles of road were completed and put in running order patents were to be issued for the lands opposite to and coterminous with that portion of the road. The entire road was to be completed within five years. Within two years the company was to designate the "general route" of the road and to file a map of the same in the Department of the Interior. There was no provision directly calling for a map showing the definite location of the road, but that such a map was to be filed was plainly implied.

[1] The general route of the road was designated on a map filed and accepted in November, 1871. The Secretary of the Interior, complying with an express provision in the granting act, then caused the odd-numbered sections within the primary limits to be withdrawn from entry and sale. That withdrawal became effective in December, 1871, and included the tract in controversy in No. 166. The Secretary also ordered a like withdrawal of the odd-numbered sections within the indemnity limits, but as the granting act did not authorize, but in effect prohibited, their withdrawal, this part of the order was of no effect. *Southern Pacific R. R. Co. v. Bell*, 183 U. S. 675, 22 Sup. Ct. 232, 46 L. Ed. 383.

No part of the railroad was constructed by the original grantee, and on January 5, 1881, it transferred the grant to the New Orleans Pacific Railway Company. At that time this company had a line of completed railroad extending from New Orleans to Whitecastle in the direction of Shreveport, and thereafter, during the years 1881 and 1882, it constructed, completed and put in running order, the road from Whitecastle to Shreveport. It also filed with the Secretary of the Interior, on November 17, 1882, a map showing the definite location of the part of the road opposite the tracts now in controversy, and the map was accepted. The road as completed was examined and accepted, and the company was recognized by the Secretary of the Interior, the Attorney General and the President,

*as rightly entitled to patents for the lands falling within the terms of the grant and lying opposite the road from Whitecastle to Shreveport.

Thereafter, in 1885, patents for a large part of the lands were issued to the New Orleans Pacific Railway Company, the assignee of the grant. Other lands remained as yet unpatented. About that time this company's rights under the grant were persistently questioned by persons who insisted that the grant was not assignable, that all rights under it were extinguished when the road was not constructed within the five years prescribed therefor, and that in any event a forfeiture could and should be declared for the failure to comply with that condition, although the road had been completed in the meantime. Because of this the Secretary of the Interior, although not acceding to the insistence, suspended the issue of patents and called the matter to the attention of Congress, saying in that connection that the company had—

“ * * * purchased a portion of a line of a railroad already built from New Orleans to Whitecastle, a distance of 68 miles; as to this portion of the road the company waived claim to the land granted. The residue of the road, from Whitecastle to Shreveport, was built by the company upon the belief of the full validity of their right to the land granted, and without this benefit of the grant the road would not have been built. The government railroad examiner reports the road substantially built and equipped, and it would not appear to comport with good faith to those who invested their money on the basis of the grant to take advantage of any technical defect, if such exists, in the transfer to the company. I would, therefore, respectfully suggest for the consideration of Congress the propriety of passing an act curative of defect, if any exists, in the transfer to the New Orleans Pacific Company, and vesting the title, originally granted to the New Orleans, Baton Rouge & Vicksburg Rail*road Company from Whitecastle to Shreveport, in the New Orleans Pacific road.”

With the matter thus brought to its attention Congress passed the Act of February 8, 1887,¹ c. 120, 24 Stat. 391. By its first section a part of the grant, with which we are not here concerned, was declared to be forfeited and was restored to the public domain. By its second section the part of the grant on the west side of the Mississippi river opposite to and coterminous with the road from Whitecastle to Shreveport, which was constructed by the New Orleans Pacific Railway Company as assignee of the grant, was con-

firmed to that company save as it was declared in a proviso—

“that all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.”

By this section the map of November 17, 1882, was required to be treated as the “definite location” of the part of the road opposite the lands now in controversy. By the third section the confirmation in the second was conditioned on the acceptance by the company of the provisions of the act. The fourth section is not material here. The fifth section authorized the Secretary of the Interior to make all needful rules and regulations for carrying the act into effect. The sixth section confirmed the patents already issued to the company, but with the express qualification that—

“The Secretary of the Interior is hereby fully authorized and in*structed to apply the provisions of the second, third, fourth, and fifth sections of this act to any of said lands that have been so patented, and to protect any and all settlers on said lands in all their rights under the said sections of this act.”

[2] The company duly accepted the provisions of the act and in that way assented to and became bound by every provision in it—the unfavorable as well as the favorable. The provisions of special importance here are the proviso in section 2 and the latter part of section 6. By one all lands occupied by actual settlers at the time of the definite location of the road and remaining in their possession, or that of their heirs or assigns, were “excepted from said grant” and made “subject to entry under the public land laws”; and by the other the Secretary of the Interior was authorized and instructed to apply the same rule to all lands for which patents already had been issued, and to protect all settlers on such lands in their rights under the act.

It does not admit of any doubt that these provisions, when accepted, became applicable to all the unpatented lands and to such of the patented lands as had not then been sold by the company. Whether they also became applicable to such of the patented lands as were sold theretofore is a question which will be considered presently.

Of the lands in suit, 80 acres were both patented and sold before the act was passed or accepted, 280 acres were patented before the act was passed and sold after it was accepted, and 120 acres were both patented and sold after the acceptance. Thus all but 80 acres came certainly within the reach of the two provisions as accepted. The 80 acres, as to which the question is left open for the moment, are part of the tract in controversy in No. 166.

¹ The general history of the grant, together with the executive and legislative action relating to it, up to the date of this act, is set forth at length in the following: Senate Report No. 711, 47th Cong., 1st Sess.; 17 Op. A. G. 370; Senate Ex. Doc. No. 31, 48th Cong., 1st Sess.; House Report No. 1556, 48th Cong., 1st Sess.; House Ex. Doc. No. 1, pt. 5, p. 43, 49th Cong., 1st Sess.; House Report No. 2698, 49th Cong., 1st Sess.; House Ex. Doc. No. 1, pt. 5, p. 49, 49th Cong., 2d Sess.

As before stated, the part of the road opposite these lands was definitely located November 17, 1882. At that time there was an actual settler on each of the 160-acre tracts. In each instance the settler had the qualifications named in the homestead law, was expecting to acquire the title under that law, had placed on the land a habitable dwelling in which he and his family were living, had cleared, fenced and was cultivating several acres and was asserting a claim to the entire tract. The settler in No. 164 continued his residence, occupancy and cultivation until 1896, when he died, and thereafter his widow continued the occupancy and cultivation, either personally or through tenants. The settler in No. 165 continued his residence, occupancy and cultivation to the time of the hearing in the District Court. And the settler in No. 166 continued his residence, occupancy and cultivation until 1885, when he sold his improvements and possessory right to another, who had the requisite qualifications and wished to acquire the title under the homestead law. The assignee then settled on the tract and thereafter resided thereon with his family and continued the occupancy and cultivation begun by his assignor. While in No. 164 the widow, and in No. 166 the assignee, succeeded to the rights of the original settler, we shall speak of all the claims as if the original settlers were the present claimants.

The existence and extent of these claims were well known among the people of the neighborhood, and the improvements and evidences of inhabitancy and cultivation on each tract were such that any one purchasing under the land grant would be charged with notice of the nature and extent of the settler's claim.

The settlers applied at the local land office—one in 1888, one in 1890 and the other in 1896—to make homestead entries of the lands and the railway company opposed their applications. Hearings were had and the contests ultimately were determined in favor of the settlers—one in 1893, one in 1896 and the other 1898. The decision in each contest was to the effect that the proofs established the right of the settler to receive the title under the proviso in section 2 and the latter part of section 6. All the lands had then been patented, and the settlers were advised by the regulations which the Secretary of the Interior had adopted, as also by the decisions in the contests, that the land department would secure a relinquishment of the outstanding title for their benefit. 5 L. D. 688. In 1892, before the contests were decided, the company and the trustees of its land grant had filed the following stipulation with the Secretary of the Interior. New Orleans Pac. Ry. Co., 15 L. D. 576:

"That in cases where patents have issued to said railway company for lands which have been or may hereafter be adjudged by the Com-

missioner of the General Land Office to have been in the possession of actual settlers at date of the definite location of said railway company's road, and title is in said railway company, said railway company and said trustees agree to make without delay conveyance thereof to the United States; and where such lands have been sold by said railway company to third persons, said railway company undertakes to recover title thereto without delay and convey the same to said settlers or to the United States, and the said trustees undertake to join in such conveyances and to do all acts necessary on their part to enable the railway company to carry out this agreement and stipulation."

After the contests were decided the land department called on the company to reconvey or surrender the title, but this was not done; and the Secretary of the Interior requested the Attorney General to institute judicial proceedings to secure for the settlers the protection promised in the act of 1887, which the company had accepted. Acting on this request the Attorney General, on February 27, 1901, brought a suit in the name of the United States against the railway company and others to cancel and annul the patents to these and many other lands similarly situated. Various obstacles were encountered in the prosecution of that general suit, one being that the purchasers from the company were not made parties, and on January 21, 1915, while that suit was still pending, the Attorney General brought the suits with which we are now concerned.

As the patents were issued before, and the suits were brought more than five years after, the Act of March 2, 1896, c. 39, 29 Stat. 42 (Comp. St. §§ 4901-4903), the prayer that the patents be canceled must be put out of view, and the alternative prayer—that the title under the patents be declared to be held in trust for the homestead claimants and the trust enforced—must be regarded as if standing alone.

[3] The right of the United States to maintain the suits is questioned on the ground that the enforcement of the asserted trust is a matter in which the United States is without interest or concern. Were the premise tenable, the conclusion would follow as of course. But the premise is not tenable. A pecuniary interest in the relief sought is not essential; it is enough if there be an interest or concern arising out of an obligation to those for whose benefit the suits are brought. *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 285, 286, 8 Sup. Ct. 850, 31 L. Ed. 823; *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; *United States v. American Bell Telephone Co.*, 128 U. S. 315, 367, 9 Sup. Ct. 90, 32 L. Ed. 450; *Heckman v. United States*, 224 U. S. 413, 439, 32 Sup. Ct. 424, 56 L. Ed. 820. By the act of 1887 the United States undertook to invest settlers coming within the provisions of that act with the title to the lands in their possession, and also

"to protect" them in that right. This meant that they were to receive a clear title. The act charged the Secretary of the Interior with the duty of adopting appropriate measures to that end, and when other means failed he invoked the aid of the Attorney General, who brought these suits. Through them the United States seeks to fulfill its obligation under the act to the settlers, and in this it has the requisite interest or concern.

*519 [4, 5] When the United States sues to enforce a public right *or to protect a public interest the defense of laches is not available; but when the suit, although in the name of the United States, is brought for the benefit of a private person his laches may be interposed with like effect as if he were suing. *United States v. Beebe*, supra. Applying this view, the court below reached the conclusion that the settlers had been guilty of such laches as would bar them from the relief sought. We are unable to concur in that conclusion. The occupancy of the settlers was both peaceable and continuous and gave notice of their equitable rights. Their claims were asserted before the land department, were the subjects of hearings and appeals, and were by it sustained. The land officers, conformably to the published regulations, undertook to secure a restoration of the outstanding title, and to that end the suit of 1901 was brought. The settlers were justified in believing that their rights were being protected, as was required by the act of 1887. No attempt was made to disturb their occupancy or to assert any right against them. We therefore think it properly cannot be said that they were guilty of any such laches as precluded them from obtaining relief in equity. As a general rule, one who is in peaceable possession under an equitable claim does not subject himself to a charge of laches for mere delay in resorting to equity to establish his claim against the holder of the legal title where the latter manifests no purpose to disturb him or to question his claim. *Ruckman v. Cory*, 129 U. S. 387, 389-390, 9 Sup. Ct. 316, 32 L. Ed. 728. We think that rule is applicable here.

*520 [6] On the merits, we are of opinion that the act of 1887, as accepted by the company, operated to exclude from the grant and to subject to these settlement claims all the lands in controversy, patented and unpatented, save the 80 acres which are yet to be specially noticed. In so far as these lands were patented it became the duty of the railway company to surrender the title, and in so far as *they were unpatented the act forbade the issue of patents to the company for them. Intending purchasers were bound to

take notice of the occupancy of the settlers, and this, with the act of 1887, which was a public law, renders untenable the claim that those who hold the title under the patents have the status of bona fide purchasers. In these circumstances the settlers, whose claims come within the proviso in section 2 and the latter part of section 6, are entitled to have a trust in their favor declared and enforced.

[7] The situation as to the 80 acres which were both patented and sold before the act of 1887 was passed is not the same. Under an express provision of the act of 1871 they were withdrawn from entry and sale while they were yet vacant and unclaimed, and the withdrawal was still in force in 1885, when they were patented. No valid claim to them could be initiated by settlement or otherwise in the presence of the withdrawal. *Hamblin v. Western Land Co.*, 147 U. S. 531, 536, 13 Sup. Ct. 353, 37 L. Ed. 237; *Wood v. Beach*, 156 U. S. 548, 15 Sup. Ct. 410, 39 L. Ed. 528; *Spencer v. McDougal*, 159 U. S. 62, 15 Sup. Ct. 1026, 40 L. Ed. 76. They were part of an odd-numbered section within the primary limits and opposite a 20-mile section of the road which was constructed, completed, put in running order and accepted by the President before they were patented. In other words, they were lawfully patented and when the company sold them, in 1886, it had the right to do so. The purpose of the granting act in directing that patents be issued as each section of twenty miles of road was completed was to enable the company to sell the lands and realize on the grant. In these circumstances the purchase was bona fide and the purchaser took the full title. It follows that before the act of 1887 was passed the 80 acres—described as the S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 3, township 3 N., range 7 W., L. M.—had passed into hands where they were not within the reach of the act or the company's acceptance. The fact that this land was sold before the *act was passed seems not to have been brought to the attention of the land department—probably because the purchaser was not a party to the contest proceedings.

The contention is made that the portions of that act which are material here do not embrace lands within the indemnity limits, but only those within the primary limits. A survey of the entire act shows that the contention is without merit.

No. 164. Decree reversed.

No. 165. Decree reversed.

No. 166. Decree affirmed as to S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 3, township 3 N., range 7 W., L. M., and reversed as to the other lands.

(248 U. S. 521)

OELWERKE TEUTONIA v. ERLANGER & GALINGER.**ERLANGER & GALINGER v. OELWERKE TEUTONIA.**

(Submitted Jan. 20, 1919. Decided Feb. 3, 1919.)

Nos. 162, 181.

1. SALVAGE ⚙️ **51—APPEAL—AMOUNT OF SALVAGE.**

Appeals to the Supreme Court concerning the amount of allowance for salvage are not encouraged, unless there has been some violation of principle or clear mistake.

2. SALVAGE ⚙️ **26—RECOVERY—EXPENSES.**

While the necessary work and danger are matters to be considered in determining the share of salvors in the benefit resulting from their work, they having undertaken it without contract or request, the cost is their own affair.

Appeals from the Supreme Court of the Philippine Islands.

Suit by Erlanger & Galinger against Oelwerke Teutonia. Award to plaintiffs was reduced by the Supreme Court of the Philippine Islands, and both parties appeal. Affirmed.

Mr. Harry W. Van Dyke, of Washington, D. C., for Oelwerke Teutonia.

Mr. F. C. Fisher, of Manila, P. I., for Erlanger & Galinger.

*Mr. Justice HOLMES delivered the opinion of the Court.

These are cross appeals from a judgment on a complaint for salvage of cargo brought by Erlanger & Galinger to which the defendant, Oelwerke Teutonia, answered denying the services and setting up a counterclaim for damages alleged to have been caused by the negligence and incompetence of the plaintiffs. The Court of First Instance found for the plaintiffs and awarded to them one-half of the net proceeds of the property saved. On appeal the Supreme Court of the Philippine Islands, while otherwise confirming the findings of the Court of First Instance, reduced the award to forty per cent. of the main part of the cargo, which was copra, and to twenty per cent. of a small item of agar agar which does not need further mention. We assume that the plaintiffs receive a corresponding proportion of the interest accruing upon the fund. *The main facts are these. The steamship Nippon, loaded principally with copra, went aground on Scarborough Reef, 120 or 130 miles from Luzon, in the afternoon of May 8, 1913. The next day the chief officer and nine of the crew were sent off in the only seaworthy small boat in search of help and on the twelfth reached Santa Cruz, Luzon,

and telegraphed to Manila for "immediate assistance for saving crew." Help was sent at once and on the 13th the captain and crew went to Hong Kong on a mail steamer that stopped for them, the captain preferring to take that course rather than to go to Manila by a coast guard cutter that had been sent to the wreck. On May 14 the plaintiffs chartered a cutter, and took possession of the Nippon on the 17th. Shortly after this the work of salvage was begun. It was finished in July when the vessel, the claim for which has been paid, and a great part of the cargo were saved.

There were protests on behalf of interested parties after the plaintiffs had started and it is denied that the vessel was abandoned. But all the earliest communications and circumstances indicate that the only hope when the chief officer left the ship was to save the lives of those left on board, and that there was no greater expectation when the captain was taken off. It is unnecessary to say more about the evidence than that it shows no ground for departing from the usual rule when two courts have agreed about the facts. As the only point of difference with regard to them concerns the amount of salvage allowed, that is the only question upon which we shall say a word.

[1, 2] Unless there has been some violation of principle or clear mistake, appeals to this Court concerning the amount of the allowance are not encouraged. *Hobart v. Drogan*, 10 Pet. 108, 119, 9 L. Ed. 363; *Post v. Jones*, 19 How. 150, 160, 15 L. Ed. 618. The plaintiffs complain that their expenses were not taken into account or were not given sufficient consideration. But, as was pointed out by the Court below, the *cost was their affair. There was no contract and no request. They went into a speculation and their only claim is a lien upon goods that they have rescued for a share in the saving that they have made for the owners. The right to share in a benefit that is the result of their work is the only ground upon which the plaintiffs can stand. Of course, within that limit the necessary work and the danger are matters to be considered. Here the danger might have been great but it was not, and the work seems to deserve neither much praise nor much blame. There was more of commercial speculation and less of help not to be found elsewhere than is usual in salvage cases, and we are not prepared to say that the Supreme Court ought to have allowed more. We are equally unprepared to say that it should have allowed less. The services were rendered rightfully and were fairly efficient. Neither side would be likely to inspire enthusiasm and both justly may be left where they were left by the Court below.

Decree affirmed.

(248 U. S. 525)

**CENTRAL OF GEORGIA RY. CO. v.
WRIGHT**, Comptroller General
of Georgia.

(Argued Jan. 21, 1919. Decided Feb. 3, 1919.)

No. 163.

1. CONSTITUTIONAL LAW ⇨138—IMPAIRING
CONTRACT OBLIGATION—CORPORATE CHAR-
TER—EXEMPTION FROM TAXATION—STATE
CONSTITUTION.

The Constitution of a state, being subsequent to the charters of a railroad that created an exemption from taxation, must yield to them.

2. CONSTITUTIONAL LAW ⇨137—IMPAIRING
CONTRACT OBLIGATION—TAXATION—EFFECT
OF LEASE.

The charter of a railroad company, making its property taxable only in a certain way and to a certain amount, *held* to prevent additional taxation of the leasehold of its lessee of such property.

In Error to the Supreme Court of the State of Georgia.

Suit by the Central of Georgia Railway Company against William A. Wright, Comptroller General of the State of Georgia. Decree for complainant was reversed by the Supreme Court of Georgia (146 Ga. 406, 91 S. E. 471), and complainant brings error. Reversed.

On reargument, decree affirmed, 250 U. S. —, 40 Sup. Ct. 1, 64 L. Ed. —.

*Messrs. A. R. Lawton and T. M. Cunningham, Jr., both of Savannah, Ga., for plaintiff in error.

Messrs. Samuel H. Sibley, of Union, Ga., and John C. Hart, of Atlanta, Ga., for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the Railway Company to prevent the collection of certain taxes, which, it is alleged, would be contrary to Article 1, § 10, and to the Fourteenth Amendment of the Constitution of the United States. The case was heard on bill, demurrer and answer and certain agreed facts, and the Court of first instance issued an injunction as prayed. The decree was reversed however by the Supreme Court of Georgia and a writ of error was taken out to

bring the case here. It presents another attempt to accomplish, by a change in form, what in *Wright v. Central of Georgia Ry. Co.*, 236 U. S. 674, 35 Sup. Ct. 471, 59 L. Ed. 781, was held to be an unconstitutional result.

[1, 2] In that decision it was explained how the Central of Georgia Railway Company had become the holder of leases from the Augusta & Savannah and the Southwestern Railroad of property which by the charters of the lessors was to be taxed only in a certain way and to a certain amount. An attempt had been made to tax the lessee for the property, the leases being for one hundred and one years, renewable in like periods upon the same terms forever. The tax was laid upon the real estate, road ^{bed}, and franchise value, (with a certain deduction,) of the two lessors. It was held that the statutes made the fee exempt from other taxation than that provided for, in favor as well of the lessee as of the lessor. The taxes now attempted to be levied are upon the leasehold interests of the lessee in the same roads and it is argued that, if the leases produce a profit in excess of the rental, the value is required to be taxed by the Constitution of the State. But the Constitution was subsequent to the charters that created the exemption and must yield to them if they apply to the present attempt. We are of opinion that although the decision in the former case necessarily was confined to the question before the Court, the reasoning applies with equal force to that now before us. The cases of *Rochester Ry. Co. v. Rochester*, 205 U. S. 236, 27 Sup. Ct. 469, 51 L. Ed. 784, and *Jetton v. University of the South*, 208 U. S. 489, 28 Sup. Ct. 375, 52 L. Ed. 584, were urged as opposed to the conclusion reached but were thought not to control in view of the exceptional facts and language that had to be considered, as was recognized in *Morris Canal & Banking Co. v. Baird*, 239 U. S. 126, 132, 36 Sup. Ct. 28, 60 L. Ed. 177. We must follow the precedent that was established after full discussion and with recognition of the difficulties involved.

The charter contracts in question are of a kind that goes back to the time when railroads were barely beginning and that would not be likely to be repeated, but of course will be carried out by the State according to what was meant when they were made.

Decree reversed.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1918

(248 U. S. 595)

No. 150. SOUTHERN PACIFIC COMPANY, petitioner, v. CALIFORNIA ADJUSTMENT COMPANY. Jan. 13, 1919. On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 237 Fed. 954, 150 C. C. A. 604, which affirms, *California Adjustment Co. v. Southern Pacific Co.*, 226 Fed. 349. Mr. C. W. Durbrow, of San Francisco, Cal., for petitioner. Mr. Leon E. Morris, of San Francisco, Cal., for respondent. Dismissed with costs, on motion of counsel for the petitioner.

(248 U. S. 547)

No. 287. FEDERAL GAS & FUEL COMPANY, plaintiff in error, v. CITY OF COLUMBUS, OHIO. Jan. 13, 1919. In error to the Supreme Court of the State of Ohio. For opinion below, see 96 Ohio St. 530, 118 N. E. 103. Mr. Henry A. Williams, of Columbus, Ohio, for plaintiff in error. Mr. Henry L. Scarlett, of Columbus, Ohio, for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Consolidated Turnpike Co. v. Norfolk & O. V. R. Co.*, 228 U. S. 596, 599, 33 Sup. Ct. 605, 57 L. Ed. 982; *Municipal Securities Corporation v. Kansas City*, 246 U. S. 63, 69, 38 Sup. Ct. 224, 62 L. Ed. 579; *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, 304, 37 Sup. Ct. 643, 61 L. Ed. 1153; *Bilby et al. v. Stewart*, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701.

(248 U. S. 584)

No. 531. J. H. REEVES, Trustee, etc., petitioner, v. YORK ENGINEERING & SUPPLY COMPANY. Jan. 13, 1919. For opinion below, see 249 Fed. 513, 161 C. C. A. 439. Mr. Cecil H. Smith, of Sherman, Tex., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(248 U. S. 584)

No. 650. David F. MITCHELL, petitioner, v. Harry MASON et al. Jan. 13, 1919. For opinion below, see 79 South. 163. Petition for a writ of certiorari to the Supreme Court of the State of Florida denied.

(248 U. S. 584)

No. 754. Joseph A. MURRAY, petitioner, v. H. E. RAY, as trustee, etc. Jan. 13, 1919. For opinion below, see 251 Fed. 866. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(248 U. S. 585)

No. 770. Elbridge HANECY, petitioner, v. James W. TAYLOR, trustee, etc. Jan. 13, 1919. For opinion below, see 253 Fed. 552. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(248 U. S. 585)

No. 783. Olof N. TEVANDER et al., petitioners, v. Eleanor M. RUYSDAEL. Jan. 13, 1919. For opinion below, see 253 Fed. 918. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(248 U. S. 585)

No. 785. Sarah BRESSLER, petitioner, v. Mary C. LUDWIG and Henry W. Ludwig. Jan. 13, 1919. For opinion below, see *Ludwig v. Bressler*, 253 Fed. 8. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(248 U. S. 585)

No. 786. WESTERN UNION TELEGRAPH COMPANY, petitioner, v. Mary E. PRESTON. Jan. 13, 1919. For opinion below, see 254 Fed. 229, which affirmed *Preston v. Western Union Telegraph Co.*, 250 Fed. 480. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(248 U. S. 595)

No. 790. The KANSAS CITY RAILWAYS COMPANY, appellant, v. Frank W. McALLISTER, Attorney General of Missouri, et al. Jan. 13, 1919. Appeal from the District Court of the United States for the Western District of Missouri. Dismissed with costs, on motion of counsel for the appellant.

(248 U. S. 596)

No. 791. KANSAS CITY RAILWAYS COMPANY, appellant, v. Frank W. McALLISTER, Attorney General of Missouri, et al. Jan. 13, 1919. Appeal from the District Court of the United States for the District of Kansas. Dismissed with costs, on motion of counsel for the appellant.

(248 U. S. 585)

No. 792. Albert J. GALEN, petitioner, v. The UNITED STATES of America. Jan. 13, 1919. For opinion below, see 250 Fed. 947. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(248 U. S. 596)

No. 157. Maggie L. LUKENS, plaintiff in error, v. INTERNATIONAL LIFE INSURANCE COMPANY. Jan. 16, 1919. In error to the Supreme Court of the State of Missouri. For opinion below, see 269 Mo. 574, 191 S. W. 418. Mr. William C. Scarritt, of Kansas City, Mo., for plaintiff in error. Mr. Fred A. Boxley, of Kansas City, Mo., for defendant in error. Dismissed, per stipulation.

(248 U. S. 548)

No. —, Original. Ex parte In the matter of George E. HAMILTON, petitioner. Jan. 20, 1919. Motion for leave to file petition for a writ of habeas corpus denied.

(248 U. S. 548)

No. 120. Elvie WHEELER, by his next friend, P. T. Wheeler, plaintiff in error, v. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY. Jan. 20, 1919. In error to the Court of Appeals of the State of Kentucky. For opinion below, see 171 Ky. 436, 188 S. W. 462. Mr. Buford C. Tynes, of Hazard, Ky., for plaintiff in error. Mr. John Calvin, of Cincinnati, Ohio, for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(248 U. S. 548)

No. 139. ADAMS EXPRESS COMPANY, plaintiff in error, v. W. N. REYNOLDS. Jan. 20, 1919. In error to the Supreme Court of the State of North Carolina. For opinion below, see Reynolds v. Adams Express Co., 172 N. C. 487, 90 S. E. 510. Messrs. Robert W. Winston, of Raleigh, N. C., and Thomas DeWitt Cuyler, of Philadelphia, Pa., for plaintiff in error. Messrs. Clement Manly and B. S. Womble, both of Winston-Salem, N. C., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(248 U. S. 586)

No. 410. GIN DOCK SUE, petitioner, v. The UNITED STATES of America. Jan. 20, 1919. For opinion below, see 245 Fed. 308, 157 C. C. A. 500. Mr. Marshall B. Woodworth, of San Francisco, Cal., for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 628. James A. KEOWN, petitioner, v. Mary E. KEOWN et al. Jan. 20, 1919. See, also, 230 Mass. 313, 119 N. E. 785. Mr. James A. Keown, in pro. per. Motion for leave to prosecute in forma pauperis denied.

No. 748. The SEABOARD AIR LINE RAILWAY, appellant, v. The UNITED STATES. Jan. 20, 1919. Motion to strike out part of the findings or to remand for new findings denied without prejudice.

(248 U. S. 586)

No. 780. Michael PEYSER, petitioner, v. Elizabeth J. GRAUTEN. Jan. 20, 1919. For opinion below, see 254 Fed. 688. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(248 U. S. 551)

No. —, Original. Ex parte In the matter of Albert Paul FRICKE, petitioner. Jan. 27, 1919. Motion for leave to file petition for a writ of mandamus herein denied.

(248 U. S. 551)

No. —, Original. Ex parte In the matter of Robert D. KINNEY, petitioner. Jan. 27, 1919. Motion for leave to file petition for a writ of mandamus herein denied.

(248 U. S. 549)

No. 153. Elmira VAN BUSKIRK, administratrix of the estate of William Van Buskirk, deceased, plaintiff in error, v. ERIE RAILROAD COMPANY. Jan. 27, 1919. In error to the United States Circuit Court of Appeals for the Third Circuit. For opinion below, see Erie R. Co. v. Van Buskirk, 228 Fed. 489, 143 C. C. A. 71. Mr. Frank F. Davis, of New York City, for plaintiff in error. Mr. George S. Hobart, of Jersey City, N. J., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 241 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. § 1218]); Haseltine v. Central Bank of Springfield, 183 U. S. 130, 22 Sup. Ct. 49, 46 L. Ed. 117; Schlosser v. Hemphill, 198 U. S. 173, 175, 25 Sup. Ct. 654, 49 L. Ed. 1000; Louisiana Navigation Co. v. Oyster Commission of Louisiana, 32 Sup. Ct. 47, 56 L. Ed. 156, 226 U. S. 99, 101, 33 Sup. Ct. 78, 57 L. Ed. 138.

(248 U. S. 549)

No. 160. LARGE OIL COMPANY, plaintiff in error, v. E. B. HOWARD, State Auditor of the State of Oklahoma. Jan. 27, 1919. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 163 Pac. 537. Messrs. John H. Burford, of Oklahoma City, Okl., and John H. Brennan, of Bartlesville, Okl., for plaintiff in error. Mr. S. P. Freeling, of Oklahoma City, Okl., for defendant in error.

PER CURIAM. Judgment reversed with costs, and cause remanded for further proceedings upon the authority of Choctaw O. & Gulf R. R. Co. v. Harrison, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234; Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, 36 Sup. Ct. 453, 60 L. Ed. 779. And see Howard, Auditor of the State of Oklahoma v. Indian Territory Illuminating Oil Co., 247 U. S. 503, 38 Sup. Ct. 426, 62 L. Ed. 1239.

(248 U. S. 550)

No. 182. J. D. BOXLEY, plaintiff in error, v. E. M. SCOTT and Franklin Chaney. Jan. 27, 1919. In error to the Supreme Court of the State of Oklahoma. For opinion below, see 162 Pac. 688. Mr. Harry H. Rogers, of Tulsa, Okl., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(248 U. S. 550)

No. 183. The BALTIMORE & OHIO RAILROAD COMPANY and Chesapeake & Ohio Railway Company, plaintiffs in error, v. Louis BLOCK. Jan. 27, 1919. In error to the Supreme Court of Appeals of the State of Virginia. Mr. Rudolph Bumgardner, of Staunton, Va., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(248 U. S. 550)

No. 306. NEW ORLEANS LAND COMPANY and Lakeview Land Company, plaintiffs in error, v. The LEADER REALTY COMPANY. Jan. 27, 1919. In error to the Supreme Court of the State of Louisiana. For opinion below, see Leader Realty Co. v. Lakeview Land Co., 142 La. 169, 76 South. 599. Messrs. Charles Louque and W. O. Hart, both of New Orleans, La., for plaintiffs in error. Mr. William Winans Wall, of New Orleans, La., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(248 U. S. 550)

No. 684. John E. HARTENBOWER et al., plaintiffs in error, v. PEOPLE OF STATE OF ILLINOIS. Jan. 27, 1919. In error to the Supreme Court of the State of Illinois. For opinion below, see Hartenbower v. People, 283 Ill. 591, 119 N. E. 605.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(248 U. S. 586)

No. 787. METROPOLITAN TRUST COMPANY OF CITY OF NEW YORK, Trustee, etc., petitioner, v. CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY et al. Jan. 27, 1919. For opinion below, see 253 Fed.

868. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(248 U. S. 586)

No. 794. Albert LE MORE and Edward E. Carriere, petitioners, v. The UNITED STATES of America. Jan. 27, 1919. For opinion below, see 253 Fed. 887. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(248 U. S. 587)

No. 800. GRAND LODGE, BROTHERHOOD OF RAILROAD TRAINMEN, petitioner, v. Sallie Ann GROVES. Jan. 27, 1919. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(248 U. S. 596)

No. 190. NORFOLK SOUTHERN RAILROAD COMPANY, plaintiff in error, v. W. H. GALLUP et al., etc. Jan. 30, 1919. In error to the Supreme Court of the State of North Carolina. For opinion below, see Gallop v. Norfolk-Southern R. Co., 173 N. C. 21, 91 S. E. 375. Mr. W. B. Rodman, of Norfolk, Va., for plaintiff in error. Dismissed with costs on motion of the plaintiff in error.

(248 U. S. 596)

No. 193. SAVANNAH & NORTHWESTERN RAILWAY et al., plaintiffs in error, v. Maggie ROACH, administratrix, etc. Jan. 30, 1919. In error to the Court of Appeals of the State of Georgia. For opinion below, see 19 Ga. App. 388, 91 S. E. 506. Mr. Robert M. Hitch, of Savannah, Ga., for plaintiffs in error. Dismissed with costs on motion of the plaintiffs in error.

(248 U. S. 597)

No. 527. CAROLINA SPRUCE COMPANY, plaintiff in error, v. BLACK MOUNTAIN RAILWAY COMPANY. Feb. 3, 1919. In error to the Supreme Court of the State of Tennessee. For opinion below, see 139 Tenn. 137, 201 S. W. 154. Mr. Robert Burrow, of Bristol, Tenn., for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(249 U. S. 110)

LANE, Secretary of the Interior, et al. v.
PUEBLO OF SANTA ROSA.

(Argued Jan. 29, 1919. Decided March 3, 1919.)

No. 197.

1. INDIANS ⇨2—JURISTIC PERSON—INDIAN PUEBLO.

The pueblo of Santa Rosa, within the region acquired from Mexico under the Gadsden Treaty, and by Act Aug. 4, 1854, made part, and subject to "all the laws," of the territory of New Mexico, one of which (Laws N. M. 1851-52, pp. 176, 418), provided that the inhabitants of any Indian pueblo having a grant or concession of land from Spain or Mexico should be a body corporate, and as such capable of suing in respect of such land, thereby became, if it was not before, a legal entity and juristic person, which status was not lost by its inclusion in the territory of Arizona, Act Feb. 24, 1863, extending thereto the laws of New Mexico, nor by Arizona becoming a state.

2. INDIANS ⇨27(1)—WARDS OF GOVERNMENT —DISPOSITION OF LANDS—INJUNCTION.

The fact, if such, that the Indians of the pueblo of Santa Rosa are wards of the United States, does not prevent the pueblo maintaining suit to enjoin disposition of its lands as public lands of the United States; an act not of guardianship, but of confiscation.

3. APPEAL AND ERROR ⇨1177(4) — DISPOSITION OF CASE ON REVERSAL.

The Court of Appeals, on reversing decree dismissing bill for injunction, on motion in nature of demurrer to bill, should not direct final decree awarding permanent injunction; defendants being entitled to answer on the merits.

Appeal from the Court of Appeals of the District of Columbia.

Suit by the Pueblo of Santa Rosa against Franklin Knight Lane, Secretary of the Interior, and another. Decree dismissing bill was reversed by the Court of Appeals of the District of Columbia, and defendants appeal. Reversed.

For opinion below, see 46 App. D. C. 411.

Mr. Solicitor Gen. King and Messrs. Charles D. Mahaffie, of Portland, Or., and C. Edward Wright, of Washington, D. C., for appellants.

Messrs. Ralph S. Rounds, of New York City, Alton M. Cates, of Los Angeles, Cal., and Henry P. Blair, of Washington, D. C., for appellee.

* Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from offering, listing, or disposing of certain lands in southern Arizona as public lands of the United States. The lands include the site of the pueblo of Santa Rosa and the surrounding territory,

comprise some 460,000 acres, and are within the region acquired from Mexico under what is known as the Gadsden Treaty of December 30, 1853. 10 Stat. 1031. The suit is brought by the pueblo of Santa Rosa, and its right to the relief sought is based on two allegations, which are elaborated in the bill: One that under the laws of Spain and Mexico it had, when that region was acquired by the United States, and under the provisions of the treaty it now has, a complete and perfect title to the lands in question; and the other, that in disregard of its title the defendants are threatening and proceeding to offer, list and dispose of these lands as public lands of the United States. In the court of first instance the bill was challenged by a motion to dismiss in the nature of a demurrer, and the motion was sustained. In the Court of Appeals the case made by the allegations in the bill was held to be one entitling the plaintiff to the relief sought, and the decree of dismissal was reversed with a direction that a permanent injunction be awarded. Pueblo of Santa Rosa v. Lane, 46 App. D. C. 411. The latter decision is challenged here on two grounds: One, that the plaintiff is not a legal entity and has no capacity to maintain the suit; and the other, that in any event, the defendant should not be subjected to a permanent injunction without according them an opportunity to answer the bill.

[1] The plaintiff is an Indian town whose inhabitants are a simple and uninformed people, measurably civilized and industrious, living in substantial houses and engaged in agricultural and pastoral pursuits. Its existence, practically as it is to-day, can be traced back through the period of Mexican rule into that of the Spanish kings. It was known then, as now, as the pueblo of Santa Rosa, and its inhabitants were known then, as now, as Pueblo Indians. During the Spanish, as also the Mexican, dominion it enjoyed a large measure of local self-government and was recognized as having capacity to acquire and hold lands and other property. With much reason this might be regarded as enabling and entitling it to become a suitor for the purpose of enforcing or defending its property interests. See *School District v. Wood*, 13 Mass. 193, 198; *Cooley's Const. Lim.* (7th Ed.) p. 276; 1 *Dillon, Munic. Corp.* (5th Ed.) §§ 50, 64, 65. But our decision need not be put on that ground for there is another which arises out of our own laws and is in itself sufficient. After the Gadsden Treaty Congress made that region part of the territory of New Mexico and subjected it to "all the laws" of that territory. Act Aug. 4, 1854, c. 245, 10 Stat. 575. One of those laws provided that the inhabitants of any Indian pueblo having a grant or concession of lands from Spain or Mexico, such as is here claimed, should be a

body corporate and as such capable of suing or defending in respect of such lands. Laws New Mex. 1851-52, pp. 176, 418. If the plaintiff was not a legal entity and juristic person before, it became such under that law; and it retained that status after Congress included it in the territory of Arizona, for the act by which this was done extended to that territory all legislative enactments of the territory of New Mexico. Act Feb. 24, 1863, c. 56, 12 Stat. 664. The fact that Arizona has since become a state does not affect the plaintiff's corporate status or its power to sue. See *Kansas Pacific R. R. Co. v. Atchison, Topeka & Santa Fé R. R. Co.*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794.

The case of *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25, on which the defendants place some reliance, is not in point. *The question there was not whether the Cherokee Tribe had the requisite capacity to sue in a court of general jurisdiction, but whether it was a "foreign state" in the sense of the judiciary article of the Constitution, and therefore entitled to maintain an original suit in this court against the state of Georgia. The court held that the tribe, although uniformly treated as a distinct political society capable of engaging in treaty stipulations, was not a "foreign state" in the sense intended, and so could not maintain such a suit. This is all that was decided.

[2] The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States—recognized as such by the legislative and executive departments—and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true,¹ we think it has no real bearing on the point we are considering. Certainly it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership. Of their capacity to maintain such a suit we entertain no doubt. The

existing wardship is not an obstacle, as is shown by repeated decisions of this court, *of which *Lone Wolf v. Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299, is an illustration.

In view of the very broad allegations of the bill, the accuracy of which has not been challenged as yet, we have assumed in what has been said that the plaintiff's claim was valid in its entirety under the Spanish and Mexican laws, and that it encounters no obstacle in the concluding provision of the sixth article of the Gadsden Treaty, but no decision on either point is intended. Both involve questions not covered by the briefs or the discussion at the bar and are left open to investigation and decision in the further progress of the cause.

[3] Of course, the Court of Appeals ought not to have directed the entry of a final decree awarding a permanent injunction against the defendants. They were entitled to an opportunity to answer to the merits just as if their motion to dismiss had been overruled in the court of first instance. By the direction given they were denied such an opportunity, and this was a plain and prejudicial error.

Our conclusion is that the decrees of both courts below should be reversed and the cause remanded to the court of first instance, with directions to overrule the motion to dismiss, to afford the defendants an opportunity to answer the bill, to grant an order restraining them from in any wise offering, listing or disposing of any of the lands in question pending the final decree, and to take such further proceedings as may be appropriate and not inconsistent with this opinion.

Decree reversed.

(249 U. S. 174)

CITY OF RICHMOND v. BIRD et al.

In re AINSLIE CARRIAGE CO.

(Argued Jan. 28 and 29, 1919. Decided March 3, 1919.)

No. 195.

BANKRUPTCY — 346 — CLAIMS — PRIORITIES — LIENS — TAXES — "DIVIDEND."

A city's unsecured claim for taxes, given no superior right by local laws, is not placed ahead of a valid lien, protected by Bankruptcy Act, § 67d, by section 64a (Comp. St. § 9618), directing that taxes be paid in advance of dividends to creditors; "dividend," as commonly used throughout the act, meaning partial payment to general creditor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dividend.]

Mr. Justice Day and Mr. Justice Clarke dissenting.

¹ See *Chouteau v. Molony*, 16 How. 203, 237, 14 L. Ed. 905; *United States v. Ritchie*, 17 How. 525, 540, 15 L. Ed. 236; *United States v. Pico*, 5 Wall. 536, 540, 18 L. Ed. 695; *United States v. Sandoval*, 231 U. S. 28, 34 Sup. Ct. 1, 58 L. Ed. 107; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307, 23 Sup. Ct. 115, 47 L. Ed. 183; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 568, 23 Sup. Ct. 216, 47 L. Ed. 299; *Tiger v. Western Investment Co.*, 221 U. S. 286, 310, et seq., 31 Sup. Ct. 578, 55 L. Ed. 738.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

In the matter of the Ainslie Carriage Company, bankrupt. Judgment of the District Court, giving the city of Richmond a preference for the payment of taxes over the claims of Elizabeth W. Bird and others for a landlord's lien, was reversed by the Circuit Court of Appeals (240 Fed. 545, 153 C. C. A. 349), and the City brings certiorari. Affirmed.

See, also, 247 Fed. 1002, 159 C. C. A. 661.

Mr. George Wayne Anderson, of Richmond, Va., for petitioner.

Mr. James E. Cannon, of Richmond, Va., for respondents.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

November 4, 1909, the chancery court at Richmond upon petition filed the preceding day appointed a receiver for the Ainslie Carriage Company; February 3, 1910, the company was adjudged bankrupt in involuntary proceedings instituted November 6, 1909. At time of receiver's appointment taxes assessed upon the bankrupt's personal property for the years 1907, 1908 and 1909 were due the *city of Richmond for which it had not distrained, although having authority so to do. Respondents, landlords of the bankrupt, under express statutory authority, levied a distress warrant November 1, 1909, upon its goods and chattels on account of rent due for the period since April 1, 1908. The question is whether their claim is entitled to priority of payment over the taxes. The Circuit Court of Appeals answered in the affirmative. *Bird v. City of Richmond*, 240 Fed. 545, 153 C. C. A. 349.

The city, while not disputing that levy of the distress warrant gave respondents a valid lien, claims priority under section 64a, Bankruptcy Act—"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court." Act July 1, 1898, c. 541, 30 Stat. 563 (Comp. St. § 9648).

Respondents maintain: (1) That their lien, perfected through distraint, was fully protected by section 67d (as it read prior to 1910), Bankruptcy Act—"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof

was necessary in order to impart notice, shall not be affected by this act." 30 Stat. 564. And (2) that under Virginia law such a lien is superior to the inchoate one which the city had for unpaid taxes but neglected to perfect by exercising the summary power granted by its charter to distraint therefor after September 1st in year for which levied.

It is not denied that respondents obtained a present valid lien upon the bankrupt's goods and chattels distrained November 1, 1909; nor is it now claimed this was annulled by adjudication of bankruptcy. That the *city of Richmond had no lien for past-due taxes upon these goods and chattels when the chancery court receiver took possession, we think must be regarded as settled by *Jackson Coal Co. v. Phillips Line*, 114 Va. 40, 49, 50, 75 S. E. 681, 684 (1912), and this notwithstanding differences between its charter, and that of Petersburg. The Supreme Court of Virginia there said:

"With respect to that part of the decree appealed from, which directed the payment of taxes due from the Phillips Line, and its predecessor in title, to the state of Virginia and the city of Petersburg, out of the fund under the control of the court, and giving the taxes priority of payment over the creditors of the receivers, the court erred, except as to the taxes for the year 1910. The property upon which these taxes were assessed was wholly personal, and no effort appears to have been made, certainly as to the years prior to 1910, either by the auditor of the state or by the city of Petersburg, to collect the taxes until the property was placed in the hands of the receivers in this cause and an account of debts against the Phillips Line ordered. The state had a right, under sections 604-623 of the Code, for one year from the date on which the taxes in her favor were assessed, to levy upon the property assessed with the taxes, which right was not exercised; and it appears that the city of Petersburg had a right of distress against the property assessed with taxes in its favor, which the city might have exercised before the taxes were returned delinquent, or the property upon which they were assessed had passed into the hands of subsequent purchasers, and thereby secured a lien therefor, but these rights were never exercised. Under these circumstances, neither the state nor the city had a lien upon the property of the Phillips Line when it went into the hands of the receivers for the taxes due them, respectively, and, therefore, the position of the state and city was no better than that of the general *creditors of the company, and they were not entitled to share in the proceeds of sale of the company's property, except as to the amount of taxes due them [the state and the city], respectively, for the year 1910, assessed against and due from the receivers."

Respondents therefore must prevail unless priority over their lien is given by section 64a to claim for taxes which, under state law, occupied no better position than one held by a general creditor. Section 67d, Bankruptcy Act, quoted *supra*, declares that liens given or accepted in good faith and not in

contemplation of or in fraud upon this act, shall not be affected by it. Other provisions must, of course, be construed in view of this positive one. Section 64a directs that taxes be paid in advance of dividends to creditors; and "dividend" as commonly used throughout the act means partial payment to general creditors. In section 65b (Comp. St. § 9649), for example, the word occurs in contrast to payment of debts which have priority. And as the local laws gave no superior right to the city's unsecured claim for taxes we are unable to conclude that Congress intended by section 64a to place it ahead of valid lienholders.

New Jersey v. Anderson, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, is not decisive of any point here contested; it only adjudged that New Jersey's claim was for a tax within the meaning of section 64a and entitled to be treated accordingly. See State of New Jersey v. Lovell, 179 Fed. 321, 102 C. C. A. 505, 31 L. R. A. (N. S.) 988.

The judgment below must be Affirmed.

Mr. Justice DAY and Mr. Justice CLARKE dissent.

(249 U. S. 168)

NEW YORK CENT. R. CO. v. PORTER et al.

(Submitted Jan. 10, 1919. Decided March 3, 1919.)

No. 134.

1. COMMERCE § 8(6) — EXCLUSIVENESS OF FEDERAL EMPLOYERS' LIABILITY ACT — STATE WORKMEN'S COMPENSATION LAW.

The consequent rights and liabilities arose under the federal Employers' Liability Act (Comp. St. §§ 8657-8665), to the exclusion of the state Workmen's Compensation Act, if deceased, when killed, was employed in interstate commerce.

2. COMMERCE § 27(5)—EMPLOYERS' LIABILITY — EMPLOYMENT IN "INTERSTATE COMMERCE."

Railroad servant, killed by passing train while shoveling snow on railroad company's premises, between platform and tracks used for interstate and intrastate cars and commerce, was then employed in "interstate commerce."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Mr. Justice Clarke, dissenting.

In Error to the Supreme Court, Appellate Division, Third Judicial Department of the state of New York.

Proceeding by Anna C. Porter, for herself and her minor children, for compensation under the New York Workmen's Compensation Act, opposed by the New York Central Rail-

road Company, successor of the New York Central & Hudson River Railroad Company. Award was affirmed by Appellate Division, and leave to appeal to the Court of Appeals denied (172 App. Div. 918, 156 N. Y. Supp. 1141), and the company brings error. Reversed and remanded.

Mr. Robert E. Whalen, of Albany, N. Y., for plaintiff in error.

Messrs. Merton E. Lewis, of Rochester, N. Y., and E. Clarence Aiken, of Albany, N. Y., for defendants in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Lewis M. Porter, a section man, was struck and instantly killed by plaintiff in error's engine attached to a passenger train and moving along the main track. The Appellate Division affirmed an award in behalf of his *widow and children under the New York Workmen's Compensation Law (Consol. Laws, c. 67). Porter v. New York Cent. & H. R. R. Co., 172 App. Div. 918, 156 N. Y. Supp. 1141. *130

[1] If the deceased was employed in interstate commerce when the accident occurred, consequent rights and liabilities arose under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657-8665]), and the state statute did not apply. New York Central R. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; Erie R. R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662.

[2] The evidence showed and the State Workmen's Compensation Commission found:

"Lewis M. Porter resided at Camden, N. Y., and upon the date of the accident, December 17, 1914, was in the employ of the New York Central Railroad Company as a laborer. On said date, while engaged in shoveling snow upon the premises of the New York Central Railroad Company between the west-bound track and a platform near the intersection of said tracks and Mexico street in the village of Camden, he was struck by the engine of a passenger train known as train No. 49, which was proceeding northerly on the west-bound track, receiving injuries from which he died immediately. The tracks of the New York Central Railroad Company at the point where the deceased was working, were used for the purpose of transporting both interstate and intrastate cars and both interstate and intrastate commerce."

Considered in connection with our opinions in Pederson v. Del., Lack. & West. R. R., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, Southern Railway Co. v. Puckett, 244 U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69, and cases there cited, we think the circumstances here presented make it quite clear that when killed Porter was employed in interstate

commerce. Accordingly, the judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice CLARKE dissents.

(249 U. S. 186)

CHICAGO & E. I. R. CO. v. COLLINS
PRODUCE CO.

(Submitted Jan. 16, 1919. Decided March 3, 1919.)

No. 138.

1. CARRIERS ⇐228(1)—INTERSTATE SHIPMENT
—BURDEN OF PROOF—LOSS ON CONNECTING
LINE.

Under the Carmack Amendment to the Interstate Commerce Act (Comp. St. §§ 8604a, 8604aa), in an action against initial carrier for loss of poultry occurring on connecting line, the burden of proof is not on the shipper to show that loss was "caused by" the connecting line, and not the military authorities in a flood district under martial law, which confiscated the poultry for benefit of sufferers.

2. APPEAL AND ERROR ⇐882(8)—RECEPTION
OF EVIDENCE—ESTOPPEL TO OBJECT—DEPO-
SITIONS.

Where carrier, sued for loss of shipment, introduced in evidence deposition taken by plaintiff, it cannot be heard to say that deposition contained statements of its agents, which were inadmissible because of lack of evidence showing relation of agents to carrier.

3. APPEAL AND ERROR ⇐1094(2)—REVIEW—
VERDICT.

Supreme Court will accept as conclusive a verdict approved by two courts.

4. CARRIERS ⇐219(5)—INTERSTATE SHIPMENT
—SEIZURE BY MILITARY AUTHORITIES—LIA-
BILITY.

Seizure of shipment of poultry on connecting line, by military authorities in flood district under martial law, to relieve sufferers, if solely by reason of invitation of connecting line, when it could have delivered shipment by exercise of ordinary care, renders the initial carrier liable.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

Action by the Collins Produce Company against the Chicago & Eastern Illinois Railroad Company. To review a judgment of the Circuit Court of Appeals (235 Fed. 857, 149 C. C. A. 169) affirming a judgment for plaintiff, defendant brings error. Affirmed.

Messrs. Homer T. Dick, of Chicago, Ill., and Lindorf O. Whitnel, of East St. Louis, Ill., for plaintiff in error.

Messrs. Charles Wham and Fred L. Wham, both of Centralia, Ill., for defendant in error.

*Mr Justice CLARKE delivered the opinion of the Court.

On March 21, 1913, the plaintiff in error, the initial carrier, accepted a carload of live poultry from the defendant in error, the shipper, for transportation from Cypress, Illinois, to Newark, New Jersey, and issued the customary bill of lading, containing the provision that the carrier should not be liable for any loss or damage to the property "caused by the act of God * * * or the authority of law."

In the progress of transportation the car arrived at Dayton, Ohio, on the morning of March 25th, and was there delayed by a flood caused by rains so unprecedented that on that date martial law was declared applicable to Dayton and the territory in which the car was held. The flood waters overflowed the rails on which the car stood, but did not reach the body of the car so as to affect the health of the poultry and access to and from it was readily maintained by the caretaker.

On March 31st the state military authorities took possession of the car and distributed its contents to persons rendered destitute by the flood.

Suit against the carrier, based on the bill of lading, commenced in a state court, was removed to the appropriate District Court of the United States.

On the trial of the case the shipper introduced evidence tending to prove that the confiscation was due to the solicitation of representatives of the carrier and to their false representation that the fowls were dying from lack of food and attention and had been or were about to be abandoned by the caretaker, but the railroad company denied this and introduced evidence tending to prove that there was no such solicitation or false representation and that the confiscation was rendered necessary by the exigencies of the situation and by the necessity for supplying food to the people rendered homeless by the flood.

The trial court charged the jury:

That it was the duty of the carrier to transport the property to destination, if it could do so; that it could not overcome the flood or the action of the military authorities and that if the latter acted of their own volition the shipper could not recover; but that if the military authorities seized the consignment solely upon and by reason of the invitation of the railroad company, and if, but for this confiscation, the property or any part of it, in the exercise of ordinary care, could have been transported to its destination, then the defendant, the carrier, would be liable for the value of such part of it as the jury might find from the evidence could have reached its destination, to be determined by the invoice price at the point of shipment, less any deterioration caused by the delay solely incident to the flood.

The verdict was for the shipper and we are asked to review the judgment of the Circuit Court of Appeals affirming the judgment of the District Court entered upon that verdict. 235 Fed. 857, 149 C. C. A. 169.

The carrier argues that three errors each requiring reversal of the judgment appear in the record.

[1] The first claim is that the court refused to rule, that by its terms, the Carmack Amendment (Act June 29, 1906, chap. 3591, sec. 7, pars. 11, 12, 34 Stat. 595 [Comp. St. §§ 8604a, 8604aa]) casts upon the shipper the burden of proving affirmatively that the loss which occurred on a connecting line was "caused by" the connecting carrier. But, assuming that the question is presented by the record, which is doubtful, *Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace*, 223 U. S. 481, 491, 32 Sup. Ct. 205, 56 L. Ed. 516, rules that, under the act as construed in *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, 205, 206, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, in such a case as we have here the liability of the initial carrier is as if the shipment had been between stations in different states, but both upon its own line, and this renders the contention untenable. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, does not conflict with this conclusion, *Cincinnati, New Orleans & Texas Pacific Railway Co. v. Rankin*, 241 U. S. 319, 326, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265.

[2] The second claim is that error was committed in the admission of testimony of military officers that the confiscation of the property resulted from communications received by them by postal card and telephone from the agents and officials of the railway company respecting the condition of the poultry and that the caretaker had abandoned it, without evidence being required to identify the senders of such messages as officers or agents of the company. But this evidence, while taken in the form of depositions by the shipper, was introduced by the carrier. One who asks a court and jury to believe evidence which he introduces will not be heard to claim that, for technical reasons, it was not admissible.

[3,4] There remains only the contention that substantial error was committed by the Circuit Court of Appeals in approving as sound law the charge to the jury that if the military authorities seized the consignment of poultry solely upon and by reason of the invitation of the railroad company, and that if but for this confiscation the property, or any part of it, in the exercise of ordinary care, could have been transported to its destination, then the carrier would be liable, etc.

The shipment was not lost by the "act of God," and the defense of the carrier on the facts was narrowed to the claim that it was prevented from performing its contract "by the authority of law"—by the appropriation by the military authorities.

The verdict approved by two courts will be accepted by this court as a conclusive finding in favor of the shipper upon the questions of fact involved.

The duties and liabilities of a common carrier have been so fully discussed by this court, notably in *Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, and in *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872, that they need not be restated here.

The common-law principle making the common carrier an insurer is justified by the purpose to prevent negligence or collusion between dishonest carriers or their servants and thieves or others, to the prejudice of the shipper, who is, of necessity, so remote from his property, when in transit, that proof of such collusion or negligence when existing, would be difficult if not impossible. *Coggs v. Bernard*, 2 Lord Raymond, 909; *Riley v. Horne*, 5 Bing. 217. The obligation to transport and to deliver is so exceptional and absolute in character that the relation of the carrier to the shipper was characterized in *Railroad Co. v. Lockwood*, supra, as so partaking of a fiduciary character as to require the utmost fairness and good faith on its part in dealing with the shipper and in the discharge of its duties to him, and so lately as *American Express Co. v. Mullins*, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. Ed. 525, 15 Ann. Cas. 536, this court declared that if a carrier, by connivance or fraud, permitted a judgment to be rendered against it for property in its charge, such judgment could not be invoked as a bar to a suit by a shipper.

These decisions, a few from many, illustrate the character of the relation of trust and confidence which must be sustained between a common carrier and a shipper. It rests at bottom upon a commercial necessity and public policy which would be largely defeated if the carrier were permitted by false representations, or by representations, which, though not intentionally false, were not known to be true, to procure the appropriation by military or other authority of property in its custody, as the jury found was done in this case, and thereby defeat its obligation to carry and deliver.

These principles of law governing the relations between the carrier and the shipper, amply justified the charge of the trial court to the jury and the judgment of the Circuit Court of Appeals must be

Affirmed.

(249 U. S. 132)

SUGARMAN v. UNITED STATES.

(Argued and Submitted Jan. 9, 1919. Decided March 3, 1919.)

No. 345.

1. COURTS $\hookrightarrow$ 385(5)—SUPREME COURT—DIRECT REVIEW OF DISTRICT COURT.

While, if any of the rulings excepted to and assigned as error involves a constitutional question, substantial, or so when writ was sued out, the Supreme Court, on direct error to the District Court, invoked on the ground that the construction or application of the federal Constitution was drawn in question, may review all questions raised, and must determine them, so far as necessary to afford relief, even if it be concluded that the constitutional question was correctly decided below, yet mere reference to a provision of the Constitution, or mere assertion of a claim under it, does not authorize any review of a conviction, and jurisdiction must be declined, unless the writ presents such substantial question properly raised below.

2. CRIMINAL LAW $\hookrightarrow$ 829(3) — TRIAL—REQUESTED INSTRUCTIONS—GIVING SUBSTANCE—ABRIDGING FREEDOM OF SPEECH.

The substance of requested instructions as to the provision of the Constitution against abridging freedom of speech held clearly embodied in the charge given.

3. CRIMINAL LAW $\hookrightarrow$ 834(2) — TRIAL—REQUESTED INSTRUCTIONS — GIVING SUBSTANCE.

The exact language of requested instructions need not be adopted, but it is enough that they are or have already been given in substance.

In Error to the District Court of the United States for the District of Minnesota.

Abraham L. Sugarman was convicted of violation of the Espionage Act (245 Fed. 604), and brings error. Dismissed.

* Messrs. Seymour Stedman, of Chicago, Ill., and T. E. Latimer, of Minneapolis, Minn., for plaintiff in error.

Mr. John Lord O'Brian, of Buffalo, N. Y., for the United States.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Espionage Act (Act June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 217, 219 [Comp. St. 1918, § 10212c]) provides that:

"Whoever, when the United States is at war, * * * shall wilfully cause or attempt to cause * * * insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States * * * shall be punished."

Sugarman was charged with having violated this section on July 24, 1917, by words spoken in an address made at a Socialist meeting which was attended by many registrants under the Selective Service Act (Act

May 18, 1917, c. 15, 40 Stat. 76 [Comp. St. 1918, §§ 2019a, 2019b, 2044a-2044k]), sustained in Selective Draft Law Cases, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856. He was tried in the District Court of the United States for the District of Minnesota, found guilty by the jury, and sentenced. See 245 Fed. 604. Thirty-one exceptions were taken to rulings of the trial judge. Instead of seeking review by the Circuit Court of Appeals under section 128 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. § 1120]), the case is brought here under section 238 (Comp. St. § 1215).

[1] Review by this court on direct writ of error is invoked on the ground that the construction or application of the federal Constitution was drawn in question. Thirty of the rulings excepted to below are assigned as errors here. If any one of them involves a constitutional question which is substantial, or was such when the defendant sued out his writ of error, we have jurisdiction to review all the questions raised and it is our duty to determine *them, so far as necessary to afford redress, even if we should conclude that the constitutional question was correctly decided below. Williamson v. United States, 207 U. S. 425, 432, 434, 28 Sup. Ct. 163, 52 L. Ed. 278; Goldman v. United States, 245 U. S. 474, 476, 38 Sup. Ct. 166, 62 L. Ed. 410. But mere reference to a provision of the federal Constitution, or the mere assertion of a claim under it, does not authorize this court to review a criminal proceeding; and it is our duty to decline jurisdiction unless the writ of error presents a constitutional question substantial in character and properly raised below. Equitable Life Assurance Society v. Brown, 187 U. S. 308, 311, 23 Sup. Ct. 123, 47 L. Ed. 190; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; Hendricks v. United States, 223 U. S. 178, 184, 32 Sup. Ct. 313, 56 L. Ed. 394; Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, 34 Sup. Ct. 874, 58 L. Ed. 1245; Brolan v. United States, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; United Surety Co. v. American Fruit Co., 238 U. S. 140, 142, 35 Sup. Ct. 828, 59 L. Ed. 1238.

Of the 31 exceptions taken below only two refer in any way to the federal Constitution. These two are for refusal to give the following instructions:

(a) "The Constitution of the United States provides that Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances. This right has been deemed so essential and necessary to free institutions and a free people that it has been incorporated in substance in the Constitutions of all the states of the Union. These constitutional provisions referred to are

not abrogated, they are not less in force now because of war, and they are as vital during war as during times of peace, and as binding upon you now as though we were at peace."

(b) "This provision of our Constitution will not justify or warrant advocating a violation of law. A man may freely speak and write and petition, but he is responsible for the consequences of what he may say, write or publish; and if what he says and publishes has a natural tendency to produce a violation of law, that is to impel the persons *addressed to violate the law, and the person using the language intends that it should produce a violation of law, then the person using such language is subject to punishment and this is not inconsistent with the right and protection guaranteed by the Constitution of the United States and of this state."

While the trial judge refused to give these specific instructions, his charge to the jury included the following passage:

"Now, considerable has also been said in this case about freedom of speech. The Constitution of the United States provides that Congress shall make no law abridging the freedom of speech. This provision of the Constitution is of course in force in times of war as well as in times of peace. But 'freedom of speech' does not mean that a man may say whatever he pleases without the possibility of being called to account for it. A man has a right to honestly discuss a measure or a law, and to honestly criticize it. But no man may advise another to disobey the law, or to obstruct its execution, without making himself liable to be called to account therefor."

[2, 3] This passage in the charge clearly embodied the substance of the two requests made by the defendant. The judge was not obliged to adopt the exact language of the instructions requested; *Holt v. United States*, 218 U. S. 245, 253, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138; nor was he obliged to repeat the instructions already given in substance. Compare *Bennett v. United States*, 227 U. S. 333, 339, 33 Sup. Ct. 288, 57 L. Ed. 531. As no substantial constitutional question was presented by the defendant, this court is without jurisdiction to review the other errors assigned.

Dismissed for want of jurisdiction.

(249 U. S. 115)

In re WHITNEY S. S. CORPORATION.

(Argued Dec. 9, 1918. Decided March 3, 1919.)

No. 25, Original.

PROHIBITION — 15 — PARTIES ENTITLED TO RELIEF—ATTACHMENT OF VESSEL—REQUISITION BY SHIPPING BOARD.

Owner of vessel in hands of United States marshal by valid attachment in rem issuing out of the District Court, no bond or release being given, had no standing to procure writ of prohi-

bition against court to dismiss, for want of jurisdiction, libel filed in such court while boat was in hands of marshal and subsequent to requisition of Shipping Board, established by Act Sept. 7, 1916, and acting under authority of Act June 15, 1917 and President's executive order of July 11, 1917, though with consent of libelants and counsel for board, no appearance being entered for vessel, boat was used for war purposes with captain as special deputy marshal.

On Petition for a Writ of Prohibition.

Petition for writ of prohibition by the Whitney Steamship Corporation, to be directed to the District Court for Eastern District of New York. Petition dismissed.

See, also, 250 U. S. —, 39 Sup. Ct. 5, 63 L. Ed. —.

Mr. Alexander S. Bacon, of New York City, for petitioner.

Mr. Peter S. Carter, of New York City, for respondent.

*Mr. Justice PITNEY delivered the opinion of the Court.

Petitioner, a corporation of the state of New York, is the owner of the Steamship H. M. Whitney, her engines, etc., which vessel, on April 18, 1918, while in petitioner's possession, was attached by the United States marshal for the Eastern district of New York in an action in rem brought by the Patent Vulcanite Roofing Company in the District Court of the United States for that district. On April 27, 1918, while the vessel was in the possession of the deputy marshal under the process in that action, the United States Shipping Board established by act of September 7, 1916 (39 Stat. 728, c. 451), acting under authority of the act of June 15, 1917 (40 Stat. 182, c. 29), and the President's Executive Order of July 11, 1917,¹ instructed one Smith as its agent to

¹ EXECUTIVE ORDER.

By virtue of authority vested in me in the section entitled "Emergency Shipping Fund" of an act of Congress entitled "An act making appropriations to supply urgent deficiencies in appropriations for the military and naval establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the taking over of title or possession, by purchase

take possession of the steamer in behalf of the United States. This Smith did pro forma on April 29, but without dispossessing the marshal or his deputy. On May 16, Theodore A. Crane's Sons Company filed its libel in rem against the steamer in the same court, and under process in this suit the marshal, who already had her in custody, again attached the vessel. Afterwards, and on May 29, the Shipping Board, by its counsel, appeared before the court, stated that the use of the vessel was needed by the government for war purposes, that the marshal was still in custody by virtue of the writs of attachment in the two suits referred to, and that the board did not desire to raise an issue over the possession of the property as between two departments of the government, and moved the court to direct the marshal to release her. No appearance having been entered in behalf of the ship, the court heard proctors for the libelants and counsel for the Shipping Board, and on motion of the latter, with consent of the former, made an order entitled in the two causes directing that the marshal be permitted to appoint the master of the ship as a special deputy United States marshal, that this deputy remain in possession of the vessel in behalf of the marshal, that the vessel, in his custody, be turned over to the Shipping Board for purposes connected with the war, the special deputy marshal or his substitutes to remain always in possession, and that the vessel be returned to the custody of the marshal upon being released from requisition by the Shipping Board.

*Thereafter the present petitioner, claimant of the vessel, appeared specially by counsel and moved the District Court to quash the attachment in the Crane suit and dismiss the libel on the ground of want of jurisdiction. These motions, after argument, were overruled; and at a subsequent date motions for a rehearing and for a certificate of juris-

or requisition, of constructed vessels, or parts thereof, or charters therein; and the operation, management and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said Board, be exercised directly by the said Board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

Woodrow Wilson.

The White House, 11 July, 1917.

diction as the basis of a direct appeal to this court were denied upon the ground that the claimant had no standing to attack the validity of the attachment.

Thereafter this court granted leave for the filing of a petition for a writ of prohibition, and made an order upon the judges of the district court to show cause why such writ should not issue. Return was made by the judge who had acted in the proceedings above mentioned, and, the matter having been argued here by counsel for the petitioner and by counsel for the Crane Company, the question for decision is whether the prohibition ought to be issued, or the order to show cause discharged.

The validity of the attachment in the suit of the Vulcanite Company and the continued possession of the marshal or his deputy under that process are not in controversy. No bond was given or deposit made for release of the vessel pursuant to section 941, Rev. St. (Comp. St. § 1567), or the admiralty rules of this court or of the District Court. Hence the vessel remained, for all purposes of the action in the custody of the court. The requisition of the Shipping Board extended merely to the use of the ship for war purposes, and did not in fact take her out of the custody of the court. So far as any interest of the petitioner was concerned, there was nothing to prevent the vessel from being subjected to attachment under process in the Crane Company suit; and as she actually was subjected to that process by the action of the marshal, the jurisdiction of the court in that suit was complete, and the owner's only recourse was to enter appearance therein, with or without giving a bond or making a deposit.

*If the custody of the ship by the officer of the court was inconsistent with the purposes of the Executive, acting through the Shipping Board, this was not a matter of which petitioner could take advantage. The application of the board through its counsel for an order permitting the vessel to be put at the service of the government for war purposes while still remaining in the custody of the marshal for the purposes of the court's jurisdiction, consented to by the only other parties who had a standing in court, was a sufficient warrant for the order made.

Order to show cause discharged and petition dismissed.

(249 U. S. 100)

**L. A. WESTERMANN CO. v. DISPATCH
PRINTING CO.**(Submitted Nov. 15, 1918. Decided March 3,
1919.)

No. 50.

**1. COPYRIGHTS ☞87 — INFRINGEMENT —
PICTORIAL ILLUSTRATIONS—NUMBER OF IN-
FRINGEMENTS.**

Within Copyright Act (Comp. St. §§ 9517-9524, 9530-9584), providing in section 25 that one who infringes "copyright in any work" shall pay damages, or in lieu thereof, stated sums, in discretion of court, the publication of six copyrighted pictorial illustrations, one in each of six issues of a newspaper, as part of an advertisement, constitutes six cases of infringement.

**2. COPYRIGHTS ☞87 — INFRINGEMENT —
PICTORIAL ILLUSTRATIONS—NUMBER OF IN-
FRINGEMENTS.**

Within Copyright Act (Comp. St. §§ 9517-9524, 9530-9584), providing in section 25 that one who infringes "copyright in any work" shall pay damages, or in lieu thereof, stated sums, in discretion of court, the publication in a newspaper of the same copyrighted pictorial illustration in two different advertisements, printed at different times, constitutes two cases of infringement.

**3. COPYRIGHTS ☞87 — INFRINGEMENT —
AMOUNT OF RECOVERY — DISCRETION OF
COURT.**

Within Copyright Act (Comp. St. §§ 9517-9524, 9530-9584), providing in section 25 that one who infringes copyright in any work shall be liable in damages, or in lieu thereof, such damages as to court may seem just, but that such damages shall not exceed \$5,000 or be less than \$250, court properly awarded for each infringement of copyrighted pictorial illustrations \$250; the court's discretion being controlled by the maximum and minimum clause.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Suit by the L. A. Westermann Company against the Dispatch Printing Company. To review a judgment of the Circuit Court of Appeals (233 Fed. 609, 147 C. C. A. 417), modifying a decree for complainant, a writ of certiorari was allowed. Decree reversed.

*Mr. Curtis C. Williams, of Columbus, Ohio, for petitioner.

Messrs. Smith W. Bennett, of Columbus, Ohio, and Luther Day, of Cleveland, Ohio, for respondent.

*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This was a bill for an injunction against future infringement of certain copyrights and to recover damages for past infringement. The injunction was granted and in

this both parties acquiesced. In addition, the District Court found that there were seven cases of infringement and awarded \$10 as nominal damages for each case—\$70 in all. The plaintiff appealed, insisting that for each case it was entitled under the copyright law to an award of not less than \$250. The Circuit Court of Appeals sustained that contention, but held that what the District Court regarded as seven cases was only one, and directed that the decree be modified by awarding \$250, instead of \$70, as damages. 233 Fed. 609, 147 C. C. A. 417. A writ of certiorari granted on the plaintiff's petition brings the matter here.

[1, 2] Whether there were seven cases of infringement or only one, and whether the damages should have been assessed at not less than \$250 for each case, are the questions to be considered. The facts bearing on the solution of these questions are as follows:

The plaintiff designs and produces pictorial illustrations of styles in women's apparel and supplies the same to dealers in such apparel for use in advertising their *goods. All the illustrations are separately copyrighted and all authorized copies carry the required copyright notice. The plaintiff grants exclusive licenses to use the illustrations for limited periods, each license being restricted to a particular locality. The dealer obtaining the license pays a fixed charge for it. Ordinarily the fact that the license is exclusive makes it attractive, serves as an incentive for paying the charge and is a helpful feature of the plaintiff's business. But when infringers use the illustrations the strength of that feature diminishes and the plaintiff's business suffers accordingly.

At the time of the infringing acts in question the Moorehouse-Martens Company, a dealer at Columbus, Ohio, had an exclusive license from the plaintiff covering the use of the illustrations in that locality.

The defendant publishes at Columbus a daily newspaper, each issue comprising as many as 30,000 copies widely circulated. Without the consent or authority of the plaintiff or its licensee the defendant reproduced and published in its newspaper six of the plaintiff's copyrighted illustrations. They were published separately, each in a distinct issue and in all the copies. Five were published once and the other one twice, the illustrations being used in each instance as part of an advertisement by some competitor in trade of the plaintiff's licensee. These two advertisements having the same illustration were by different advertisers and were separated by an interval of 26 days.

The record, while showing that the plaintiff was damaged by the infringing publications, does not show the amount of the damages, a matter which is explained by un-

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disputed testimony to the effect that the damages could not be estimated or stated "in dollars and cents, or in money." On this point the Circuit Court of Appeals aptly said:

*104 "The plaintiff's damages rested in the injury to his Moorehouse contract, and in the discouragement of *and the tendency to destroy his system of business. To make any accurate proof of actual damages was obviously impossible."

Whether the defendant made any profit from the publications does not appear. In its bill the plaintiff asked for what are termed statutory damages in lieu of actual damages and profits.

The copyright statute, Act March 4, 1909, c. 320, 35 Stat. 1075 (Comp. St. §§ 9517-9524, 9530-9584), gives to one who copyrights a pictorial illustration the exclusive right to print, reprint, publish, copy and vend the same (sections 1 and 5), and provides (section 25¹) that one who infringes "the copyright in any work" so protected shall be liable, among other things—

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, * * * or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in the case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, * * * and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. * * *

"First. In the case of a painting, statue, or sculpture, ten dollars, for every infringing copy made or sold by or found in the possession of the infringer or his agents or employes;

*105 "Second. In the case of any work enumerated in section five of this act² except a painting, statue, or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

"Fourth. In the case of a dramatic or dramatico-musical or choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance."

The statute says that the liability thus defined is imposed for infringing "the copyright in any" copyrighted "work." The words are

in the singular, not the plural. Each copy-right is treated as a distinct entity, and the infringement of it as a distinct wrong to be redressed through the enforcement of this liability. Infringement of several copyrights is not put on the same level with infringement of one. On the contrary, the plain import of the statute is that this liability attaches in respect of each copyright that is infringed. Here six were infringed, each covering a different illustration. Thus there were at least six cases of infringement in the sense of the statute. Was there also another? The illustration covered by one of the copyrights was published on two separate occasions, each time in a different advertisement. There was no connection between the two advertisements other than the inclusion of the same illustration in both. Each was by a different advertiser and was published at his instance and for his benefit. The advertisers were not joint, but independent, infringers, neither having any connection with what was done by the other. By publishing their advertisements, the defendant participated in their independent infringements. In these circumstances, we think the second publication of the illustration must be regarded as another and distinct case of infringement. Whether it would be otherwise if that publication had *been merely a continuation or repetition of the first, and what bearing the "third" and "fourth" subdivisions of section 25, before quoted, would have on the solution of that question, are matters which we have no occasion to consider now. They are mentioned only to show that no ruling thereon is intended.

We conclude, as did the District Court, that there were seven cases of infringement in the sense of the statute.

[3] On the question of the amount of damages to be awarded for each case we are in accord with the Circuit Court of Appeals. Both parties recognize that under the proofs the damages must be assessed under the alternative provision requiring the infringer, in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc. The fact that these damages are to be "in lieu of actual damages" shows that something other than actual damages is intended—that another measure is to be applied in making the assessment. There is no uncertainty as to what that measure is or as to its limitations. The statute says, first, that the damages are to be such as to the court shall appear to be just; next, that the court may, in its discretion, allow the amounts named in the appended schedule, and finally, that in no case shall they be more than \$5,000 nor less than \$250, except that for a newspaper reproduction of a copyrighted photograph they shall not be more than \$200 nor less than \$50. In other words,

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¹ For a subsequent amendment of this section see Act Aug. 24, 1912, c. 356, 37 Stat. 478 (Comp. St. § 9546).

² "Prints and pictorial illustrations" are among the copyrightable works enumerated in section 5.

the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. With-
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in these limitations the court's discretion and sense of justice are controlling, but it has *no discretion when proceeding under this provision to go outside of them.

Apart from the natural import of its words, the history of the provision makes strongly for this view. An early statute required the infringer of a copyright in a dramatic composition to pay such damages "as to the court shall appear to be just," but "not less than" a prescribed amount. Act Aug. 18, 1856, c. 169, 11 Stat. 138; Act July 8, 1870, c. 230, § 101, 16 Stat. 214. This statute became section 4966 of the Revised Statutes. A later statute provided that the recovery for infringing a copyright in an engraving should not be less than \$250 nor more than \$10,000, and for infringing a copyright in a photograph of an object other than a work of art should not be less than \$100 nor more than \$5,000. Act March 2, 1895, c. 194, 28 Stat. 965. In 1909, when the copyright statutes were revised, these provisions, and others without present bearing, were brought together in the "in lieu" provision now under consideration. True, they were broadened so as to include other copyrights and the limitations were changed in amount, but the principle on which they proceeded—that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations—was retained. The new provision, like one of the old, says the damages shall be such "as to the court shall appear to be just." Like both the old, it prescribes a minimum limitation and, like one, a maximum limitation.

In *Brady v. Daly*, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 100, which was an action to recover for the infringement of a copyright in a dramatic composition, the first of the earlier provisions—that in section 4966, Rev. Stat.—was much considered. The trial court was of opinion that, while the damages were to be such as appeared to it to be just, it could not go below the prescribed minimum; and it made the assessment accordingly. In this court it was contended that in this view
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the provision was penal and the action was one to recover a penalty. But the contention was overruled and the judgment affirmed, the court saying (175 U. S. 154, 157, 20 Sup. Ct. 64, 65 [44 L. Ed. 109]):

"It is evident that in many cases it would be quite difficult to prove the exact amount of damages which the proprietor of a copyrighted dramatic composition suffered by reason of its unlawful production by another, and yet it is also evident that the statute seeks to provide a remedy for such a wrong and to grant to the proprietor the right to recover the damages which he has sustained therefrom.

"The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. In the face of the difficulty of determining the amount of such damages in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. The statute itself does not speak of punishment or penalties, but refers entirely to damages suffered by the wrongful act. The person wrongfully performing or representing a dramatic composition is, in the words of the statute, 'liable for damages therefor.' This means all the damages that are the direct result of his wrongful act. The further provision in the statute, that those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one. * * *

"Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum
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amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained."

It was after the minimum limitation was thus recognized as of controlling force in the assessment of the damages that the terms of the provision then under consideration were substantially repeated in the "in lieu" provision of the revised act. This hardly would have been done had it not been intended that the limitation should be as controlling there as in the earlier statute. That it was intended to be thus controlling is shown by the reports of the committees on whose recommendation the act was passed. House Report No. 2222 and Senate Report No. 1108, 60th Cong., 2d Sess.

In our opinion the District Court erred in awarding less than \$250 damages in each of the seven cases, and the Circuit Court of Appeals erred in holding there was only one case instead of seven.

Decree reversed.

Mr. Justice DAY did not participate in the consideration or decision of this case.

(249 U. S. 130)

WERK et al. v. PARKER et al.

(Argued Nov. 21, 1918. Decided March 3, 1919.)

No. 73.

1. EVIDENCE —19—JUDICIAL NOTICE.

In a patent infringement suit, judicial notice may be taken of facts that appear abundantly from standard works accessible in every considerable library.

2. PATENTS —328—INVENTION—OIL PRESS MATS.

There is in the Werks patents, Nos. 758,574 and 758,575, for oil-press mats, a mere mechanical adaptation of familiar materials and methods, not amounting to invention; it involving no claim of an improvement in the art of weaving, but only the application of that art and a combination of threads of a certain type and character in order to produce a particular result.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Suit by Robert F. Werk and others, copartners as Robert F. Werk & Co., against F. Thomas Parker and another, copartners as the F. T. Parker Company. Decree for defendants (221 Fed. 644) was affirmed by the Circuit Court of Appeals (231 Fed. 121, 145 C. C. A. 309), and complainants bring certiorari. Affirmed.

Mr. T. Hart Anderson, of New York City, for petitioners.

Messrs. John Weaver and Frederick S. Drake, both of Philadelphia, Pa., for respondents.

Mr. Justice PITNEY delivered the opinion of the Court.

Petitioners sued respondents in the District Court of the United States for the Eastern District of Pennsylvania for infringement of two divisional patents, Nos. 758,574 and 758,575, granted April 26, 1904, to Robert F. Werk. Defendants answered denying patentable novelty, and also denying infringement. The patents relate to an oil-press mat or cloth for use in the extraction of cotton-seed oil. The claim in issue under the former patent was for:

*"An oil-press mat or cloth made entirely of long animal hair and consisting of warp and weft threads, said weft-threads being composed exclusively of soft, pliable hair and the warp-threads greatly exceeding the weft-threads in number per square inch."

And in the second patent:

"An oil-press mat or cloth consisting of warp-threads and weft-threads, each composed ex-

clusively of long hair derived from animals' tails and manes, which hair is soft and pliable; the warp-threads exceeding the weft-threads in number per square inch, and the weft-threads being thicker than the warp-threads."

The District Court dismissed the bill on the ground of noninfringement. 221 Fed. 644. The Circuit Court of Appeals, without discussing this question, affirmed the decree upon the ground that the patent disclosed no such novel information to the oil-pressing art as warranted a grant of the patent monopoly. 231 Fed. 121, 145 C. C. A. 309. At the conclusion of its opinion the court stated (231 Fed. 125, 145 C. C. A. 309) that, in view of the fact that certain references quoted were not given in evidence, the sending down of the mandate would be deferred for a time to permit of an application for reargument or other form of relief to meet such references. Thereupon a petition for a rehearing was filed in behalf of appellants, which, while not disputing the accuracy of the results disclosed by the court's investigation, insisted that there was error in giving effect to the anticipatory matter thus disclosed, and in "failing to give controlling consideration to the fact that both of the two claims declared upon are laid not only to a particular woven structure of an oil-press mat, but also to an oil-press mat of such particular woven structure, when its threads are composed of animal hair." The rehearing was refused, after which the present writ of certiorari was allowed. 242 U. S. 645, 37 Sup. Ct. 239, 61 L. Ed. 543.

In the process of obtaining oil from cotton seed, the *seeds, having been cleaned and freed from lint, are hulled and chopped up, the meats being separated from the hulls; the meats are passed through a crusher, next cooked in water, and after this are spread upon an oil-press mat or cloth, the ends of which are folded over to cover the upper surface of the cooked meats. The mat with its inclosed mass of meats is then placed in a press and subjected to a pressure of about 4,000 pounds, which has the effect of expressing the oil through the mat as through a strainer.

One of the patents declares, and the evidence at the hearing indicated, that the highest grade of mat previously in general use was made of camel's hair, and that this was objectionable because of its tendency to pack and felt together when in use to such an extent as to hinder the free flow of the oil, and also because of its want of durability. The use of long animal hair, specifically horse hair, obviated this difficulty to such an extent as materially to reduce the percentage of oil wasted, as well as the cost of the mat in proportion to the product. Defendants accomplished like results with mats woven from human hair.

The Circuit Court of Appeals, while finding that the change from camel's hair to horse-hair mats was sufficient to constitute invention in the art, if this use of horse-hair mats was first disclosed by Werk, nevertheless found, from an examination of standard works, that the patentee's use was but a revival of an old and well-recognized use of such mats in the art of oil extraction. Reference was made to the British Encyclopedia, 9th edition, 1884, the Standard Dictionary of 1894, and a multitude of other publications long antedating the application for the patent.

It is not questioned that these references abundantly showed that the use of hair cloth, and especially horse-hair cloth, in the making of oil-press mats or cloths, was well known in the art long before the patents in suit.

[1] Nor is it questioned—Indeed, we deem it clear, beyond question—that the court was justified in taking judicial notice of facts that appeared so abundantly from standard works accessible in every considerable library. *Brown v. Piper*, 91 U. S. 37, 42, 23 L. Ed. 200; *Terhune v. Phillips*, 99 U. S. 592, 25 L. Ed. 293.

[2] The burden of petitioner's argument in this court, as in the application for a rehearing in the circuit court of appeals, is that there was nothing in these publications to show that the horse-hair cloth so familiar in the art embodied the "structural characteristics" of the oil-press mats of the patents in suit, referring to the peculiar mode of weaving described in the claims. But at the hearing it was clearly proved, and was conceded to be beyond controversy, that the patents involved no claim of an improvement in the art of weaving, but only the application of that art and a combination of threads of a certain type and character in order to produce a particular result. And this, in our opinion, goes no further than a mere mechanical adaptation of familiar materials and methods, not rising to the dignity of invention. *Atlantic Works v. Brady*, 107 U. S. 192, 200, 2 Sup. Ct. 225, 27 L. Ed. 438; *Penn. R. R. v. Locomotive Truck Co.*, 110 U. S. 490, 494, 4 Sup. Ct. 220, 28 L. Ed. 222; *Hollister v. Benedict Mfg. Co.*, 113 U. S. 59, 71, 73, 5 Sup. Ct. 717, 28 L. Ed. 901; *Aron v. Manhattan Ry. Co.*, 132 U. S. 84, 90, 10 Sup. Ct. 24, 33 L. Ed. 272; *McClain v. Ortmyer*, 141 U. S. 419, 426, 429, 12 Sup. Ct. 76, 35 L. Ed. 800; *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 222, 13 Sup. Ct. 850, 37 L. Ed. 707; *Wright v. Yuengling*, 155 U. S. 47, 54, 15 Sup. Ct. 1, 39 L. Ed. 64; *Olin v. Timken*, 155 U. S. 141, 155, 15 Sup. Ct. 49, 39 L. Ed. 100; *Market Street Ry. Co. v. Rowley*, 155 U. S. 621, 629, 15 Sup. Ct. 224, 39 L. Ed. 284.

Decree affirmed.

(249 U. S. 178)

GILCREASE v. McCULLOUGH et al.

(Argued Jan. 21, 1919. Decided March 3, 1919.)

No. 167.

INDIANS — 13 — ENROLLMENT RECORDS — EFFECT — EVIDENCE OF AGE.

The enrollment record of Creek citizenship, which Act May 27, 1908, c. 199, § 3, declares shall be "conclusive evidence as to the age" of the citizen, is conclusive only so far as it purports to state age; and giving in years, only, the ages of six members of a family under the same date of enrollment, is not conclusive that it was their birthday; and does not exclude evidence of how much more, less than a year, was the age of one of them.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Action by Thomas Gilcrease against G. R. McCullough and others. Judgment for defendants was affirmed by the Supreme Court of Oklahoma (162 Pac. 178), and plaintiff brings certiorari. Affirmed.

Mr. A. J. Biddison, of Tulsa, Okl., for petitioner.

Mr. James B. Diggs, of Tulsa, Okl., for respondents.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Thomas Gilcrease, a Creek Indian of one-eighth blood, received under date of December 15, 1902, an allotment of surplus land under Act of Congress March 1, 1901, c. 676 (31 Stat. 861), as amended by Act of June 30, 1902, c. 1323 (32 Stat. 500). On February 8, 1911, his twenty-first birthday, he executed to McCullough and Martin an oil and gas lease thereof. Later he brought suit in a state court of Oklahoma to set it aside insisting that, under the applicable enrollment record of Creek citizenship, he must be assumed to have been under age at the time the lease was executed, although he had in fact attained his majority. The trial court entered judgment for the defendants which was affirmed by the Supreme Court of the state (162 Pac. 178), and a rehearing was denied, January 9, 1917. The case comes here on writ of certiorari. 243 U. S. 653, 37 Sup. Ct. 480, 61 L. Ed. 948.

The only substantial question submitted is this: Did the entry concerning Gilcrease's age made in the enrollment record of Creek citizenship preclude defendant from showing that he was actually of age when the lease was executed? The decision of that question depends wholly upon the construction to be given section 3 of the Act of May 27, 1908, c. 199 (35 Stat. 312, 313), as applied to the record.

Section 3 provides:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by

the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman."

The enrollment record introduced in evidence, so far as material, is as follows:

Residence: Leonard, Creek Nation. Creek Roll.
Post Office: Mounds, Ind. Ter.

Dawes' Roll No.	Name	Relationship to person first named	Age	Sex	Blood
1504	1 Gilcrease, Lizzie		25	F.	¼
1505	2 " , Thomas	Son	9	M.	¼
1506	3 " , Eddie	"	7	"	¼
1507	4 " , Ben	"	5	"	¼
1508	5 " , Lena	Daughter	3	F.	¼
1509	6 " , Florence	"	1	"	¼
Citizenship certificate issued— June 9th, 1899.			June 9/99.		

*Gilcrease insists that the entry "June 9/99," near the lower right-hand corner of the enrollment card, signifies that the application for his enrollment was made on June 9, 1899; that in giving his age as "9," the roll declared him to be exactly 9 years old on June 9, 1899; and that, consequently, in the absence of other evidence to the contrary in the enrollment record, he must be deemed to have been under age on February 8, 1911.

But there was no declaration or finding of fact by the Commission that Gilcrease was exactly 9 years old on June 9, 1899. The declaration that a person is 9 years of age signifies, in the absence of conditions requiring exact specification, merely that he has reached or passed the ninth anniversary of his birth and is still less than 10 years old. There was neither a statute nor a regulation of the Commission which required an exact specification of age. Nor did the printed blank used for the enrollment provide a space either for entering the date of applicant's birthday or for entering the number of months and days by which his age exceeded a full year. Furthermore, the enrollment card itself bears positive evidence that it did not purport to represent the applicant as being exactly 9 years old on the day of application. For this same card records, in like manner, on the assumed date of application, also the ages of his mother, of three brothers, and a sister. Is the court expected to believe that the Commission found, that the six members of the family were all born on the 9th day of June?

Gilcrease insists, however, that the act makes the enrollment record not merely "conclusive," but the exclusive "evidence as to the age" of the citizen; or, in other words, that Congress has provided, not a rule of evidence, but the following rule of substantive law: Whenever a member of the Five

Civilized Tribes is stated in the enrollment record to be a certain number of years old and the day of his enrollment is stated therein, he shall be unable to convey his lands so long as the rolls do not show affirmatively that he is 21 years old. For this contention there is no support in the words of the statute; nor is there any in reason. As well might it be contended that where the record states the number of the applicant's years, but gives only the year and not the day or the month of the application of enrollment, evidence could not be introduced to show that the application was made before December 31st of the year given, or that if no age whatever appeared in the enrollment record the citizen must for 21 years after the date of enrollment be conclusively presumed to be a minor. The enrollment record is, of course, conclusive as to that which it in terms recites or which is necessarily implied from the words and figures used. But there is no indication of an intention on the part of Congress that facts not inconsistent with the recitals of the record shall not be proved, whenever relevant. The roll had already been held to be practically conclusive as to facts, the determination of which was a condition precedent to enrollment. Compare *United States v. Wildcat*, 244 U. S. 111, 37 Sup. Ct. 561, 61 L. Ed. 1024. The purpose of section 3 of the Act of May 27, 1908, seems to have been simply to make the record conclusive as to age in so far as it purports to state age. The cases in the lower federal courts, the recent decisions in the Supreme Court of Oklahoma, and the great weight of all the authorities support the proposition that, when the age is stated simply in years or whenever the age is not stated definitely by the addition of the months or days, other evidence may be introduced to supplement the record by proving these and thus establish the exact date of birth.¹

Affirmed.

¹ *Etchen v. Cheney*, 235 Fed. 104, 148 C. C. A. 598; *McDaniel v. Holland*, 230 Fed. 945, 145 C. C. A. 139; *Cushing v. McWaters* (Okla.), 175 Pac. 838; *Tyrell v. Shaffer* (Okla.), 174 Pac. 1074; *Jordan v. Jordan* (Okla.), 162 Pac. 753; *Heffner v. Harmon* (Okla.), 159 Pac. 650. Compare also *Hutchison v. Brown* (Okla.), 167 Pac. 624, 626; *Jackson v. Lair*, 48 Okl. 269, 150 Pac. 162. For earlier case, contra, see *Rice v. Anderson*, 39 Okl. 279, 134 Pac. 1120. Compare also *Linnam v. Beck*, 51 Okl. 727, 152 Pac. 344; *Henley v. Davis* (Okla.), 156 Pac. 337, 338.

The petitioner in his brief sets out a number of letters from the Land Department on the question of whether, under section 3, the date of application is to be considered the date of birth, when date of birth not given. In all the communications where the question is considered it is stated in effect, as in that of August 24, 1908, from Mr. Leupp, Commissioner of the General Land Office, to the Secretary of the Interior (Land 56330—1908 E. B. H.), that the "application for enrollment shall be construed, for the purposes of the government, as representing the age of the applicant at that time, and that the date of the application shall be held to be the anniversary of the date of birth, except where the records show otherwise." It is always stated that the act

(249 U. S. 63)

WITHNELL v. RUECKING CONST. CO.

(Argued and Submitted Jan. 16, 1919. Decided March 3, 1919.)

No. 142.

1. CONSTITUTIONAL LAW $\Leftrightarrow$ 290(3)—DUE PROCESS—STREET IMPROVEMENT—ASSESSMENT—NOTICE AND HEARING—"LEGISLATIVE ACT."

The charter of the city of St. Louis, adopted by vote of the people under authority of the Constitution of Missouri, is in effect a "legislative act," within the principle that, when an assessment is made in accordance with a fixed rule adopted by a legislative act, opportunity to be heard in advance on question of amount and extent of assessment and benefits is not essential to due process.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legislative Act.]

2. COURTS $\Leftrightarrow$ 399(1)—ERROR TO STATE COURT—QUESTIONS REVIEWABLE.

On error to the state court on the ground that assessment for street improvement violated the Fourteenth Amendment, decision of state court as to manner of laying out district and whether it conformed to charter is conclusive.

3. CONSTITUTIONAL LAW $\Leftrightarrow$ 233—EQUAL PROTECTION—DUE PROCESS—STREET IMPROVEMENTS—ASSESSMENTS.

Attack on the system authorized by St. Louis City Charter of assessing three-fourths of cost of street improvement on abutting property according to area, ascertained by prescribed method, as denying the protection afforded by the Fourteenth Amendment, can only succeed if it has produced results as to the complaining party's property palpably arbitrary or grossly unequal.

In Error to the Supreme Court of the State of Missouri.

Suit by the Ruecking Construction Company against William W. Withnell. Judgment for plaintiff was affirmed by the Supreme Court of Missouri (269 Mo. 546, 191 S. W. 685), and defendant brings error. Affirmed.

Messrs. E. T. Allen and C. B. Allen, both of St. Louis, Mo., for plaintiff in error.

Messrs. Frank B. Coleman and George M. Block, both of St. Louis, Mo., for defendant in error.

* Mr. Justice DAY delivered the opinion of the Court.

The construction company brought suit to enforce the lien of twelve tax bills issued on account of the cost of paving a portion of

shall be so construed "for the purposes of the government." This does not purport to be a result reached on a careful interpretation of the act; but was apparently adopted simply as a practical working rule of the Department. *McDaniel v. Holland*, 230 Fed. 945, 948-950, 145 C. C. A. 139.

Broadway in the city of St. Louis. Withnell, plaintiff in error, is the owner of property assessed, fronting on Broadway, being five lots in city block No. 2069, five lots in city block No. 2608, and unplatted property in city blocks Nos. 2620 and 2621.

The validity of the tax bills was affirmed by the Supreme Court of Missouri. *Ruecking Const. Co. v. Withnell*, 269 Mo. 546, 191 S. W. 685. The case is here because of alleged violation of the Fourteenth Amendment to the federal Constitution in assessing the lien of these tax bills upon plaintiff in error's property. The assessment was levied in accordance with the charter of the city of St. Louis. An assessment for improving other portions of the street than are here involved, made under the terms of the St. Louis charter, was before this court in *Gast Realty Company v. Schneider Granite Company*, 240 U. S. 55, 36 Sup. Ct. 254, 60 L. Ed. 523. In that case the assessment was held invalid in part. After being remanded to the Supreme Court of Missouri, and a second judgment, the case was again before this court. 245 U. S. 288, 38 Sup. Ct. 125, 62 L. Ed. 292.

The method of making assessments under the charter of the city of St. Louis, as stated in *Gast Realty Company v. Schneider Granite Company*, supra, is as follows: One-fourth of the total cost is levied upon all the property fronting upon or adjoining the improvement according to frontage and three-fourths according to area ascertained as follows:

"A line shall be drawn midway between the street to be improved and the next parallel or converging street on each side of the street to be improved, which line shall be the boundary of the district, except as hereinafter provided, namely: If the property adjoining the street to be improved is divided into lots, the district line shall be so drawn as to include the entire depth of all lots fronting on the street to be improved. * * * If there is no parallel or converging street on either side of the street improved, the district lines shall be drawn three hundred feet from and parallel to the street to be improved; but if there be a parallel or converging street on one side of the street to be improved to fix and locate the district line, then the district line on the other side shall be drawn parallel to the street to be improved and at the average distance of the opposite district line so fixed and located."

In the *Gast Realty Company Case* the area assessment was held invalid because it assessed a large and disproportionate part of the plaintiff in error's property. The memorandum appended to the opinion shows that the foot-front assessment was not disturbed. And see the subsequent consideration of the matter in *Schneider Granite Company v. Gast Realty Company*, 245 U. S. 288, 38 Sup. Ct. 125, 62 L. Ed. 292, supra.

[1] In support of the constitutional objection it is contended that the plaintiff in error

was not allowed to be heard as to the validity and apportionment of the assessment, and was therefore denied due process of law. The charter provision for notice and hearing is inserted in the margin.¹ But whether a property owner is entitled to be heard in advance upon the questions of benefit and apportionment depends upon the authority under which the assessment is made. When the assessment is made in accordance with a fixed rule adopted by a legislative act, a property owner is not entitled to be heard in advance on the question of the amount and extent of the assessment and the benefits conferred. *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Embree v. Kansas City Road District*, 240 U. S. 242, 36 Sup. Ct. 317, 60 L. Ed. 624; *Wagner v. Baltimore*, 239 U. S. 207, 217, 218, 36 Sup. Ct. 66, 60 L. Ed. 230, and cases cited. We are of opinion that the assessment made in accordance with the rule of the St. Louis charter was legislative in character and required no previous notice or preliminary hearing as to the nature and extent of benefits in order to maintain its constitutional validity. The charter of the city of St. Louis was adopted by a vote of the people under state constitutional authority. It was under consideration in *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810. This court said:

"As the legislative power of a state is vested in the Legislature, generally that body has the

supreme control, *and it delegates to municipal corporations such measure thereof as it deems best. The city of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the Legislature, but it framed its own charter under express authority from the people of the state, given in the Constitution. Sections 20 and 21 of article 9 of the Constitution of 1875 of the state of Missouri authorized the election of 13 freeholders to prepare a charter to be submitted to the qualified voters of the city which, when ratified by them, was to 'become the organic law of the city.' * * * In pursuance of these provisions of the Constitution, a charter was prepared and adopted, and is therefore 'the organic law' of the city of St. Louis, and the powers granted by it, so far as they are in harmony with the Constitution and laws of the state, and have not been set aside by any act of the General Assembly, are the powers vested in the city. This charter is an organic act, so defined in the Constitution, and is to be construed as organic acts are construed. The city is in a very just sense an 'imperium in imperio.' Its powers are self-appointed, and the reserved control existing in the General Assembly does not take away this peculiar feature of its charter."

The same view has been repeatedly declared by the Supreme Court of Missouri. In *Meier v. St. Louis*, 180 Mo. 391, 409, 79 S. W. 955, that court declared, citing its previous decisions, that the charter of St. Louis, adopted under the Constitution, had as respects local assessments all the force of legislative acts.

We reach the conclusion that the attack upon the validity of the assessment for want of advance notice of hearing as to benefits must fail.

¹"No ordinance for the construction or reconstruction of any street, avenue, boulevard, alley or public highway of the city, shall be passed unless recommended by the board of public improvements, as hereinafter provided. The board shall designate a day on which they will hold a public meeting to consider the improvement of any designated streets, avenues, boulevards, alleys or public highways by grading or regrading, by constructing, or reconstructing, by paving or repaving the roadway, including cross-walks and intersections, and shall give two weeks' public notice, in the papers doing the city printing, of the time, place and matter to be considered, stating in such notice the kind of material and manner of construction proposed to be used for the wearing surface of such improvement, naming more than one kind of material or manner of construction, if the board deems it advisable so to do, and also the class of specification and plan for such work, which specification and plan shall be approved by said board, and filed in its office. If within fifteen days after such public meeting, the owners of the major part of the area of the land made taxable by this article for such improvement, shall file in the office of the board of public improvements their written remonstrance against the proposed improvement, or against the material or manner thereof, the board shall consider such remonstrance, and if said board shall, by a two-thirds vote, at a regular meeting, approve of the improvement, material or manner remonstrated against, they shall cause an ordinance for the same to be prepared and report the same with the reasons for their action and the remonstrance to the assembly. If such majority fail to remonstrate within fifteen days or shall petition the board for the improvement, said board may by a majority vote approve the same, and shall cause an ordinance to be prepared and reported to the assembly therefor."

[2, 3] Regarding the front-foot method of assessment as being unassailable under the previous decisions of this court (240 U. S. and 245 U. S., supra), we come to consider the area assessment. Objections based on the manner of laying out the district, and whether it conforms to the plan outlined in the city charter are conclusively disposed of by the decisions of the state court. We have to deal only with the questions raised as to the alleged denial of the protection afforded by the Fourteenth Amendment. An examination of the plat made part of the record, and reproduced in the briefs of counsel, shows that owing to the curvatures in Broadway and the relation thereto of converging and parallel streets, the assessing district laid out in accordance with the charter is of irregular outline. The lots assessed are by no means uniform in size, nor is their relation to the improvement uniformly alike. Some blocks, including some of the plaintiff in error's, are not subdivided into lots, and are irregular in shape. But we are not prepared to hold that the assessment district was so laid out with reference to plaintiff in error's property as requires this court to declare the application of the area rule a deni-

al of due process of law, or of the equal protection of the laws. That the assessment, owing to the difficulties of the situation, made inequalities inevitable, is apparent. The Supreme Court of the state finds, and we are not prepared to disturb its conclusion, that the property east and west of Broadway, in the subdivision of the same for the purposes of assessment, was treated with fairness and with as much equality as the situation permitted. The attack upon constitutional grounds because of the system which the charter authorized in making the assessment can only succeed if it has produced results as to plaintiff in error's property palpably arbitrary or grossly unequal. This system has been sustained in many decisions in the Supreme Court of Missouri, and has long been enforced in practice in that state. Its application in the instance passed upon in *Gast Realty Company v. Schneider Granite Company*, 240 U. S. 55, 36 Sup. Ct. 254, 60 L. Ed. 523, supra, was found to work so arbitrarily as to require an avoidance of the area assessment upon constitutional grounds. The *frontage rule of assessment, now generally in use, has been frequently sustained by the decisions of this court. It may and does in some instances work inequalities in benefits conferred upon property assessed. In the present case a calculation found in the brief of the defendant in error, the correctness of which does not seem to be challenged, shows that if the property had been assessed by the front-foot rule, that of the plaintiff in error would have had a larger assessment than the one which resulted from the method employed.

The Supreme Court of Missouri found that no evidence was offered to sustain the allegations of the cross-bill that the tax-bills were confiscatory or disproportionate to the benefits received in that the city escaped paying its just proportion of the cost of the improvement because of its ownership of property within the district.

We are not prepared to say that the plaintiff in error, because of arbitrary legislative action or the abuse of power, was denied due process of law or the equal protection of the laws in this assessment.

Affirmed.

(240 U. S. 170)

MISSOURI & ARKANSAS LUMBER & MINING CO. v. GREENWOOD DIST. OF SEBASTIAN COUNTY, ARK., et al.

(Submitted Jan. 17, 1919. Decided March 3, 1919.)

No. 149.

1. JUDGMENT ⚡872—REVIVAL—EFFECT.

Revivals of judgment merely keep it alive and permit its enforcement beyond the period fixed by the statute of limitations, and do not

give it any greater efficacy than when first rendered.

2. CONSTITUTIONAL LAW ⚡152—IMPAIRING OBLIGATION OF CONTRACT—PROVISION OF JUDGMENT FOR INTEREST.

Acts Ark. 1893, p. 145, providing that no judgment rendered or to be rendered against a county on warrants shall bear interest after passage of the act, does not impair the obligation of contract, in violation of Const. art. 1, § 10, as respects a prior judgment on non-interest-bearing warrants, though the judgment provides for interest from date at a specified rate.

3. CONSTITUTIONAL LAW ⚡152 — DEPRIVING OF PROPERTY WITHOUT DUE PROCESS.

Though existing judgment against a county on noninterest-bearing warrants provides for interest from date at a specified rate, judgment creditor is not deprived of property, within the Fourteenth Amendment by Acts Ark. 1893, p. 145, providing that no such judgment shall bear interest after passage of the act.

In Error to the District Court of the United States for the Western District of Arkansas.

Mandamus by the Missouri & Arkansas Lumber & Mining Company against the Greenwood District of Sebastian county, Ark., and others. Mandamus denied, and plaintiff brings error. Affirmed.

Messrs. John H. Vaughn, of Fort Smith, Ark., and B. R. Davidson, of Fayetteville, Ark., for plaintiff in error.

Mr. Thomas B. Pryor, of Fort Smith, Ark., for defendants in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Article 16, § 1, Constitution of Arkansas (1874), declares: "Nor shall any county, city, town or other municipality ever issue any interest-bearing evidences of indebtedness." *171

During 1889 (or about that time) Sebastian county, for the benefit of Greenwood district, issued certain noninterest-bearing warrants payable "out of any money in the treasury appropriated for ordinary purposes" of which plaintiff in error became lawful holder and owner. It sued upon them in the United States Circuit Court, Western District of Arkansas, and obtained a judgment, January 26, 1891, for \$13,703.29, "with interest at the rate of six per cent. per annum from this date until paid together with all its costs in and about this case laid out and expended." So far as not satisfied, this was revived in 1900 and again in 1910; and at different dates from 1896 to 1914 the county made payments thereon aggregating its face value together with six per cent. interest reckoned to March 21, 1893, and all costs.

An act of the Arkansas Legislature ap-

proved March 21, 1893 (Acts Ark. 1893, p. 145), provides: "No judgment rendered or to be rendered against any county in the state on county warrants or other evidences of county indebtedness shall bear any interest after the passage of this act;" and relying upon this inhibition the county claimed that the above-mentioned payments fully discharged the judgment against it. Thereupon, May 23, 1916, plaintiff in error petitioned the court below for a mandamus to compel payment of alleged accrued interest. Answering, the county denied further liability and then asked for an order requiring that the judgment be satisfied of record. The trial court refused a mandamus and directed satisfaction as prayed. Whether plaintiff in error's rights under the federal Constitution would be violated by giving effect to the statute is the only question presented for our consideration. The Supreme Court of the state sustained its validity in *Read v. Mississippi County*, 69 Ark. 365, 63 S. W. 807, 86 Am. St. Rep. 202, where the precise points here involved were presented.

[1] The two revivals in 1900 and 1910 kept the judgment ^{*alive} and permitted its enforcement beyond the periods fixed by statutes of limitation. Their entry gave it no greater efficacy than it possessed when first rendered.

[2, 3] Plaintiff in error maintains that the challenged act conflicts with section 10, art. 1, of the Constitution and also the Fourteenth Amendment, forbidding a state from depriving any person of property without due process of law; but we think the contrary is settled by our opinion in *Morley v. Lake Shore Railway Co.*, 146 U. S. 162, 168, 171, 13 Sup. Ct. 54, 56 (36 L. Ed. 925). There the judgment directed that interest should accrue from its entry without mentioning any rate, the statutory one then being seven per centum; later another act fixed six per centum for the future and the debtor claimed benefit of it while the creditor maintained that to permit this would violate both the Contract Clause and Fourteenth Amendment. Through Mr. Justice Shiras we said:

"After the cause of action, whether a tort or a broken contract, not itself prescribing interest till payment, shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the Constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the nonpayment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is, of course, entitled to the interest so prescribed until payment is received, or until the state shall, in the exercise of its discretion, declare that such interest shall be changed or cease to accrue. Should the statutory damages for nonpayment of a judgment be determined by a state, either in whole or in

part, the owner of a judgment will be entitled to receive and have a vested right in the damages which shall have accrued up to the date of the legislative change; but after that time his rights as to interest as damages are, as when he first obtained his judgment, just what the Legislature chooses to declare. He has no contract whatever on the subject with the defendant in the judgment, and his right is to receive, and the defendant's obligation is to pay, as damages, just what the state chooses to prescribe. * * * The discretion exercised by the Legislature in prescribing what, if any, damages shall be paid by way of compensation for delay in the payment of judgments is based on reasons of public policy, and is altogether outside the sphere of private contracts. * * * The further contention of the plaintiff in error, that he has been deprived of his property without due process of law, can be more readily disposed of. If, as we have seen, the plaintiff has actually received on account of his judgment all that he is entitled to receive, he cannot be said to have been deprived of his property."

See *Barnitz v. Beverly*, 163 U. S. 118, 129, 16 Sup. Ct. 1042, 41 L. Ed. 93.

It is insisted that as the judgment now under consideration specified a definite interest rate while the one in *Morley v. Lake Shore Railway Co.*, supra, did not, the doctrine there approved is inapplicable. To this we cannot assent; mere recital of a particular rate does not change the nature of the charge as a penalty or liquidated damages.

It should be noted that the county warrants, upon which plaintiff in error sued, bore no interest; if the parties had lawfully stipulated therefor, a different question would have been presented.

The judgment of the court below is Affirmed.

(249 U. S. 194)

SEUFERT BROS. CO. v. UNITED STATES.

UNITED STATES et al. v. SEUFERT BROS. CO.

(Argued Jan. 29 and 30, 1919. Decided March 3, 1919.)

Nos. 187, 188.

INDIANS — 3 — TREATIES — FISHING RIGHTS.

"The right of taking fish at all usual and accustomed places in common with citizens of the territory," reserved to the Yakima Tribes by the treaty of June 9, 1855, 12 Stat. 951, ceding the lands occupied by them on the north side of the Columbia river in Washington, will be construed, according to its natural meaning and their understanding thereof, as shown by their habitual acts thereafter, to give the right to fish in such places on the south or Oregon side of the river, in the country of another tribe, with which similar treaty was made at about the same time.

Appeals from the District Court of the United States for the District of Oregon.

Suit by the United States, as trustee and guardian of the Confederated Tribes and Bands of Yakima Indians and Nations, and as trustee and guardian of and on relation of Sam Williams, and Sam Williams, against the Seufert Bros. Company. From the decree (233 Fed. 579) defendant appeals, and the United States takes a cross-appeal, which is abandoned and dismissed. Affirmed.

Messrs. H. S. Wilson, of Portland, Or., and A. S. Bennett, of Salem, Or., for Seufert Bros. Co.

Mr. Assistant Attorney General Brown, for the United States and another.

*Mr. Justice CLARKE delivered the opinion of the Court.

As trustee and guardian of the Yakima Indians, the government of the United States instituted this suit in the federal District Court for the District of Oregon to restrain defendant, a corporation, its officers, agents, and employés, from interfering with the fishing rights in a described locality on the south side and bank of the Columbia river, which it was alleged were secured to the Indians by article 3 of the treaty between them and the United States, concluded June 9, 1855, and ratified by the Senate on March 8, 1859 (12 Stat. 951).

The District Court granted in part the relief prayed for and found as follows:

That the "following described portion of the south bank of the Columbia river in the county of Wasco, state and district of Oregon, was at the time of the treaty, always has been, and now is, one of the usual and accustomed fishing places belonging to and possessed by the Confederated Tribes and Bands of Indians known as the Yakima Nation. * * *

And the court further decreed that the rights and privileges to fish in common with citizens of the United States reserved by said Yakima Nation and guaranteed by the United States to it in the treaty of June 9, 1855, applied to all the usual and accustomed fishing places on the south bank or shore of the Columbia river, in the decree described.

An appeal from the decree granting an injunction brings the case here for review.

As stated by counsel for the appellant the most important question in the case is this: Did the treaty with the Yakima Tribes of Indians ceding to the United States lands occupied by them, on the north side of the Columbia river in the territory of Washington and reserving to the Indians "the right of taking fish at all usual and accustomed places in common with citizens of the territory" give them the right to fish in the country of another *tribe on the south or Oregon side of

the river? The appeal requires the construction of the language quoted in this question, and the circumstances incident to the making of the treaty are important.

Fourteen tribes or bands of confederated Indians, which, for the purposes of the treaty were considered as one nation under the name of Yakima Nation, at the time of the making of the treaty occupied an extensive area in the territory, now state, of Washington, which is described in the treaty, and was bounded on the south by the Columbia river. By this treaty the government secured the relinquishment by the Indians of all their rights in an extensive region, and in consideration therefor a described part of the lands claimed by them was set apart for their exclusive use and benefit as an Indian reservation, and in addition fishing privileges were reserved to them by the following provision in article 3:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, *as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them.*"

This treaty was one of a group of eleven treaties negotiated with the Indian tribes of the northwest between December 26, 1854, and July 16, 1855, inclusive. Six of these were concluded between June 9th and July 16th, inclusive, and one of these last, dated June 25th, was with the Walla-Walla and Wasco Tribes, "residing in Middle Oregon," and occupying a large area, bounded on the north by that part of the Columbia river in which the fishing places in controversy are located (12 Stat. 963). This treaty contains a provision for an Indian reservation and one saving fishing rights very similar in its terms to that of the Yakima treaty, viz:

"That the exclusive right of taking fish in the streams running through and *bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with citizens of the United States, and of erecting suitable houses for curing the same."

These treaties were negotiated in a group for the purpose of freeing a great territory from Indian claims, preparatory to opening it to settlers, and it is obvious that with the treaty with the tribes inhabiting Middle Oregon in effect, the United States was in a position to fulfill any agreement which it might make to secure fishing rights in, or on either bank of, the Columbia river in the part of it now under consideration—and the treaty was with the government, not with Indians, former occupants of relinquished lands.

The District Court found, on what was suf-

ficient evidence, that the Indians living on each side of the river, ever since the treaty was negotiated, had been accustomed to cross to the other side to fish, that the members of the tribes associated freely and intermarried, and that neither claimed exclusive control of the fishing places on either side of the river or the necessary use of the river banks, but used both in common. One Indian witness, says the court, "likened the river to a great table where all the Indians might come to partake."

The record also shows with sufficient certainty, having regard to the character of evidence which must necessarily be relied upon in such a case, that the members of the tribes designated in the treaty as Yakima Indians, and also Indians from the south side of the river, were accustomed to resort habitually to the locations described in the decree for the purposes of fishing at the time the treaty was entered into, and that they continued to do so to the time of the taking of the evidence in the case, and also that Indians from both sides of the river built houses upon the south bank in which to dry and cure their fish during the fishing season.

*This recital of the facts and circumstances of the case renders it unnecessary to add much to what was said by this court in *United States v. Winans*, 198 U. S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089, in which this same provision of this treaty was considered and construed. The right claimed by the Indians in that case was to fishing privileges on the north part and bank of the Columbia river—in this case similar rights are claimed on the south part and bank of the river.

The difference upon which the appellant relies to distinguish this from the former case is that the lands of the Yakima Indians were all to the north of the river and therefore it is said that their rights could not extend beyond the middle of that stream, and also that since the proviso we are considering, is in the nature of an exception from the general grant of the treaty, whatever rights it saves must be reserved out of the thing granted, and as all of the lands of the Yakima tribes lay to the north of the river it cannot give any rights on the south bank.

But in the former case (*United States v. Winans*, *supra*), the principle to be applied in the construction of this treaty was given in this statement:

"We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where

power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.' [*Choctaw Nation v. U. S.*] 119 U. S. 1 [7 Sup. Ct. 75, 30 L. Ed. 306; *Jones v. Meehan*], 175 U. S. 1 [20 Sup. Ct. 1, 44 L. Ed. 491]."

How the Indians understood this proviso we are considering is not doubtful. During all the years since the treaty was signed they have been accustomed habitually to resort for fishing to the places to which the decree of the lower court applies, and they have shared such places with Indians of other tribes from the south side of the river and with white men. This shows clearly that their understanding of the treaty was that they had the right *to resort to these fishing grounds and make use of them in common with other citizens of the United States—and this is the extent of the right that is secured to them by the decree we are asked to revise.

To restrain the Yakima Indians to fishing on the north side and shore of the river would greatly restrict the comprehensive language of the treaty, which gives them the right "of taking fish at all usual and accustomed places and of erecting temporary buildings for curing them," and would substitute for the natural meaning of the expression used—for the meaning which it is proved the Indians, for more than fifty years derived from it—the artificial meaning which might be given to it by the law and by lawyers.

The suggestion, so impressively urged, that this construction "imposes a servitude upon the Oregon soil," is not alarming from the point of view of the public, and private owners not only had notice of these Indian customary rights by the reservation of them in the treaty, but the "servitude" is one existing only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year, that any person, not negligently or willfully blind to the conditions of the property he was purchasing, must have known of them.

The only other questions argued by the appellant relate to the claims which counsel anticipated would be made on the cross-appeal by the government, which, however, was abandoned before oral argument and must be dismissed. It results that the decree of the District Court must be

Affirmed.

(249 U. S. 79)

WHITEHEAD v. GALLOWAY et al.

(Submitted Jan. 23, 1919. Decided March 3, 1919.)

No. 184.

DEEDS 84—VENDOR AND PURCHASER 231(9) — PLACE OF RECORD—CREATION OF NEW RECORDING DISTRICT.

Under Act June 21, 1906, making a new recording district 29 in Indian Territory out of portion of old district 20, and in view of Act Feb. 19, 1903, and Mansf. Dig. Ark. 1884, § 671, made applicable to Indian Territory, deed to land situated in new district could not be validly recorded in old district, and, if so recorded, was not notice to subsequent purchasers, though there was no recording office in new district at time of recording, especially since, if deed had been recorded as soon as possible in new county, it would have been in time to afford notice to subsequent purchaser.

In Error to the Supreme Court of the State of Oklahoma.

Action by James E. Whitehead against James O. Galloway and others. To review a judgment of the Supreme Court of Oklahoma (153 Pac. 1101), affirming a judgment for defendants, plaintiff brings error. Affirmed.

Mr. Claude S. Arnold, of Enid, Okl., for plaintiff in error.

Mr. H. A. Ledbetter, of Ardmore, Okl., for defendants in error.

*Mr. Justice Day delivered the opinion of the Court.

This is a contest between claimants to the ownership of a tract of land now part of Carter county, Oklahoma, and prior to June 21, 1906, a part of the twentieth recording district, Ryan (office of the recording district), Indian Territory. Thereafter it was in the twenty-ninth recording district, Duncan (office of the recording district), Indian Territory.

The facts so far as pertinent are:

On the twenty-seventh day of June, 1906, Wilburn Adams, who held title to the land, made and delivered a deed for the same to the plaintiff in error, Whitehead, which deed was filed for record in the office of the twentieth recording district at Ryan, Indian Territory, on the twenty-eighth day of June, 1906, and was duly recorded. Afterwards Adams and wife made a warranty deed of the same property to James O. Galloway, dated November 16, 1906, and recorded November 22, 1906, in the office of the twenty-ninth recording district of the Indian Territory at Duncan. Galloway on the 24th day of December, 1906, conveyed the same to Winfield S. Pressgrove and his wife, which deed was recorded

at Duncan. Pressgrove and wife executed to the Travelers' Insurance Company of Hartford, Connecticut, a mortgage on the land dated March 22, 1907, recorded April 5, 1907, in the office of the twenty-ninth recording district at Duncan, Indian Territory. Pressgrove and wife executed a mortgage to the Atkinson, Warren & Henley Company dated March 22, 1907, recorded April 24, 1907, in the office of the twenty-ninth recording district at Duncan.

On June 21, 1906, Congress passed an act (34 Stat. 343):

"That in addition to the places now provided by law for holding courts in the Southern judicial district of Indian Territory courts shall be held in the town of Duncan, and all laws regulating the holding of the courts in the Indian Territory shall be applicable to the said court hereby created in said town of Duncan. That the territory next hereinafter described shall be known as recording district numbered twenty-nine, beginning at a point where township line between townships two and three north reaches the east boundary line of Oklahoma Territory; thence east on said township line twenty-four miles to where it intersects with range line three and four west; thence south on said range line twelve miles to where it intersects the base line between townships one north and one south; thence east along said base line six miles to the range line between ranges two and three west; thence south twelve miles along said range line to the township line between townships two and three south; thence west thirty miles along said township line to where it intersects with the east line of Oklahoma Territory; thence north along said line twenty-four miles to the place of beginning; and the place of recording and holding court in said district shall be Duncan."

Prior to the passage of this act of Congress the lands involved in this case were located in the twentieth recording district of the Indian Territory, known as the "Ryan district." But this act made them a part of the twenty-ninth recording district, known as the "Duncan recording district." On June 30, 1906, C. M. Campbell, who was then clerk of the United States Court for the Southern District of the Indian Territory, appointed C. N. Jackson deputy clerk and ex officio recorder for the newly-created twenty-ninth recording district, with headquarters at Duncan. C. N. Jackson took and subscribed the oath of office and filed his bond on June 30, 1906, and his appointment was duly approved by the United States Court at Ardmore on the same day. He arrived at Duncan and first opened his office on July 7, 1906, and the first entry made upon the books was upon that date. No recording office was opened at Duncan prior to July 7, 1906, when C. N. Jackson arrived and opened one.

From the time of the conveyance of the lands to Pressgrove (December 24, 1906) he has been in the actual possession thereof.

The lower court and the Supreme Court of Oklahoma decided in favor of Galloway and his successors, holding that the recording of the deed, made to Whitehead, at Ryan, was not constructive notice to the subsequent purchasers. 153 Pac. 1101, rehearing denied without opinion 157 Pac. xxiii.

At the time of the passage of the statute of June 21, 1906, another statute provided in effect (Act Feb. 19, 1903, c. 707, 32 Stat. 841, 10 Fed. Stats. [1st Ed.] 130):

That chapter 27 of the Digest of the Statutes of Arkansas of 1884 be extended to the Indian Territory so far as the same is applicable and not inconsistent with any law of Congress; that the clerk or deputy clerk of the United States court of each of the courts of the territory should be ex officio recorder for his district and perform the duties required of the recorder in the chapter of Mansfield's Digest, hereinafter referred to. The duty was placed on each clerk or deputy clerk to record in the books provided for the office all deeds, mortgages, etc. Instruments theretofore recorded with the clerk of the United States Court for the Indian Territory were not required to be again recorded, but should be transferred to the indexes without further cost, and that such records theretofore made should be of full force and effect. That whenever in said chapter (Mansfield's Digest) the word "county" occurs there should be substituted the word "district" and wherever the words "state" or "state of Arkansas" occur there should be substituted therefor the words "Indian Territory," and wherever the words "clerk" or "recorder" occur there should be substituted the words "clerk or deputy clerk of the United States court." The statute further provides that all instruments of writing, the filing of which is provided by law, should be recorded or filed in the office of the clerk or deputy clerk at the place of holding court in the recording district where said property may be located.

The provisions of Mansfield's Digest, which Congress extended to the Indian Territory so far as applicable, provide (Mansfield's Digest 1884, c. 27, § 671):

"No deed, bond, or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond, or instrument, obtaining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond, or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and ex officio recorder of the county where such real estate may be situated."

Congress made no provision whereby deeds to lands in the new district were to be recorded at Ryan in the old district pending the opening of the office in the new district at Duncan. The provision as to transfer of

recorded instruments to the new indexes 32 Stat. 842, applied to instruments theretofore recorded. See *Bank v. Keys*, 229 U. S. 179, 33 Sup. Ct. 642, 57 L. Ed. 1140.

Cases cited by plaintiff in error, where statutes provide for the organization of new counties, and holding that until such new counties are organized the place for recording is the old county where the lands are situated, are not apposite. Congress itself declared and defined the new recording district, and the applicable provisions of Mansfield's Digest provided that no conveyance should be constructive notice against a subsequent purchaser unless such deed should be filed for record in the office of the clerk and ex officio recorder of the district where the real estate was situated. The statute is explicit, and when Whitehead bought from Adams the requirement of the law was plain that the deed should be filed for record at Duncan in the new district. See *Astor v. Wells*, 4 Wheat. 466, 4 L. Ed. 616. But, it is said, at the time of the conveyance to Whitehead, no office had been established at Duncan. This fact, however, did not continue Ryan as the place for recording deeds for lands in the new district.

The requirements of the legislation are positive, making Duncan the place for filing the deed in the new recording district where the lands are situated. The plaintiff in error urges that until an office was opened at Duncan it was impossible to record a deed there. This fact does present an anomalous situation, not to be remedied, however, by judicial construction in derogation of positive and controlling legislation.

Moreover, by the agreed statement of facts it appears that a deputy clerk, who became ex officio recorder, was appointed June 30, 1906, and opened his office for the transaction of business at Duncan on July 7, 1906. The conveyance from Adams to Galloway was made on November 16, 1906. Had Whitehead filed his deed for record at Duncan after the recording office was opened there and prior to November 16, 1906, Galloway and the subsequent purchasers would have had constructive notice by means of this record of the prior conveyance. But all that Whitehead did was to file his deed at Ryan after the land had become part of the Duncan district. After the opening of the Duncan office, it was his duty, if he would charge others with constructive notice, to file his deed in the office at Duncan. Had he done this he would have had a conveyance of record which would have been constructive notice to subsequent purchasers. Such constructive notice was not conveyed to Galloway and the subsequent purchasers by the filing of the deed for record at Ryan in the old district. It results that the judgment of the Supreme Court of Oklahoma must be Affirmed.

(240 U. S. 53)

ALASKA PACIFIC FISHERIES v. TERRITORY OF ALASKA (two cases).

(Argued Dec. 19 and 20, 1918. Decided March 3, 1919.)

Nos. 117, 118.

COURTS 382(5)—ERROR TO CIRCUIT COURT OF APPEALS — FINALITY OF JUDGMENT — ALASKA.

Under Judicial Code, § 134 (Comp. St. § 1125), relating to jurisdiction of the Circuit Court of Appeals, and in view of sections 241 and 247 (Comp. St. §§ 1218, 1224), and Comp. St. § 3564, and laws relating to Alaska, decision of Circuit Court of Appeals of Ninth Circuit on appeal from District Court of Alaska is final, and not reviewable by Supreme Court on writ of error, though constitutional questions are involved; the court having ample power, under Judicial Code, § 240 (Comp. St. § 1217), to review on certiorari constitutional questions.

Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Actions by the Territory of Alaska against the Alaska Pacific Fisheries. To review a judgment of the Circuit Court of Appeals (236 Fed. 52, 149 C. C. A. 262; 236 Fed. 70, 149 C. C. A. 280), affirming a judgment of District Court in favor of the Territory, defendant brings error. Writ dismissed.

Messrs. J. A. Hellenthal, of Juneau, Alaska, and Harvey M. Friend, of Washington, D. C., for plaintiff in error.

Mr. George B. Grigsby, of Juneau, Alaska, for the Territory.

*Mr. Justice DAY delivered the opinion of the Court.

These cases were argued and submitted together, and may be disposed of in a single opinion.

In case No. 117 the action was brought in the District Court for Alaska to recover moneys alleged to be due under a statute imposing a tax upon prosecuting the business of fishing by means of fish traps in the waters of Alaska. The defendant, the Alaska Pacific Fisheries, filed an *answer in which it set up that the act of the Alaska Legislature, under which the suit was brought, was void under the act of Congress creating the Legislature of Alaska, and under the Constitution of the United States, and set up other defenses not involving the Constitution.

In case No. 118 the Territory brought an action to recover taxes claimed to be due under an act of the Legislature of the Territory of Alaska for prosecuting the business of fishing for and canning salmon in Alaska. With other defenses the constitutionality of the law was contested by the defendant.

Judgment in each case was rendered in the District Court in sums in excess of \$500

against the Alaska Pacific Fisheries. Upon error to the Circuit Court of Appeals for the Ninth Circuit the judgments of the District Court were affirmed. 236 Fed. 52, 149 C. C. A. 262; 236 Fed. 70, 149 C. C. A. 280.

Motions to dismiss the writs of error were filed by the Attorney General of the Territory upon the ground that the judgments of the Circuit Court of Appeals are final. Consideration of the motions was passed to the hearing upon the merits. A determination of the motions involves a construction of sections of the Judicial Code regulating appeals and writs of error in the District Court for Alaska and the Circuit Court of Appeals for the Ninth Circuit. Section 134 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. § 1125]) provides:

"In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section 247, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the District Court for Alaska or from any division thereof, to the Circuit Court of Appeals for the Ninth Circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such Circuit Court *of Appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the Circuit Court of Appeals."

Section 247 (36 Stat. 1158 [Comp. St. § 1224]) of the Code provides:

"Appeals and writs of error may be taken and prosecuted from the final judgments and decrees of the District Court for the district of Alaska or for any division thereof direct to the Supreme Court of the United States, in the following cases: In prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the District Courts to the Supreme Court."

Section 241 (36 Stat. 1157 [Comp. St. § 1218]) of the same Code provides:

"In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this title, there shall be of right an appeal or writ of error to the

Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

It is the contention of the plaintiff in error that under section 241 the judgments of the Circuit Court of Appeals are not final and there is a right to a writ of error from this court, the matter in controversy exceeding \$1,000, besides costs.

*The District Court of Alaska is a court with the jurisdiction of United States District Courts and general jurisdiction in civil, criminal, equity, and admiralty causes. 4 U. S. Comp. St. § 3564. In that court these suits were brought to recover the taxes in question. As already indicated, the answer in each of the cases raised an issue as to the constitutionality of the statute under which the taxes were levied, and the question which we are now to consider is: Are the judgments of the Circuit Court of Appeals final? In interpreting the sections of the statutes controlling this matter resort must be had to the language of the laws, to the history of the legislation, and the decisions of this court interpreting the Circuit Court of Appeals Act, now substantially carried into the Judicial Code, in so far as the same are applicable.

*The sections of the Judicial Code pertaining to Alaska had their origin in prior federal legislation concerning the territory. The committee on revision of the laws in its report to Congress said of section 134:

"This section is drawn from section 202 of the Criminal Code for Alaska (Act March 3, 1899, c. 429, 30 Stat. 1307), and from sections 504 and 505 of the Civil Code (Act June 6, 1900, c. 786, 31 Stat. 414, 415), and states what was the existing law on the subject. Those portions of the sections which authorize the taking of writs of error and appeals direct to the Supreme Court are revised in section 247. Formerly capital cases went direct to the Supreme Court. Section 247 was so modified as to take from the Supreme Court its jurisdiction of capital cases, the effect being to vest the right to review on a writ of error in the Circuit Court of Appeals. This is accomplished, so far as this section is concerned, by the omission of the words 'other than capital' after the words 'and in all criminal cases.'" Note by Committee on Revision, 5 Fed. Stat. Ann. p. 644, note to section 134.

Sections 504 and 505 of the Alaska Civil Code, as they stood before the enactment of the Judicial Code, are found in 31 Statutes at Large, pp. 414, 415. These sections are as follows:

"Sec. 504. Appeals and writs of error may be taken and prosecuted from the final judgments of the District Court for the district of Alaska or any division thereof direct to the Supreme Court of the United States in the following cases, namely: In prize causes and in all cases which involve the construction or application of the Constitution of the United States, or in

which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question, or in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States; and that in all other cases where the amount involved or the value of the subject-matter exceeds five hundred dollars the United States Circuit Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of error or appeal the final judgments, orders, of the District Court.

"Sec. 505. The judgments of the Circuit Court of Appeals shall be final in all cases coming to it from the District Court, but whenever the judges of the Circuit Court of Appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any case pending before the Circuit Court of Appeals on writ of error to or appeal from the District Court, judges may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the questions and propositions certified to it, and its instruction shall be binding upon the Circuit Court of Appeals."

A reading of these sections shows that two classes of cases were provided for: (1) Prize cases, and cases involving the Constitution and treaties; (2) other cases wherein the amount involved exceeds \$500. In the first class of cases appeal or writ of error was to this court direct. In the second class of cases the writ of error or appeal was to the United States Circuit Court of Appeals for the Ninth Circuit. Under section 505 the judgments of the Circuit Court of Appeals were made final in all cases coming to it from the District Court, with the provision that the Circuit Court of Appeals might certify propositions of law to this court in any cases pending before it upon writs of error or appeals. The like provision as to the finality in the Circuit Court of Appeals was, we think, carried into the Judicial Code in section 134 thereof, and a writ of error or appeal to this court was allowed where the federal Constitution was involved, under the provisions of section 247. In section 134, as in the Alaska Code from which we have quoted, the judgment of the Circuit Court of Appeals was made final "in all such cases"; that is, in cases in which the section permitted appeals or writs of error to the Circuit Court of Appeals.

It is true that section 134 begins by reference to cases other than those which may come to this court, and might be construed to allow appeals to the Circuit Court of Appeals for the Ninth Circuit only in cases which could not be brought directly to this court. But, bearing in mind the sources of the legislation which was enacted into the Judicial Code and the interpretation which this court has placed upon the Circuit Court of Appeals Act of 1891, we are led to the conclusion that it was not the intention of

Congress to give practically two appeals in the class of cases which we are now considering. Under section 5 of the Circuit Court of Appeals Act of 1891 (26 Stat. 826, c. 517), direct appeals might be taken from the District Courts or Circuit Courts to this court in cases which involved the construction or application of the Constitution of the United States, and where such was the only matter involved an appeal could not be taken to the Circuit Court of Appeals. *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318, 36 Sup. Ct. 293, 60 L. Ed. 658. But in cases wherein issues were involved affecting the construction and application of the Constitution, as well as others upon which the case might go to the Circuit Court of Appeals under the Circuit Court of Appeals Act, two appeals were not allowed, and the judgment of the Circuit Court of Appeals was final if the case was taken there, and the jurisdiction originally invoked rested solely upon grounds which by section 6 of the Circuit Court of Appeals Act (section 128, Judicial Code [Comp. St. § 1120]) made its judgment final. *Macfadden v. United States*, 213 U. S. 288, 29 Sup. Ct. 490, 53 L. Ed. 801; *Robinson v. Caldwell*, 165 U. S. 359, 17 Sup. Ct. 343, 41 L. Ed. 745; *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280; *American Sugar Co. v. New Orleans*, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859; *Boise Water Co. v. Boise City* (No. 2), 230 U. S. 98, 33 Sup. Ct. 1003, 57 L. Ed. 1409.

Under the original Alaska Act, cases involving the application of the Constitution were directly reviewable in this court, and those reviewable by the Circuit Court of Appeals for the Ninth Circuit, were by the terms of the act made final in that court. The Judicial Code, which is primarily a codification of former statutes, carried the provisions of these sections into that Code with the change which made all criminal cases, capital as well as others, final in the Circuit Court of Appeals. *Itow v. United States*, 233 U. S. 581, 34 Sup. Ct. 699, 58 L. Ed. 1102.

We think Congress, in enacting the Judicial Code, contemplated no change as to the finality of the judgments of the Circuit Court of Appeals for the Ninth Circuit in cases taken to that court from the District Court of Alaska.

The plaintiff in error might have taken a writ of error from this court to the District Court. Section 247. It did not choose to do so, and as the cases involved issues other than those relating to the Constitution, sued out a writ of error from the Circuit Court of

Appeals. By the terms of section 134 the judgment of that court is made final.

The contention that the effect of this construction is to make the Circuit Court of Appeals a court of final jurisdiction in cases involving questions of the construction and application of the Constitution, is met by the suggestion that this court has ample power under the Judicial Code to review judgments of the Circuit Court of Appeals, made final in that court, by writs of certiorari. Section 240 (Comp. St. § 1217).

Reaching the conclusion that the judgments of the Circuit Court of Appeals were final in these cases, it follows that the writs of error must be

Dismissed.

(249 U. S. 62)

ALASKA SALMON CO. v. TERRITORY OF ALASKA.

(Argued and Submitted Jan. 20, 1919. Decided March 3, 1919.)

No. 151.

Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Action by the Territory of Alaska against the Alaska Salmon Company. To review a judgment of the Circuit Court of Appeals (236 Fed. 62, 149 C. C. A. 272), affirming a judgment of the District Court in favor of the Territory, defendant brings error. Writ dismissed.

Messrs. Warren Gregory, of San Francisco, Cal., E. S. McCord, and W. H. Bogle, both of Seattle, Wash., and George H. Whipple, of San Francisco, Cal., for plaintiff in error.

Mr. George B. Grigsby, of Juneau, Alaska, for the Territory.

Memorandum by direction of the Court, by Mr. Justice DAY.

This action was brought in the District Court of Alaska by the Territory of Alaska to recover license taxes from the Alaska Salmon Company. Judgment was rendered in the District Court in favor of the Territory. To review that judgment a writ of error was taken from the Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of Appeals affirmed the judgment of the District Court. 236 Fed. 62, 149 C. C. A. 272. A petition for a rehearing was filed, and denied. Petition for writ of certiorari to the Circuit Court of Appeals was denied in this court. 242 U. S. 648, 37 Sup. Ct. 242, 61 L. Ed. 544.

The writ of error must be dismissed. The judgment of the Circuit Court of Appeals for the Ninth Circuit was final for the reasons set forth in Nos. 117 and 118, *Alaska Pacific Fisheries v. Territory of Alaska*, 249 U. S. 53, 39 Sup. Ct. 208, 63 L. Ed. 474, just decided.

Dismissed.

(249 U. S. 41)

PANAMA R. CO. v. BOSSE.

(Submitted Jan. 31, 1919. Decided March 3, 1919.)

No. 203.

1. APPEAL AND ERROR ⇐1001(1)—REVIEW—QUESTION OF FACT.

Whether defendant's negligence was the immediate cause of the injury, depending on the view the jury might take of the facts, will not be considered; there being evidence justifying the verdict.

2. COMMON LAW ⇐14—MASTER'S LIABILITY—INJURY TO THIRD PERSONS—RULE IN CANAL ZONE.

The rule of master's liability for negligence of servant in the scope of his employment can be applied to accident in the Canal Zone, in view of change of population and sovereignty; Civ. Code Republic of Panama, arts. 2341, 2347, 2349, not being necessarily inconsistent with the common-law rule; the President's order of March 8, 1904, continuing the law then in force, being merely an embodiment of the rule that a change of sovereignty does not put an end to existing private law; and the ratification of that order by Act Aug. 24, 1912, c. 390, not fastening on the zone a specific interpretation of the former Civil Code, and not overthrowing the principle previously announced by the Supreme Court of the Zone, that it would look to the common law in the construction of the Columbia statutes.

3. DAMAGES ⇐32—PHYSICAL PAIN—CANAL ZONE.

Physical pain being a substantial and appreciable part of the wrong done, allowed for in the customary compensation which the people of the Canal Zone have been awarded in their native courts, was properly considered in fixing damages for personal injury from accident arising in Canal Zone.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Action by Theodore Bosse against the Panama Railroad Company. Judgment for plaintiff was affirmed by the Circuit Court of Appeals (239 Fed. 303, 152 C. C. A. 291), and defendant brings error. Affirmed.

* Messrs. Frank Feuille, of Ancon, Canal Zone, and Jackson H. Ralston and William E. Richardson, both of Washington, D. C., for plaintiff in error.

Messrs. Theodore C. Hinckley, of Panama, Canal Zone, and Joseph W. Bailey, of Washington, D. C., for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an action for personal injuries and consequent suffering alleged to have been caused, on July 3, 1916, by the Railroad Company's chauffeur's negligent driving of a motor omnibus at an excessive rate of speed in

a crowded thoroughfare in the Canal Zone. The suit was brought in the District Court of the Canal Zone. The defendant, the plaintiff in error, demurred to the declaration generally, and also demurred specifically to that part that claimed damages for pain. The demurrer was overruled *and there was a trial, at which, after the evidence was in, the defendant requested the Court to direct a verdict in its favor and, failing that, to instruct the jury that the plaintiff could not recover for physical pain. The instructions were refused, the jury found a verdict for the plaintiff and the judgment was affirmed by the Circuit Court of Appeals. 239 Fed. 303, 152 C. C. A. 291, followed in Panama R. Co. v. Toppin (C. C. A.) 250 Fed. 989.

[1] The main question in the case is whether the liability of master for servant familiar to the common law can be applied to this accident arising in the Canal Zone. Subordinate to that is the one already indicated, whether there can be a recovery for physical pain. There is some slight attempt also to argue that the defendant's negligence was not the immediate cause of the injury, but as that depended upon the view that the jury might take of the facts and as there was evidence justifying the verdict, we shall confine ourselves to the two above-mentioned questions of law.

[2] By the Act of Congress of April 28, 1904, c. 1758, § 2, 33 Stat. 429, temporary powers of government over the Canal Zone were vested in such persons and were to be exercised in such manner as the President should direct. An executive order of the President addressed to the Secretary of War on March 8, 1904, directed that the power of the Isthmian Commission should be exercised under the Secretary's direction. The order contained this passage, "The laws of the land, with which the inhabitants are familiar, and which were in force on February 26, 1904, will continue in force in the canal zone * * * until altered or annulled by the said commission"; with power to the Commission to legislate, subject to approval by the Secretary. This was construed to keep in force the Civil Code of the Republic of Panama, which was translated into English and published by the Isthmian Canal Commission in 1905. By the Act of Congress of August 24, 1912, c. 390, § 2, 37 Stat. 560, 561 (Comp. St. § 10038):

"All laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

On these facts it is argued that the defendant's liability is governed by the Civil Code alone as it would be construed in countries

where the civil law prevails and that so construed the code does not sanction the application of the rule respondeat superior to the present case.

But there are other facts to be taken into account before a decision can be reached. On December 5, 1912, acting under the authority of the before-mentioned Act of August 24, 1912, § 3 (Comp. St. § 10039), the President declared all the land within the limits of the Canal Zone to be necessary for the construction, etc., of the Panama Canal and directed the Chairman of the Isthmian Commission to take possession of it, with provisions for the extinguishment of all adverse claims and titles. It is admitted by the plaintiff in error that the Canal Zone at the present time is peopled only by the employes of the Canal, the Panama Railroad, and the steamship lines and oil companies permitted to do business in the Zone under license. If it be true that the Civil Code would have been construed to exclude the defendant's liability in the present case if the Zone had remained within the jurisdiction of Columbia it does not follow that the liability is no greater as things stand now. The President's order continuing the law then in force was merely the embodiment of the rule that a change of sovereignty does not put an end to existing private law, and the ratification of that order by the Act of August 24, 1912, no more fastened upon the Zone a specific interpretation of the former Civil Code than does a statute adopting the common law fasten upon a territory a specific doctrine of the English Courts. *Wear v. Kansas*, 245 U. S. 154, 157, 38 Sup. Ct. 55, 62 L. Ed. 214, Ann. Cas. 1918B, 586. Probably the general ratification did no more than to supply any power that by accident might have been wanting. *Honolulu Rapid Transit & Land Co. v. Wilder*, 211 U. S. 137, 142, 29 Sup. Ct. 44, 53 L. Ed. 121. In the matter of personal relations and duties of the kind now before us the supposed interpretation would not be a law with which the present "Inhabitants are familiar," in the language of the President's order, but on the contrary an exotic imposition of a rule opposed to the common understanding of men. For whatever may be thought of the unqualified principle that a master must answer for the torts of his servant committed within the scope of his employment, probably there are few rules of the common law so familiar to all, educated and uneducated alike.

As early as 1910 the Supreme Court of the Canal Zone announced that it would look to the common law in the construction of the Columbia statutes. *Kung Ching Chong v. Wing Chong*, 2 Canal Zone Sup. Ct. Rep. 25, 30, and following that announcement, in January, 1913, held that "at least so far as the empresarios of railroads are concerned" the liability of master for servant would be

maintained in the Zone to the same extent as recognized by the common law. *Fitzpatrick v. Panama Railroad Co.*, 2 Canal Zone Sup. Ct. Rep. 111, 121, 128. The principle certainly was not overthrown by the Act of 1912. It is not necessary to dwell upon the drift toward the common law doctrine noticeable in some civil law jurisdictions at least, or to consider how far we should go if the language of the Civil Code were clearer than it is. It is enough that the language is not necessarily inconsistent with the common law rule. By article 2341, in the before-mentioned translation:

"He who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it, without *prejudice to the principal penalty which the law imposes. * * *

By article 2347:

"Every person is liable not only for his own acts for the purpose of the indemnity of damage, but also for the acts of those who may be under his care," illustrating by the cases of father, tutor, husband, etc.

By article 2349:

"Masters shall be responsible for the damage caused by their domestics or servants, on the occasion of a service rendered by the latter to the former; but they shall not be responsible if it be proved or appear that on such occasion the domestics or servants conducted themselves in an improper manner, which the masters had no means to foresee or prevent by the employment of ordinary care and the competent authority; in such case all responsibility for the damage shall fall upon said domestics or servants."

The qualification in this last article may be taken to refer to acts outside the scope of the employment. It cannot refer to all torts, for that would empty the first part of meaning. A master must be taken to foresee that sooner or later a servant driving a motor will be likely to have a collision, which a jury may hold to have been due to his negligence, whatever care has been used in the employment of the man.

We are satisfied that it would be a sacrifice of substance to form if we should reverse a decision, the principle of which has been accepted by all the judges accustomed to deal with the locality, in deference to the possibility that a different interpretation might have been reached if the Civil Code had continued to regulate a native population and to be construed by native Courts. It may be that they would not have distinguished between a negligent act done in the performance of the master's business and a malicious one in which the servant went outside of the scope of that for which he was employed. But we are by no means sure that they would not have decided as we decide. At all events we are of opinion that the ruling was

*47 correct. As we do not rely for our conclusion upon a *Columbia act specially concerning the empresarios of railroads, we do not discuss a suggestion, made only, it is said, to show that the act is inapplicable, to the effect that the charter of the Railroad Company did not grant the power to operate the omnibus line. The company was acting under the authority and direction of General Goethals and we do not understand that the defence of ultra vires is set up or could prevail.

[3] In view of our conclusion upon the main point but little need be said with regard to allowing pain to be considered in fixing the damages. It cannot be said with certainty that the Supreme Court of the Zone was wrong in holding that under the Civil Code damages ought to be allowed for physical pain. *Fitzpatrick v. Panama Railroad Co.*, 2 Canal Zone Sup. Ct. Rep. 111, 129, 130; *McKenzie v. McClintic-Marshall Construction Co.*, 2 Canal Zone Sup. Ct. Rep. 181, 182. Physical pain being a substantial and appreciable part of the wrong done, allowed for in the customary compensation which the people of the Zone have been awarded in their native courts, it properly was allowed here.

Judgment affirmed.

(249 U. S. 164)

CHICAGO GREAT WESTERN R. CO. v. BASHAM.

(Submitted Dec. 19, 1918. Decided March 3, 1919.)

No. 111.

1. COURTS ⇌ 391(1)—CERTIORARI.

Under Judicial Code, § 237, as amended by Act Sept. 6, 1916, § 2 (Comp. St. § 1214), allowing review in cases in which writ of error is not permissible by certiorari or otherwise, the words "or otherwise" add nothing of substance to the thought expressed by the new act.

2. COURTS ⇌ 391(1)—STATE SUPREME COURT—WRIT OF ERROR OR CERTIORARI — SAVING CLAUSE.

A judgment of the Iowa Supreme Court, by its subject-matter not reviewable on writ of error, within Judicial Code, § 237, as amended by Act Sept. 6, 1916, § 2 (Comp. St. § 1214), is not within section 7 of the act of 1916, which saved for six months right under existing law to review judgments entered before act took effect, where, though judgment was entered before act took effect, petition for rehearing was not decided until thereafter.

In Error to the Supreme Court of the State of Iowa.

Action by L. W. Basham, administrator of the estate of John J. Spellman, deceased,

against the Chicago Great Western Railroad Company. From a judgment of the Supreme Court of Iowa, affirming judgment for plaintiff (178 Iowa, 998, 154 N. W. 1019, rehearing denied 157 N. W. 192), defendant brings error; a second petition to rehear having been denied. Writ dismissed.

Messrs. George H. Carr, Fred P. Carr, and O. M. Brockett, all of Des Moines, Iowa, for plaintiff in error.

Messrs. Thomas A. Cheshire and Howard J. Clark, both of Des Moines, Iowa, for defendant in error.

*Mr. Justice PITNEY delivered the opinion of the Court.

[1] This is a writ of error directed to the court of last resort of a state since the taking effect of the Act of September 6, 1916, c. 448, 39 Stat. 726, by the second section of which section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156 [Comp. St. § 1214]), was so amended that the revisory jurisdiction of this Court over the decisions of state courts, exercisable by writ of error, was confined to cases involving the validity of a treaty or statute of, or an authority exercised under the United States, the decision being against their validity, or involving the validity of a statute of, or an authority exercised under a state, on the ground of repugnancy to the Constitution, treaties, or laws of the United States, the decision being in favor of their validity; and by which the final judgment or decree of a state court of last resort based upon a decision adverse to a right or immunity claimed under the Constitution or a statute of the United States, previously reviewable by writ of error, was (with other kinds specified) made reviewable only in case this court, in the exercise of its discretionary authority, should require, "by writ of certiorari or otherwise," that the judgment be certified to it for review. See *Phila. & Reading C. & I. Co. v. Gilbert*, 245 U. S. 162, 38 Sup. Ct. 58, 62 L. Ed. 221; *Ireland v. Woods*, 246 U. S. 323, 328, 38 Sup. Ct. 319, 62 L. Ed. 745. The words "or otherwise" add nothing of substance to the thought expressed by the new act. *Huguley Mfg. Co. v. Gleton Cotton Mills*, 184 U. S. 290, 295, 22 Sup. Ct. 452, 46 L. Ed. 546.

[2] In the case before us the questions raised by the record and assignments of error relate wholly to the alleged denial by the Supreme Court of Iowa of certain rights and immunities asserted by plaintiff in error under the Act of Congress approved April 22, 1908, commonly known as the Employers' Liability Act (35 Stat. 65 c. 149 [Comp. St. §§ 8657-8665]; Act April 5, 1910, 36 Stat. 291, c. 143). Hence, under the new system established by the Act of 1916, the judgment is in the class *of those that are reviewable

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in this court not by writ of error but by writ of certiorari.

By section 7 of the latter act it was provided that the right of review under existing laws in respect of judgments entered before the act took effect (October 6, 1916) should remain unaffected for the period of six months thereafter, but at the end of that time should cease. The present writ of error was applied for within the six-months period—December 19, 1916—and the question whether our jurisdiction is properly invoked by this form of writ depends upon whether the judgment sought to be reviewed was “entered before this act takes effect” within the meaning of section 7.

The action was brought against the railway company in a district court to recover damages for the death of plaintiff's intestate, and a trial by jury resulted in a verdict and judgment for the plaintiff. Defendant appealed to the Supreme Court of Iowa, and that court on November 26, 1915, delivered an opinion for affirmance (*Basham v. Chicago G. W. Ry. Co.*, 178 Iowa, 998, 154 N. W. 1019), and judgment was entered accordingly. A petition for a rehearing was filed, which, after consideration, was overruled April 7, 1916 (*Basham v. Chicago G. W. Ry. Co.*, 178 Iowa, 998, 157 N. W. 192), and a writ of procedendo was awarded. Thereafter a second petition for rehearing was filed, and, having been fully considered, was overruled on December 18, 1916, and judgment to that effect duly entered. The petition for allowance of a writ of error from this court, presented on the following day to the Chief Justice of the Supreme Court of Iowa, averred that the final order and judgment affirming the judgment of the district court was entered by the Supreme Court on the 18th day of December, 1916; and for review of this judgment a writ of error was prayed for and allowed.

We think this was a correct statement of the effective date of the judgment sought to be reviewed.

Section 237, Judicial Code, both before and since the amendment of September 6, 1916, permits of the review by this court only of the final judgment or decree of the highest state court in which a decision in the suit could be had. It is only a judgment marking the conclusion of the course of litigation in the courts of the state that is subjected to our review. Hence, whatever its form of finality, if a judgment be in fact subject to reconsideration and review by the state court of last resort through the medium of a petition for rehearing, and such a petition is presented to and entertained and considered by that court, we must take it that by the practice prevailing in the state the litigation is not brought to a conclusion until this petition is disposed

of, and until then the judgment previously rendered cannot be regarded as a final judgment within the meaning of the act of Congress. We said recently in an analogous case:

“If it were not so a judgment of a state court susceptible of being reviewed by this court would, notwithstanding that duty, be open at the same time to the power of a state court to review and reverse.” *Andrews v. Virginian Ry. Co.*, 248 U. S. 272, 39 Sup. Ct. 101, 63 L. Ed. 236, decided January 7, 1919.

It results that in the present case the judgment of the Supreme Court of Iowa did not become a “final judgment” until December 18, 1916, and by reason of the nature of the only federal questions raised in the record it then was reviewable in this court only by writ of certiorari, because of the above-cited provisions of the act of 1916.

Writ of error dismissed.

(249 U. S. 86)

UNITED STATES v. DOREMUS.

(Submitted Jan. 16, 1919. Decided March 3, 1919.)

No. 367.

POISONS —2—HARRISON NARCOTIC DRUG ACT—VALIDITY.

Harrison Narcotic Drug Act, § 2 (Comp. St. § 6287h), aiming to confine, by imposition of penalties, sales of narcotic drugs to registered dealers, to those dispensing them as physician and those coming to dealers with legitimate prescriptions of physicians, inserted in an act specifically providing for the raising of revenue, by excise tax on such dealers and others named in section 1 (section 6287g), has such relation to facilitating the collection of the revenue as to be within the power of Congress under the authority given it by Const. art. 1, § 8, to impose excise taxes, and is not a mere attempt to exercise a power not delegated, the reserved police power of the states.

The Chief Justice, Mr. Justice McKenna, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissenting.

In Error to the District Court of the United States for the Western District of Texas.

C. T. Doremus was indicted for violating the Harrison Drug Act. Demurrer to indictment was sustained (246 Fed. 958), and the United States brings error. Reversed.

Mr. Assistant Attorney General Porter and Mr. W. C. Herron, of Washington, D. C., for the United States.

*Mr. Justice DAY delivered the opinion of the Court.

Doremus was indicted for violating section

2 of the so-called Harrison Narcotic Drug Act. Act Dec. 17, 1914, c. 1, 38 Stat. 785 (6 U. S. Comp. Stat. 1916, § 6287g). Upon demurrer to the indictment the District Court held the section unconstitutional for the reason that it was not a revenue measure, and was an invasion of the police power reserved to the states. 246 Fed. 958. The case is here under the Criminal Appeals Act March 2, 1907, c. 2564, 34 Stat. 1246 (Comp. St. § 1704).

*90 * There are ten counts in the indictment. The first two were treated by the court below as sufficient to raise the constitutional question decided. The first count in substance charges that: Doremus, a physician, duly registered, and who had paid the tax required by the first section of the act, did unlawfully, fraudulently, and knowingly sell and give away and distribute to one Ameris a certain quantity of heroin, to wit, five hundred one-sixth grain tablets of heroin, a derivative of opium, the sale not being in pursuance of a written order on a form issued on the blank furnished for that purpose by the Commissioner of Internal Revenue.

The second count charges in substance that: Doremus did unlawfully and knowingly sell, dispense and distribute to one Ameris five hundred one-sixth grain tablets of heroin not in the course of the regular professional practice of Doremus and not for the treatment of any disease from which Ameris was suffering but as was well known by Doremus, Ameris was addicted to the use of the drug as a habit, being a person popularly known as a "dope fiend," and that Doremus did sell, dispense, and distribute the drug, heroin, to Ameris for the purpose of gratifying his appetite for the drug as an habitual user thereof.

*91 Section 1 of the act (section 6287g) requires persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or cocoa leaves or any compound, manufacture, salt, derivative or preparation thereof, to register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on. At the time of such registry every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the said drugs is required to pay to the collector a special tax of \$1 per annum. It is made unlawful for any person required to register *under the terms of the act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the said drugs without having registered and paid the special tax provided in the act.

Section 2 (section 6287h) provides in part:

"It shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be

issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the state, territorial, district, municipal, and insular officials named in section five of this act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for a period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this section shall apply—

"(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon regularly registered under this act in the course of his professional practice only: Provided, that such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date and the *name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this act. *92

"(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this act: Provided, however, that such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: And provided further, that such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned."

It is made unlawful for any person to obtain the drugs by means of the order forms for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business in said drugs, or the legitimate practice of his profession.

It is apparent that the section makes sales of these drugs unlawful except to persons who have the order forms issued by the Commissioner of Internal Revenue, and the order is required to be preserved for two years in such way as to be readily accessible to official inspection. But it is not to apply (a) to physicians, etc., dispensing and distributing the drug to patients in the course of profes-

sional practice, the physician to keep a record thereof, except in the case of personal attendance upon a patient; and (b) to the sale, dispensing, or distributing of the drugs by a dealer upon a prescription issued by a physician, etc., *registered under the act. Other exceptions follow which are unnecessary to the consideration of this case.

Section 9 (section 62870) inflicts a fine or imprisonment, or both, for violation of the act.

This statute purports to be passed under the authority of the Constitution, article 1, § 8, which gives the Congress power "To lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

The only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared it cannot add others. Subject to such limitation Congress may select the subjects of taxation, and may exercise the power conferred at its discretion. *License Tax Cases*, 5 Wall. 462, 471, 18 L. Ed. 497. Of course Congress may not in the exercise of federal power exert authority wholly reserved to the states. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. *Veazie Bank v. Fenno*, 8 Wall. 533, 541, 19 L. Ed. 482, in which case this court sustained a tax on a state bank issue of circulating notes. *McCray v. United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561, where the power was thoroughly considered, and an act levying a special tax upon oleomargarine artificially colored was sustained. And see *Flint v. Stone Tracy Co.*, 220 U. S. 107, 147, 153, 156, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, and cases cited.

Nor is it sufficient to invalidate the taxing authority *given to the Congress by the Constitution that the same business may be regulated by the police power of the state. *License Tax Cases*, 5 Wall. 462, 18 L. Ed. 497, supra.

The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it. In *re Kollock*, 165 U. S. 526, 536, 17 Sup. Ct. 444, 41 L. Ed. 813.

The legislation under consideration was before us in a case concerning section 8 of the act, and in the course of the decision we said:

"It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right." *United States v. Jin Fuey Moy*, 241 U. S. 394, 402, 36 Sup. Ct. 658, 659, 60 L. Ed. 1061, Ann. Cas. 1917D, 854.

Considering the full power of Congress over excise taxation the decisive question here is: Have the provisions in question any relation to the raising of revenue? That Congress might levy an excise tax upon such dealers, and others who are named in section 1 of the act, cannot be successfully disputed. The provisions of section 2, to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law. This case well illustrates the possibility which may have induced Congress to insert *the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being as the indictment charges, an addict may not have used this great number of doses for himself. He might sell some to others without paying the tax, at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue.

We cannot agree with the contention that the provisions of section 2, controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue, as we should be obliged to do if we were to declare this act beyond the power of Congress acting under its constitutional authority to impose excise taxes. It follows that the judgment of the District Court must be reversed. Reversed.

The CHIEF JUSTICE dissents because he is of opinion that the court below correctly held the act of Congress, in so far as it embraced the matters complained of, to be beyond the constitutional power of Congress to

enact because to such extent the statute was a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the states.

Mr. Justice McKENNA, and Mr. Justice VAN DEVANTER and Mr. Justice McREYNOLDS concur in this dissent.

(249 U. S. 96)

WEBB et al. v. UNITED STATES.

(Argued Jan. 16, 1919. Decided March 3, 1919.)

No. 370.

1. POISONS —2—HARRISON DRUG ACT—SALES PROHIBITED.

The Harrison Narcotic Drug Act, § 2 (Comp. St. § 6287h), first sentence, prohibits retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor, and who cannot obtain one because not of the class to which such blanks are allowed to be issued.

2. POISONS —2—HARRISON ACT—CONDITIONS OF SALES—CONSTITUTIONALITY.

Harrison Narcotic Drug Act, § 2 (Comp. St. § 6287h), first sentence, construed as prohibiting retail sales by druggists of morphine to a person not having a prescription or order blank held not unconstitutional.

3. POISONS —2—HARRISON ACT—"PHYSICIAN'S PRESCRIPTION."

A physician's order for morphine issued to an habitual user, not in the course of professional treatment for a cure, but to keep him comfortable by maintaining his customary use, is not a "physician's prescription" within Harrison Narcotic Drug Act, § 2 (Comp. St. § 6287h), exception(b).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Prescription.]

The Chief Justice, Mr. Justice McKenna, Mr. Justice Van Devanter, and Mr. Justice McReynolds dissenting.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

W. S. Webb and Jacob Goldbaum were convicted of violation of the Harrison Drug Act, and took the case to the Circuit Court of Appeals, which certifies questions. Questions answered.

Messrs. Ralph Davis and Ike W. Crabtree, both of Memphis, Tenn., for Webb and another.

*Mr. Assistant Attorney General Porter, for the United States.

Mr. Justice DAY delivered the opinion of the Court.

This case involves the provisions of the Harrison Narcotic Drug Act (Act Dec. 17, 1914, c. 1, 38 Stat. 785; Comp. St. §§ 6287g-6287q), considered in *United States v. Doremus* (No. 367, just decided) 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493. The case comes here upon a certificate from the Circuit Court of Appeals for the Sixth Circuit. From the certificate it appears that Webb and Goldbaum were convicted and sentenced in the District Court of the United States for the Western District of Tennessee on a charge of conspiracy (section 37, Penal Code [Act March 4, 1909, c. 321, 35 Stat. 1096; Comp. St. § 10201]) to violate the Harrison Narcotic Law. While the certificate states that the indictment is infartificial, it is certified to be sufficient to support a prosecution upon the theory that Webb and Goldbaum intended to have the latter violate the law by using the order blanks (section 1 of the act) for a prohibited purpose.

The certificate states:

"If section 2, rightly construed, forbids sales to a non-registrable user, and if such prohibition is constitutional, we next meet the question whether such orders as Webb gave to applicants are 'prescriptions,' within the meaning of exception (b) in section 2.

"We conclude that the case cannot be disposed of without determining the construction and perhaps the constitutionality of the law in certain particulars, and for the purpose of certification, we state the facts as follows—assuming, as for this purpose we must do, that whatever the evidence tended to show, in aid of the prosecution, must be taken as a fact:

"Webb was a practicing physician and Goldbaum a retail druggist, in Memphis. It was Webb's regular custom and practice to prescribe morphine for habitual users, upon their application to him therefor. He furnished these 'prescriptions,' not after consideration of the applicant's individual case, and in such quantities and with such direction as, in his judgment, would tend to cure the habit, or as might be necessary or helpful in an attempt to break the habit, but with such consideration and rather in such quantities as the applicant desired for the sake of continuing his accustomed use. Goldbaum was familiar with such practice and habitually filled such prescriptions. Webb had duly registered and paid the special tax as required by section 1 of the act. Goldbaum had also registered and paid such tax and kept all records required by the law. Goldbaum had been provided with the blank forms contemplated by section 2 of the act for use in ordering morphine, and, by the use of such blank order forms, had obtained from the wholesalers, in Memphis, a stock of morphine. It had been agreed and understood between Webb and Goldbaum that Goldbaum should, by using such order forms, procure a stock of morphine, which morphine he should and would sell to those who desired to purchase and who came provided with Webb's so-called prescriptions. It was the

intent of Webb and Goldbaum that morphine should thus be furnished to the habitual users thereof by Goldbaum and without any physician's prescription issued in the course of a good faith attempt to cure the morphine habit. In order that these facts may have their true color, it should also be stated that within a period of eleven months Goldbaum purchased from wholesalers, in Memphis, thirty times as much morphine as was bought by the average retail druggist doing a larger general business, and he sold narcotic drugs in 6,500 instances; that Webb regularly charged fifty cents for each so-called prescription, and within this period had furnished, and Goldbaum had filled, over four thousand such prescriptions; and that one Rabens, a user of the *drug, came from another state and applied to Webb for morphine and was given at one time ten so-called prescriptions for one drachm each, which prescriptions were filled at one time by Goldbaum upon Rabens' presentation, although each was made out in a separate and fictitious name."

Upon these facts the Circuit Court of Appeals propounds to this court three questions:

1. "Does the first sentence of section 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor and who cannot obtain an order blank because not of the class to which such blanks are allowed to be issued?"

2. "If the answer to question one is in the affirmative, does this construction make unconstitutional the prohibition of such sale?"

3. "If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of section 2?"

"If question one is answered in the negative, or question two in the affirmative, no answer to question three will be necessary; and if question three is answered in the affirmative, questions one and two become immaterial."

[1-3] What we have said of the construction and purpose of the act in No. 367 plainly requires that question one should be answered in the affirmative. Question two should be answered in the negative for the reasons stated in the opinion in No. 367. As to question three—to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that *no discussion of the subject is required. That question should be answered in the negative.

Answers directed accordingly.

For the reasons which prevented him from assenting in No. 367, the Chief Justice also dissents in this case.

Mr. Justice McKENNA, Mr. Justice VAN DEVANTER, and Mr. Justice McREYNOLDS concur in the dissent.

(249 U. S. 34.)

G. S. NICHOLAS & CO. et al. v. UNITED STATES.

ALEX. D. SHAW & CO. et al. v. SAME.

(Argued Jan. 14, 1919. Decided March 3, 1919.) Nos. 62, 63.

CUSTOMS DUTIES — 21 — ADDITIONAL DUTY — "GRANT" BY FOREIGN COUNTRY ON EXPORTATION.

The "allowance" of three pence or five pence made by British revenue legislation on each gallon of certain spirits, on the exportation thereof, is a "grant" bestowed, within Tariff Act, § 4, par. E (Comp. St. § 5296), providing that, whenever any country shall pay or bestow, directly or indirectly, any bounty or grant on the exportation of any article, there shall be levied and paid on it, on importation, in addition to the regular duty, an additional one, equal to the net amount of such bounty or grant, however it be paid or bestowed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grant.]

On Writs of Certiorari to the United States Court of Customs Appeals.

Protests of G. S. Nicholas & Co. and others and of Alex. D. Shaw & Co. and others against imposition of additional duties on importations of spirits were overruled by the Board of General Appraisers, which decision was affirmed by the Court of Customs Appeals (7 Ct. Cust. Appeals, 97), and they bring certiorari. Affirmed.

Mr. W. P. Preble, of New York City, for Alex. D. Shaw & Co. and others.

Mr. Albert H. Washburn, of New York City, for G. S. Nicholas & Co. and others.

Mr. Assistant Attorney General Hanson, for the United States.

* Mr. Justice McKENNA delivered the opinion of the Court.

Writs of certiorari to review a judgment of the Court of Customs Appeals, affirming a decision by the Board of General Appraisers, which overruled the protests of petitioners against the action of collectors of customs at Boston and New York assessing additional or countervailing duties on whisky and gin imported from Great Britain. 7 Ct. Cust. Appeals, 97.

Paragraph E of section 4 of the Tariff Act of 1913 (38 Stat. 114 [Comp. St. § 5296]) reads as follows:

"E. That whenever any country, dependency, colony, province or other political subdivision of

government shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, colony, province or other political subdivision of government, and such article of merchandise is dutiable under the provisions of this act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by manufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties."

*36 The question in the case is the legality of the counter*vailing duty. It was determined and declared to be necessary under paragraph E by reason of the allowance under the British legislation of three pence upon plain British spirits and five pence upon British compounded spirits. 23 & 24 Vict. c. 129.

The case is not of broad compass. The act of Parliament referred to above levies a duty upon every gallon of spirits of a certain strength which after certain designated dates were or should be distilled within the United Kingdom, or which, having been distilled therein, were on the designated dates in the stock or possession of any distiller or in any duty-free warehouse, and which after the named dates should be taken out for consumption within the United Kingdom.

It is provided that "in consideration of the loss and hindrance caused by excise regulation in the distillation and rectification of spirits in the United Kingdom" there shall be paid "to any distiller or proprietor of such spirits on the exportation thereof from a duty-free warehouse or on depositing the same in a customs warehouse * * * the allowance of two pence per gallon * * * and to any licensed rectifier who * * * has or shall have deposited in a customs warehouse spirits distilled and rectified in the United Kingdom the following allowances: * * * Three pence per gallon, and on spirits of the nature of spirits of wine an allowance of two pence per gallon. * * *"

Subsequent acts of Parliament repeat the provisions for allowance upon exported spirits, adding some details, and are replete with the regulations and provisions which the legislators thought or experience had demonstrated were necessary. And there is quite

an enumeration of warehouses and their purposes which, however necessary from the standpoint of the law, happily is not necessary to our consideration of the questions in the case, although counsel describe them and use them in display of the options which *it is contended the law gives to a distiller—that is, to export, warehouse, or sell the spirits or use them under conditions which would or would not result in an allowance. We do not find it necessary to go into such confusing considerations. The question in the case is more direct, and is whether the three pence and five pence paid on account of export from the United Kingdom is the bestowal "directly or indirectly" of a "bounty or grant upon the exportation of any article or merchandise from such country," to use the words of paragraph E.

Looking only at the paragraph and judging from the first impressions of its words, the problem presented would seem to be without difficulty. There is paid to an exporter of spirits from the United Kingdom the sum of three or five pence a gallon, as the case may be, and the instant conclusion is that the sale of spirits to other countries is relieved from a burden that their sale in the United Kingdom must bear. There is a benefit, therefore, in exportation, an inducement to seek the foreign market. And thus it would seem, if we regard the substance of things, that the condition of the application of paragraph E obtains.

Counsel, however, resist this view in somewhat lengthy and minute arguments, only the basic propositions of which we can give. They dwell especially upon the purpose of the British act and the differences, not only actual, as they contend, but recognized in the administrative and legislative parlance of this country, between the words "allowance," "bounty," "drawback" and "grant." In support of the first contention—that is, the purpose of the British act—it is urged that the allowance provided for is not a "bounty" upon exportation, but "compensation" to the distiller and rectifier for costs due to excise restrictions. In other words, that the allowance is not a premium on exportation, but the remission or reimbursement of the expense of manufacture to accommodate the "peculiar conditions and necessities" of the British fiscal policy. In confirmation of this view it is said that not all British spirits when exported get the allowance, but only those that are warehoused in a certain specified way, and that, besides, the allowance is also paid when certain spirits go into domestic consumption. And the British ambassador is quoted as saying of the allowances that they "do not even compensate the loss they are intended to reimburse, as is abundantly proved."

It is hence asserted that the condition of the application of paragraph E—that is, a premium bestowed on an exportation from

another country—is absent and that, besides, the paragraph is of limited scope, the word bounty not being used in its most comprehensive sense, and that there is a wide difference between an “indirect bounty” and “indirectly paying a bounty,” and that for an indirect bounty the paragraph does not provide. Counsel attempt to justify the distinction and illustrate it by the citation of the example of many acts of Congress by which “indirect” bounties were legislated and also by the comments of legislators in discussion of the purpose and effect of the use of the words “allowances,” and “rebates,” and “drawbacks.” And *United States v. Passavant*, 169 U. S. 16, 23, 18 Sup. Ct. 219, 42 L. Ed. 644, is quoted for a distinction between “the word ‘bounty’ as differentiated from the word ‘drawback’ in tariff parlance” and “the shades of meaning which Congress had in mind when enacting paragraph E and provisions in *pari materia*.” In further support of their distinctions counsel cite the executive practice of this country, and adduce the decisions of this and other courts to show that such practice is a useful resolvent of the meaning of words and of legislative intention.

*329 We appreciate the strength of the argument, but the circumstances are but aids to persuasion; they do not compel it. Every new statute is individual and presents its own problem. That before us does, and, as we have *said, looking at its words alone, has no uncertainty of purpose. Whenever any country “shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise,” there shall be levied and paid upon it, upon importation, in addition to the regular duty, an additional one “equal to the net amount of such bounty or grant, however the same be paid or bestowed.” The statute was addressed to a condition and its words must be considered as intending to define it, and all of them—“grant” as well as “bounty”—must be given effect. If the word “bounty” has a limited sense the word “grant” has not. A word of broader significance than “grant” could not have been used. Like its synonyms “give” and “bestow,” it expresses a concession, the conferring of something by one person upon another. And if the “something” be conferred by a country “upon the exportation of any article or merchandise” a countervailing duty is required by paragraph E.

There can be, therefore, but one inquiry: Was something—bounty or grant—paid or bestowed upon the exportation of spirits? Counsel’s answer we have given; ours is different. They dwell upon the meaning of one word and the necessary adjustments of the British revenue legislation; we regard all of the words, the fact of payment and the event—the fact that the grant is made at the time of exportation and only upon ex-

portation (of course, we mean of the spirits destined for the United States)—the event, that the spirits may be sold cheaper in the United States than in the United Kingdom, and necessarily there may be that aid to their competitive power. We do not think that it is a repelling answer to say that they are sold here at the same price that they would be sold for in the United Kingdom if the latter imposed no tax, that is, sold here as if they had not been taxed at all, and therefore sold not below their natural cost. This is mere speculation of the effects of a different situation. We have the *fact of spirits able to be sold cheaper in the United States than in the place of their production, and this the result of an act of government because of the destination of the spirits being a foreign market. For that situation paragraph E was intended to provide. What legislation some other situation might require or receive we are not called upon to conjecture.

Our conclusion is supported, we think, by *United States v. Passavant*, supra, a case from which counsel have adduced some argument. An importation of goods from Germany was the subject of the decision. That country imposed a tax upon merchandise when sold by the manufacturer thereof for consumption or sale in the markets of Germany. Upon exportation of the merchandise the tax was remitted. The remission was called ‘bonification of tax’ as distinguished from being refunded as a rebate. The merchandise could be purchased in bond for exportation in the principal markets of Germany at the net invoice price and without paying the so-called German duty. The merchandise with which the case was concerned was so purchased.

Upon importation of the merchandise it was determined by the collector and customs appraiser that its value was the net invoice value with the German duty added. This ruling was contested by the importer and the Board of General Appraisers reversed it. The Circuit Court, to which the case had been carried, affirmed the decision of the Board of General Appraisers. Upon appeal to the Circuit Court of Appeals that court asked of this court whether the German duty had been lawfully included by the collector and customs appraiser in their estimate of the dutiable value. We answered in the affirmative, and said, through Mr. Chief Justice Fuller:

That “the laws of this country in the assessment of duties proceed upon the market value in the exporting country and not upon the market value less such remission or ameliora*tion as that country chooses to allow in accordance with its own views of public policy.”

And this conclusion was reached upon the effect of the remitted tax and not upon the word used to designate it. In other words,

the decision was not determined by a consideration of costs of manufacture or their reimbursement nor by the requirements of the policies of the exporting country. It regarded the fact and effect of the remitted excise.

Downs v. United States, 187 U. S. 496, 23 Sup. Ct. 222, 47 L. Ed. 275, is a like example, and direct and indirect bounties are illustrated. As an instance of the former the amount paid upon the production of sugar under the act of Congress of October 1, 1890 (26 Stat. 617, c. 1244) is adduced, and also the "draw-back" (the word of the statute is used) upon certain articles exported; as instances of the latter, that is, of indirect bounties, the remission of taxes upon the exportation of articles which are subject to a tax when sold or consumed in the country of their production is given, and, as another example, the laws permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden.

We consider further discussion unnecessary and the judgment of the Court of Customs Appeals is
Affirmed.

(249 U. S. 119)

NORTH PAC. S. S. CO. v. HALL BROS.
MARINE RY. & SHIPBUILDING CO.

(Argued and Submitted Nov. 18 and 19, 1918.
Decided March 3, 1919.)

No. 53.

1. ADMIRALTY ⚓10, 18—JURISDICTION—TORT AND CONTRACT.

While civil jurisdiction of admiralty in matters of tort depends upon locality, whether the act was committed upon navigable waters; in matters of contract it depends upon the subject-matter, the nature and character of the contract.

2. ADMIRALTY ⚓27—JURISDICTION—IMPLIED HYPOTHECATION.

Neither in jurisdiction nor in method of procedure are the admiralty courts of the United States dependent alone upon the theory of implied hypothecation; it being established that in a civil cause of maritime origin, involving personal responsibility, libellant may proceed in personam, if respondent is within reach of process.

3. ADMIRALTY ⚓11—"MARITIME CONTRACT"—CONTRACT TO BUILD SHIP OR FURNISH MATERIAL.

Contract for building ship or supplying materials for her construction is not a "maritime contract."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maritime Contract.]

4. ADMIRALTY ⚓27—JURISDICTION—CONTRACT TO REPAIR SHIP—CONSTITUTION AND STATUTES.

Under Const. art. 3, § 2, extending judicial power of United States to all cases of admiralty jurisdiction, and legislation enacted to carry it into execution (Act Sept. 24, 1789, c. 20, § 9, 1 Stat. 73, 77; Rev. St. § 563 (8); Judicial Code § 24 (3) [Comp. St. § 991]), entire contract, contemplating performance of service and furnishing of necessary materials for repairs of steamship to make her fit for Alaskan voyage, held within maritime jurisdiction, so that libel in personam against owner would lie, though repairs in which libellant was to furnish work and materials, and use of marine railway and other equipment, would have been under superintendence of owner.

Appeal from the District Court of the United States for the Northern District of California.

Libel by the Hall Bros. Marine Railway & Shipbuilding Company against the North Pacific Steamship Company, which filed answer and cross-libel, resulting in decree for the Shipbuilding Company and dismissal of the cross-libel; the Steamship Company filing motion to arrest and vacate the decree and to dismiss the cause for want of jurisdiction, which motion was denied, and the Steamship Company appeals. Decree affirmed.

Messrs. Jackson H. Ralston and William E. Richardson, both of Washington, D. C., for appellant.

Messrs. Warren Gregory, Allen L. Chickerling, and George H. Whipple, all of San Francisco, Cal., for appellee.

*Mr. Justice PITNEY delivered the opinion of the Court.

This is a direct appeal under section 238, Judicial Code (Act March 3, 1911, 36 Stat. 1087, 1157, c. 231 [Comp. St. § 1215]), involving only the question whether the cause was within the admiralty jurisdiction of a District Court of the United States.

Both parties are corporations of the state of California. Appellee, which for convenience may be referred to as the "Shipbuilding Company," filed its libel in personam against appellant, which we may call the "Steamship Company," to recover a balance claimed to be due for certain work and labor done, services rendered, and materials furnished in and about the repairing of the steamship Yucatan. The Steamship Company filed an answer denying material averments of the libel, and a cross-libel setting up a claim for damages for delay in the making of the repairs. The cause having been heard upon the pleadings and proofs, there was a decree for a recovery in favor of the Shipbuilding Company and a dismissal of the cross-libel. After this the Steamship Com-

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pany filed a motion to arrest and vacate the decree and to dismiss the cause for want of jurisdiction. The motion was submitted to the court upon the pleadings, the proofs taken upon the hearings of the merits, and some slight additional proof. It was denied, and the present appeal followed.

The facts were these: In the month of May, 1911, the Steamship Company was the owner of the American steamer Yucatan, which then lay moored or tied up at *dock upon the waters of Puget Sound at Seattle, in the state of Washington. The vessel, which was of steel construction, was in need of extensive repairs. She had been wrecked, and had remained submerged for a long time; ice floes had torn away the upper decks, and some of her bottom plates also needed to be replaced. She was under charter for an Alaskan voyage, to be commenced as soon as the repairs could be completed. The Shipbuilding Company was the owner of a shipyard, marine railway, machine shops, and other equipment for building and repairing ships, situate upon and adjacent to the navigable waters of Puget Sound at Winslow, in the same state, and had in its employ numerous mechanics and laborers. Under these circumstances it was agreed, between the parties that the Shipbuilding Company should tow the vessel from where she lay to the shipyard, haul her out as required upon the marine railway to a position on dry land adjacent to the machine shop—the place being known as the “dry dock,” and the hauling out being described as “docking”—and should furnish mechanics, laborers, and foremen as needed, who were to work with other men already in the employ of the Steamship Company, and under its superintendence; and the Shipbuilding Company was also to furnish plates and other materials needed in the repairs, and the use of air compressors, steam hammers, riveters, boring machines, lathes, blacksmith forge, and the usual and necessary tools for the use of such machines. At the time the contract was made, another vessel (the Archer) was upon the dry dock, and it was uncertain how soon she could be returned to the water. It was understood that the Yucatan should be hauled out as soon as the Archer came off, should remain upon the dry dock only during such part of the work as required her to be in that position, and at other times should lie in the water alongside the plant. For the services to be performed and the materials and equipment *to be furnished, the Shipbuilding Company was to receive stated prices, thus: For labor of all classes, the actual rate of wages paid to the men plus 15 per cent.; for use of tug and scow, a stated sum per hour; for hauling out the vessel and the use of the marine railway, a stated sum for the first 24 hours, and a specified rate per day for 6 “lay days” immediately following the hauling out; for

each working day thereafter, another rate; for vessel lying alongside the dock for repairs, no charge; for the running of air compressors, a certain charge per hour; for the use and operation of other machines, certain rates specified; and for materials supplied, invoice prices and cost of freight to plant, with 10 per cent. additional.

The vessel was docked and repaired in the manner contemplated by the agreement; she was brought to the shipyard on the 27th of May, and lay in the water alongside of the dock there until the 17th of June, during which time upper decks and beams were put in and other work of a character that could be done as well while she was afloat as in the dry dock. On June 17th she was hauled out and remained in dry dock for about two weeks while her bottom plates were renewed. During the same period the propeller was removed to permit of an examination of the tail shaft, and as the shaft showed deterioration a new one was ordered to be supplied by a concern in San Francisco. Upon completion of the work upon the bottom plates, and on the 5th of July, the vessel was returned to the water and lay there for about two weeks awaiting arrival of the new tail shaft. When this arrived the vessel was again hauled out, the tail shaft and propeller were fitted, and the remaining repairs completed. Libellant's claim was for work and labor performed, services rendered, and materials furnished under the circumstances mentioned, and was based upon the agreed scale of compensation.

The question in dispute is whether a claim thus grounded *is the subject of admiralty jurisdiction; appellant's contention being that the contract, or at least an essential part of it, was for the use by appellant of libellant's marine railway, shipyard, equipment, and laborers in such manner as appellant might choose to employ them, and that it called for the performance of no maritime service by libellant.

The Constitution (article 3, § 2) extends the judicial power of the United States to “all cases of admiralty and maritime jurisdiction”; and the legislation enacted by Congress for carrying the power into execution has been equally extensive. Act Sept. 24, 1789, c. 20, § 9, 1 Stat. 73, 77; Rev. Stat. § 563 (8); Judicial Code, § 24 (3); 36 Stat. 1087, 1091, c. 231 (Comp. St. § 991). In defining the bounds of the civil jurisdiction, this court from an early day has rejected those trammels that arose from the restrictive statutes and judicial prohibitions of England. *Waring v. Clarke*, 5 How. 441, 457, 459, 12 L. Ed. 226; *Insurance Co. v. Dunham*, 11 Wall. 1, 24, 20 L. Ed. 90; *The Lottawanna*, 21 Wall. 558, 576, 22 L. Ed. 654.

[1] It must be taken to be the settled law of this court that while the civil jurisdiction of the admiralty in matters of tort de

pend upon locality, whether the act was committed upon navigable waters, in matter of contract it depends upon the subject-matter, the nature and character of the contract, and that the English rule, which conceded jurisdiction, with a few exceptions, only to contracts made and to be executed upon the navigable waters, is inadmissible; the true criterion being the nature of the contract, as to whether it have reference to maritime service or maritime transactions. *People's Ferry Co. v. Beers*, 20 How. 393, 401, 15 L. Ed. 961; *Phila. W. & B. R. Co. v. Phila., etc.*, *Steam Towboat Co.*, 23 How. 209, 215, 16 L. Ed. 433; *Insurance Co. v. Dunham*, 11 Wall. 1, 26, 20 L. Ed. 90; *The Eclipse*, 135 U. S. 599, 608, 10 Sup. Ct. 873, 34 L. Ed. 269.

In some of the earlier cases the influence of the English *rule may be discerned, in that the question whether a contract was to be performed upon the navigable waters was referred to as pertinent to the question whether the contract was of a maritime nature (*The Thomas Jefferson*, 10 Wheat. 428, 429, 6 L. Ed. 358; *The Planter* [*Peyroux v. Howard*] 7 Pet. 324, 341, 8 L. Ed. 700; *Steamboat Orleans v. Phoebus*, 11 Pet. 175, 183, 9 L. Ed. 677; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 392, 12 L. Ed. 465); but a careful examination of the opinions shows that the place of performance was dealt with as an evidential circumstance bearing with more or less weight upon the fundamental question of the nature of the contract. If they go beyond this, they must be deemed to be overruled by *Insurance Co. v. Dunham*, supra.

[2] Neither in jurisdiction nor in the method of procedure are our admiralty courts dependent alone upon the theory of implied hypothecation; it being established that in a civil cause of maritime origin involving a personal responsibility the libellant may proceed in personam if the respondent is within reach of process. *The General Smith*, 4 Wheat. 438, 443, 4 L. Ed. 609; *Manro v. Almeida*, 10 Wheat. 473, 486, 6 L. Ed. 369; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 390, 12 L. Ed. 465; *Morewood v. Enequist*, 23 How. 491, 16 L. Ed. 516; *The Belfast*, 7 Wall. 624, 644, 19 L. Ed. 266; *The Kalorama*, 10 Wall. 204, 210, 19 L. Ed. 941; *The Sabine*, 101 U. S. 384, 386, 25 L. Ed. 982; *In re Louisville Underwriters*, 134 U. S. 488, 490, 10 Sup. Ct. 587, 33 L. Ed. 991; *Workman v. New York City*, 179 U. S. 552, 573, 21 Sup. Ct. 212, 45 L. Ed. 314; *Ex parte Indiana Transportation Co.*, 244 U. S. 456, 37 Sup. Ct. 717, 61 L. Ed. 1253.

That a materialman furnishing supplies or repairs may proceed in admiralty either against the ship in rem or against the master or owner in personam is recognized by the twelfth rule in admiralty (29 Sup. Ct. xi) adopted in its present form in the year 1872 (13 Wall. xiv, 20 L. Ed. 922) after a

long controversy that began with *The General Smith*, 4 Wheat. 438, 4 L. Ed. 609, and ended with *The Lottawanna*, 21 Wall. 558, 579, 581, 22 L. Ed. 654. See *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296.

[3] It is settled that a contract for building a ship or supplying materials for her construction is not a maritime contract. *People's Ferry Co. v. Beers*, 20 How. 393, 15 L. Ed. 961; *Roach v. Chapman*, 22 How. 129, 16 L. Ed. 294; *Edwards v. Elliott*, 21 Wall. 532, 553, 557, 22 L. Ed. 487; *The Winnebago*, 205 U. S. 354, 363, 27 Sup. Ct. 509, 51 L. Ed. 836. In the case in 20 How. 402, 15 L. Ed. 961, the court said:

"So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land, to be performed on land."

But the true basis for the distinction between the construction and the repair of a ship, for purposes of the admiralty jurisdiction, is to be found in the fact that the structure does not become a ship, in the legal sense, until it is completed and launched.

"A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject * * * to mechanics' liens created by state law enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction." *Tucker v. Alexandroff*, 183 U. S. 424, 438, 22 Sup. Ct. 195, 46 L. Ed. 264.

In *The Robert W. Parsons*, 191 U. S. 17, 33, 34, 24 Sup. Ct. 8, 13 (48 L. Ed. 73), it was held that the admiralty jurisdiction extended to an action for repairs put upon a vessel while in dry dock; but the question whether this would apply to a vessel hauled up on land for repairs was reserved, the language of the court, by Mr. Justice Brown, being:

"Had the vessel been hauled up by ways upon the land and there repaired a different question might have been presented, as to which we express no opinion; but as all serious repairs upon the hulls of vessels are made in dry dock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs."

*In *The Steamship Jefferson*, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907, it was held that the admiralty jurisdiction extends to a claim for salvage service rendered to a vessel while undergoing repairs in a dry dock.

[4] What we have said sufficiently indicates the decision that should be reached in the case at bar. The contract as made con-

templated the performance of services and the furnishing of the necessary materials for the repairs of the steamship Yucatan. It was an entire contract, intended to take the ship as she was and to discharge her only when completely repaired and fit for the Alaskan voyage. It did not contemplate, as is contended by appellant, either a lease, or a contract for use in the nature of a lease, of the libellant's marine railway and machine shop. The use of these was but incidental; the vessel being hauled out, when consistent with the progress of other work of the Ship-building Company, for the purpose of exposing the ship's bottom to permit of the removal and replacement of the broken plates and the examination of the propeller and tail shaft. In *The Planter* (Peyroux v. Howard), 7 Pet. 324, 327, 341, 8 L. Ed. 700, the vessel, requiring repairs below the water line as well as above, was to be and in fact was hauled up out of the water; and it was held that the contract for materials furnished and work performed in repairing her under these circumstances was a maritime contract. We think the same rule must be applied to the case before us; that the doubt intimated in *The Robert W. Parsons*, 191 U. S. 17, 33, 34, 24 Sup. Ct. 8, 48 L. Ed. 73, must be laid aside; and that there is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all.

This is recognized by the Act of Congress of June 23, 1910 (chapter 373, 36 Stat. 604 [Comp. St. § 7783]), which declares that "any person furnishing repairs, supplies, or other necessities, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic," upon the order of a proper person, shall have a maritime lien upon the vessel.

The principle was recognized long ago by Mr. Justice Nelson in a case decided at the circuit, *Wortman v. Griffith* (1856) 3 Blatchf. 528, 30 Fed. Cas. 648, No. 18057, which was a libel in personam to recover compensation for services rendered in repairing a steamboat. Libellant was the owner of a shipyard with apparatus consisting of a railway cradle and other fixtures and implements used for the purpose of hauling vessels out of the water and sustaining them while being repaired. Certain rates of compensation were charged for hauling the vessel upon the ways, and a per diem charge for the time occupied while she was under repair, in cases where the owner of the yard and apparatus was not employed to do the work but the repairs were made by other shipmasters, as was done in that case. The owner of the yard and appa-

ratus, together with his employes, superintended and conducted the operation of raising and lowering the vessel and also of fixing her upon the ways preparatory to the repairs, a service requiring skill and experience and essential to the process of repair. Mr. Justice Nelson held there was no substantial distinction between such a case and the case where the shipmaster was employed to make the repairs; and that the admiralty jurisdiction must be sustained.

Nor is the present case to be distinguished upon the ground that the repairs in which libellant was to furnish work and materials and the use of a marine railway and other equipment were to be done under the superintendence of the Steamship Company. This affected the quantum of the services and the extent of the responsibility, but not the essential character of the services of the nature of the contract, which, in our opinion, were maritime.

Decree affirmed.

(249 U. S. 72)

COMPANIA GENERAL DE TABACOS DE FILIPINAS v. ALHAMBRA CIGAR & CIGARETTE MFG. CO.

(Submitted Jan. 22, 1919. Decided March 3, 1919.)

No. 180.

COURTS 387(2) — PHILIPPINE ISLANDS — REVIEW BY SUPREME COURT—TREATY.

Treaty of Paris 1898, arts. 8, 13, providing that cession of Philippine Islands to United States shall not impair property rights of individuals or associations, and continuing in force rights of property secured by patent and copyright, is not involved, within Judicial Code, § 248, by decision of Supreme Court of Philippine Islands, in action for infringement and unfair competition by Philippine association having Spanish trade-mark in *La Flor de la Isabela*, that action was for wrongful use of name "Isabela," which was a geographical name incapable of registration as trade-mark, and that no unfair competition was shown.

Appeal from the Supreme Court of the Philippine Islands.

Suit for infringement of trade-name by the Compania General de Tabacos de Filipinas against the Alhambra Cigar & Cigarette Manufacturing Company. From a decree of the Supreme Court of the Philippine Islands, reversing a decree of the court of the first instance, plaintiff appeals. Appeal dismissed.

*Mr. F. C. Fisher, of Manila, P. I., for appellant.

Mr. H. W. Van Dyke, of Washington, D. C., for appellee.

Mr. Justice DAY delivered the opinion of the Court.

Suit was brought by the appellant, a corporation organized under the laws of Spain, in the Court of First Instance of Manila. The complainant set up: That for more than 27 years it had been engaged in the business of manufacturing cigars and cigarettes in the Philippine Islands. That its factory is known as "La Flor de la Isabela," which name is used upon the packages and containers of the products manufactured by complainant and on the advertising matter in its cigar and cigarette business. That on April 5, 1887, the kingdom of Spain as the sovereign authority in the Philippine Islands issued to it, under laws then in force, a certificate of registration and ownership of certain trade-marks and trade-names and label designs therein described and enumerated, including the trade-name "La Flor de la Isabela," conferring the right upon the complainant to all the benefits appurtenant thereto, including the right to prosecute for infringement. That the trade-name has been in continuous use solely by the complainant from the issuance of the Spanish certificate of registration and ownership to the time of bringing suit, except for the acts of the appellee. That by reason of the long-continued use of the phrase "La Flor de la Isabela" to designate its factory and its products the said phrase and sundry abbreviations thereof, when applied to the manufactures of tobacco as a distinguishing brand or name, had come to have a secondary meaning designating and denoting that they are the products of its factory. In common parlance the name "La Flor de la Isabela" is abbreviated to "Isabelas" when applied to cigars or cigarettes. That on or about the 1st of June, 1914, the defendant, now appellee, a corporation organized under the laws of the Philippine Islands, engaged in the manufacture and sale of cigars and cigarettes in Manila and elsewhere in the Philippine Islands, unlawfully misappropriated to its own use and benefit the word "Isabelas" in its secondary meaning as a distinguishing brand or name of its tobacco products. That the unlawful use of the name "Isabelas" as the distinguishing brand or name of the products of the defendant is calculated to deceive the public into the belief that the goods of the defendant so designated and branded are the goods manufactured by the complainant, and that the use thereof by the defendant will cause it irreparable injury. An injunction was prayed against the defendant, and an accounting sought.

The Court of First Instance found in favor of the complainant because of its exclusive ownership of the Spanish trade-mark, and in favor of the defendant on the question of unfair competition. Upon appeal to the Supreme Court of the Philippine Islands,

that court found in favor of the defendant upon both issues, and directed a reversal of the judgment below. 33 Phil. Rep. 485. Appeal to this court was sought and allowed upon the ground that the judgment of the Supreme Court was in an action which involved the Paris Treaty of 1898 between the United States and Spain, because it is therein provided that the property rights of private establishments or associations having legal capacity to acquire and possess property, and especially the rights of property secured by copyrights and patents acquired by Spaniards in the Philippine Islands at the time of the ratification of the treaty, shall not be impaired, but shall continue to be respected.

This appeal was perfected before the Act of September 6, 1916, 39 Stat. 726, c. 448, and is controlled by section 248 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1158), which provided that this court should have jurisdiction to review, revise, reverse, modify or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings in which the Constitution, or any statute, treaty, title, right, or privilege of the United States is involved.

The contention is that the provisions of this treaty were involved in the decision of the Supreme Court thereby authorizing this appeal.

By the treaty of Paris of 1898 (30 Stat. 1758) Spain ceded to the United States the archipelago known as the Philippine Islands. In article 8 of the treaty it is provided that the relinquishment or cession, as the case may be, " * * * cannot in any respect impair the property rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be." Article 13 provides that "the rights of property secured by copyrights and patents acquired by Spaniards in the Island of Cuba, and in Porto Rico, the Philippines and other ceded territories at the time of the exchange of the ratifications of this treaty, shall continue to be respected." Treaties in Force, 1904, pp. 722, 725, 726.

It is the evident purpose of these provisions in view of the cession of territory made by Spain to the United States, to preserve private rights of property, and to provide that the change of sovereignty should work no impairment of such rights.

The Philippine Act of 1902, carried into the section of the Judicial Code which we have quoted, intended to give this court jurisdiction in cases involving rights secured

by the treaty of 1898 and other treaties of the United States. A good illustration of a case of this character is found in *Vilas v. Manila*, 220 U. S. 345, 31 Sup. Ct. 416, 55 L. Ed. 491, where certain claims were made against the city of Manila, which it was contended survived, notwithstanding the cession to the United States. A writ of error was sued out to a judgment of the Supreme Court of the Philippine Islands denying relief because of its holding that the municipality of Manila after the treaty was a totally different corporate entity and in nowise liable for debts created under the Spanish sovereignty. Exception was taken to the jurisdiction, but this court held that the case involved the treaty of 1898, as the question was made to turn in the court below upon the consequence of the change of sovereignty and the reincorporation of the city after the substituted sovereignty. Mr. Justice Lurton, who delivered the opinion of the court, said:

"This disposes of the question of the jurisdiction of this court grounded upon the absence from the petition of the plaintiffs of any distinct claim under the treaty of Paris, since under section 10 of the Philippine Organic Act of July 1, 1902, this court is given jurisdiction to review any final decree or judgment of the Supreme Court of the Philippine Islands where any treaty of the *United States 'is involved.' That treaty was necessarily 'involved,' since neither the court below nor this court can determine the continuity of the municipality nor the liability of the city as it now exists for the obligations of the old city, without considering the effect of the change of sovereignty resulting from that treaty. See *Reavis v. Fianza*, 215 U. S. 16, 22 [30 Sup. Ct. 1, 54 L. Ed. 72]."

In this case no such question is presented. The decision involved no consideration of treaty rights, nor were the same discussed in the judgment in the court below. The Philippine Supreme Court in determining the issues, held that the name "Isabela," which appellees were charged with using, was a geographical and descriptive term and incapable of registration as a trade-mark either under the Philippine Act No. 666 (Pub. Laws 1902-1903), or the law as it existed under the Spanish régime; that the Spanish trade-name as registered consisted of the words "La Flor de la Isabela" and the trade-mark of a shield with certain devices thereon. That the action was not for the infringement of the trade-name "La Flor de la Isabela," but was for the violation of the trade-name "Isabela." And that unfair competition was not shown.

Certainly the treaty, in providing that property rights of this class should be respected, did not intend to prevent the consideration by the courts of the nature and extent of the rights granted, or prohibit the application of laws for the enforcement and regulation of such property rights when not in derogation thereof. Philippine Act 666, § 14, Comp. of the Acts of the Philippine Com. § 68, itself provides that certificates issued under the Spanish-sovereignty, unannulled under the royal decree of 1888, shall be conclusive evidence of the exclusive right of ownership of such trade-marks or trade-names.

Reliance is had by appellant, to sustain the jurisdiction, on the decision of this court in *Ubeda v. Zialcita*, 226 U. S. 452, 33 Sup. Ct. 165, 57 L. Ed. 296. There suit was brought upon a trade-mark registered *under the Spanish régime. The record shows that the appeal was allowed upon two grounds: (1) That the amount involved exceeded \$25,000; (2) alleged violation of treaty rights in the decision that the trade-mark being itself an imitation of earlier trade-marks prevented an injunction in favor of its owner. As to the treaty claim this court said (226 U. S. 454, 33 Sup. Ct. 166 [57 L. Ed. 296]):

"In such a case [the wrongful appropriation of an earlier mark] the Philippine Act denies the plaintiff's right to recover. Act No. 666, § 9. See section 12, and No. 744, § 4. * * * It is said that to apply the rule there laid down would be giving a retrospective effect to section 9 as against the alleged Spanish grant of December 16, 1898, to the plaintiff, contrary to the general principles of interpretation and to article 13 of the Treaty of Paris, of April 11, 1899, providing that the rights of property secured by copyrights and patents shall continue to be respected. But the treaty, if applicable, cannot be supposed * * * to contravene the principle of section 9, which only codifies common morality and fairness. The section is not retrospective in any sense, for it introduces no new rule."

Certainly, this was far from holding that a right of appeal existed because a right secured by the treaty was involved.

The present case was decided upon grounds entirely compatible with continued respect for the trade-mark and trade-name rights granted by the Spanish sovereignty. It results that in the sense of the statute, giving a right to review in this court, no treaty of the United States was involved in the decree which it is sought to reverse.

The appeal must be
Dismissed.

(249 U. S. 152)

MIDDLETON v. TEXAS POWER & LIGHT CO.

(Submitted Dec. 18, 1918. Decided March 3, 1919.)

No. 102.

1. CONSTITUTIONAL LAW §42 — VALIDITY OF STATUTE—PERSONS ENTITLED TO OBJECT.

One not an employé in an excepted class in the Texas Workmen's Compensation Act (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]) may not assert any grievance that excepted class might have to the validity of the act.

2. CONSTITUTIONAL LAW §245 — MASTER AND SERVANT §347—WORKMEN'S COMPENSATION ACT—EQUAL PROTECTION OF LAWS.

The Texas Workmen's Compensation Act (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]) does not deny the equal protection of the laws, in that it excludes from operation of the act domestic servants, farm laborers, employés of railroad carrier, laborers working cotton gin, and employés of persons, etc., employing no more than five; there being sufficient reasons as to each class for their exclusion.

3. CONSTITUTIONAL LAW §48—DISCRIMINATION—PRESUMPTION.

There is a strong presumption that a Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based on adequate grounds.

4. CONSTITUTIONAL LAW §209 — EQUAL PROTECTION CLAUSE—CONSTRUCTION.

The equal protection clause of the federal Constitution does not require that state laws shall cover the entire field of proper legislation in a single enactment.

5. CONSTITUTIONAL LAW §48 — VALIDITY OF ACTS—BURDEN OF PROOF.

The burden is on him who attacks a law for unconstitutionality.

6. CONSTITUTIONAL LAW §245 — EQUAL PROTECTION—TEXAS WORKMEN'S COMPENSATION ACT.

The Texas Workmen's Compensation Act (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]) does not deny the equal protection of the laws, in that discrimination results from operation of act as between employés of different employers engaged in the same work, where one employer becomes a subscriber and another does not.

7. CONSTITUTIONAL LAW §245 — EQUAL PROTECTION—TEXAS WORKMEN'S COMPENSATION ACT.

The Texas Workmen's Compensation Act (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]) does not deny the equal protection of laws, because option to become a subscriber rests with employ-

er, and dissenting employé has no other remedy than withdrawing from the employment.

8. CONSTITUTIONAL LAW §92—LIBERTY OF CITIZEN.

A citizen has no vested right to have rules of law remain unchanged for his benefit.

9. CONSTITUTIONAL LAW §301—DUE PROCESS—DEPRIVATION OF PROPERTY—TEXAS WORKMEN'S COMPENSATION ACT.

The Texas Workmen's Compensation Act (Acts 33d Leg. c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]) does not deprive employé of liberty and property without due process of law, in that he may be required to accept act, if employer does, or withdraw from employment.

In Error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas.

Action by Charlie Middleton against the Texas Power & Light Company. From a judgment of the Court of Civil Appeals of Texas (188 S. W. 276), affirming on rehearing, after answer to certified questions (108 Tex. 96, 185 S. W. 556), a judgment dismissing the action, which judgment had been previously reversed (178 S. W. 956), plaintiff brings error. Affirmed.

* Mr. Charles B. Braun, of Waco, Tex., for plaintiff in error.

Messrs. Harry P. Lawther and Alexander Pope, both of Dallas, Tex., for defendant in error.

Mr. Justice PITNEY delivered the opinion of the Court.

Alleging that in the month of December, 1913, he was in the employ of the Texas Power & Light Company in the *state of Texas, and while so employed received serious personal injuries through the bursting of a steam pipe due to the negligence of his employer and its agents, Middleton sued the company in a district court of that state to recover his damages. The defendant interposed an answer in the nature of a plea in abatement setting up that at the time of the accident and at the commencement of the action defendant was the holder of a policy of liability and compensation insurance, issued in its favor by a company lawfully transacting such business in the state, conditioned to pay the compensation provided by the Texas Workmen's Compensation Act, which was approved April 16, 1913, and took effect on the 1st day of September in that year (chapter 179, Acts of 33d Legislature, [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]) of which fact the plaintiff had proper and timely notice as provided by the act; and that no claim for the compensation provided in the act with respect to the alleged injury had been made by plaintiff,

but on the contrary he had refused to receive such compensation, with other matters sufficient to bring defendant within the protection of the act. Plaintiff took a special exception in the nature of a demurrer, upon the ground (among others) that the act was in conflict with the Fourteenth Amendment to the Constitution of the United States. The exception was overruled, the plea in abatement sustained, and the action dismissed. On appeal to the Court of Civil Appeals it was at first held that the judgment must be reversed (178 S. W. 956); but upon an application for a rehearing the constitutional questions were certified to the Supreme Court of the state. That court sustained the constitutionality of the law (108 Tex. 96, 185 S. W. 556); and in obedience to its opinion the Court of Civil Appeals set aside its former judgment and affirmed the judgment of the district court. Thereupon the present writ of error was sued out under section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by Act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

*Thus we have presented, from the standpoint of an objecting employé, the question whether the Texas Employers' Liability Act is in conflict with the due process and equal protection provisions of the Fourteenth Amendment.

The act creates an employers' insurance association, to which any employer of labor in the state, with exceptions to be mentioned, may become a subscriber; and out of the funds of this association, derived from premiums on policies of liability insurance issued by it to subscribing members and assessments authorized against them if necessary, the compensation provided by the act as due on account of personal injuries sustained by their employés, or on account of death resulting from such injuries, is to be paid. This is a stated compensation, fixed with relation to the employé's average weekly wages, and accrues to him absolutely when he suffers a personal injury in the course of his employment incapacitating him from earning wages for as long a period as one week, or to his representatives or beneficiaries in the event of his death from such injury, whether or not it be due to the negligence of the employer or his servants or agents. Such compensation is the statutory substitute for damages otherwise recoverable because of injuries suffered by an employé, or his death occasioned by such injuries, when due to the negligence of the employer or his servants; it being declared that the employé of a subscribing employer, or his representatives or beneficiaries in case of his death, shall have no cause of action against the employer for damages except where a death is caused by the willful act or omission or gross negligence of the employer. Employers who do not become subscribers are subject as before to

suits for damages based on negligence for injuries to employés or for death resulting therefrom, and are deprived of the so-called "common-law defenses" of fellow servant's negligence and assumed risk, and also of contributory *negligence as an absolute defense, it being provided that for contributory negligence damages shall be diminished except where the employer's violation of a statute enacted for the safety of employés contributes to the injury or death; but that where the injury is caused by the willful intention of the employé to bring it about the employer may defend on that ground. Every employer becoming a subscriber to the insurance association is required to give written or printed notice to all his employés that he has provided for the payment by the association of compensation for injuries received by them in the course of their employment. Under certain conditions an employer holding a liability policy issued by an insurance company lawfully transacting such business within the state is to be deemed a subscriber within the meaning of the act. There are administrative provisions, including procedure for the determination of disputed claims. By section 2 of part 1 (Vernon's Sayles' Ann. Civ. St. 1914, art. 5246hh) it is enacted as follows:

"The provisions of this act shall not apply to actions to recover damages for the personal injuries or for death resulting from personal injuries sustained by domestic servants, farm laborers, nor to the employés of any person, firm or corporation operating any railway as a common carrier, nor to laborers engaged in working for a cotton gin, nor to employés of any person, firm or corporation having in his or their employ not more than five employés."

Following the order adopted in the argument of plaintiff in error, we deal first with the contention that the act amounts to a denial of the equal protection of the laws. This is based in part upon the classification resulting from the provisions of the section just quoted, it being said that employés of the excepted classes are left entitled to certain privileges which by the act are denied to employés of the non-excepted classes, without reasonable basis for the distinction.

[1] Of course plaintiff in error, not being an employé in *any of the excepted classes, would not be heard to assert any grievance they might have by reason of being excluded from the operation of the act. *Southern Ry. Co. v. King*, 217 U. S. 524, 534, 30 Sup. Ct. 594, 54 L. Ed. 868; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 550, 32 Sup. Ct. 784, 56 L. Ed. 1197; *Rosenthal v. New York*, 226 U. S. 260, 271, 33 Sup. Ct. 27, 57 L. Ed. 212, Ann. Cas. 1914B, 71; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 34 Sup. Ct. 359, 58 L. Ed. 713; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 35 Sup. Ct. 167, 59 L. Ed. 364. But plaintiff in error sets up a griev-

ance as a member of a class to which the act is made to apply.

[2] However, we are clear that the classification cannot be held to be arbitrary and unreasonable. The Supreme Court of Texas in sustaining it said (108 Tex. 110, 111, 185 S. W. 561):

"Employés of railroads, those of employers having less than five employés, domestic servants, farm laborers and gin laborers are excluded from the operation of the act, but this was doubtless for reasons that the Legislature deemed sufficient. The nature of these several employments, the existence of other laws governing liability for injuries to railroad employés, known experience as to the hazards and extent of accidental injuries to farm hands, gin hands and domestic servants, were all matters no doubt considered by the Legislature in exempting them from the operation of the act. Distinctions in these and other respects between them and employés engaged in other industrial pursuits may, we think, be readily suggested. We are not justified in saying that the classification was purely arbitrary."

[3, 4] There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of employment, this would not amount to a constitutional objection. *Rosenthal v. New York*, 226 U. S. 260, 271, 33 Sup. Ct. 27, 57 L. Ed. 212, Ann. Cas. 1914B, 71; *Patsone v. Pennsylvania*, 232 U. S. 138, 144, 34 Sup. Ct. 281, 58 L. Ed. 539; *Missouri, Kan. & Texas Ry. v. Cade*, 233 U. S. 642, 649, 650, 34 Sup. Ct. 678, 58 L. Ed. 1135; *International Harvester Co. v. Missouri*, 234 U. S. 199, 215, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525; *Keokee Coke Co. v. Taylor*, 234 U. S. 224, 227, 34 Sup. Ct. 856, 58 L. Ed. 1288; *Miller v. Wilson*, 236 U. S. 373, 384, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829.

[5] The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism. But in this case adequate grounds are easily discerned. As to the exclusion of railroad employés, the existence of the federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. §§ 8657-8665), as amended by act April 5, 1910, c. 143, 36 Stat. 291, applying exclusively as to employés of common carriers by rail injured while employed in interstate commerce, establishing liability for negligence and exempting from liability in the absence of negligence in all cases with-

in its reach (*New York Central R. R. Co. v. Winfield*, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139; *Erie R. R. Co. v. Winfield*, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662), and the difficulty that so often arises in determining in particular instances whether the employé was employed in interstate commerce at the time of the injury (see *Pedersen v. Del., Lack. & West. R. R.*, 229 U. S. 146, 151, 152, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 259, 260, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; *Illinois Central R. R. v. Behrens*, 233 U. S. 473, 478, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; *New York Central R. R. Co. v. Carr*, 238 U. S. 260, 263, 35 Sup. Ct. 780, 59 L. Ed. 1293; *Pennsylvania Co. v. Donat*, 239 U. S. 50, 36 Sup. Ct. 4, 60 L. Ed. 139; *Shanks v. Del., Lack. & West. R. R.*, 239 U. S. 556, 559, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; *Louisville & Nash. R. R. Co. v. Parker*, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119; *Erie R. R. Co. v. Welsh*, 242 U. S. 303, 306, 37 Sup. Ct. 116, 61 L. Ed. 319; *Southern Ry. Co. v. Puckett*, 244 U. S. 571, 573, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69), reasonably may have led the Legislature to the view that it would be unwise to attempt to apply the new system to railroad employés, in whatever kind of commerce employed, and that they might better be left to common-law actions with statutory modifications already in force (*Vernon's Sayles' Texas Civ. Stat.* 1914, arts. 6640-6652), and such others as experience might show to be called for.

The exclusion of farm laborers and domestic servants from the compulsory scheme of the New York Workmen's Compensation Act was sustained in *New York Central R. R. Co. v. White*, 243 U. S. 188, 208, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, upon the ground that the Legislature reasonably might consider that the risks inherent in those occupations were exceptionally patent, simple, and familiar. The same result has been reached by the state courts generally. *Opinion of Justices*, 209 Mass. 607, 610, 96 N. E. 308; *Young v. Duncan*, 218 Mass. 346, 349, 106 N. E. 1; *Hunter v. Colfax Coal Co.*, 175 Iowa, 245, 287, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917D, 15, Ann. Cas. 1917E, 803; *Sayles v. Foley*, 38 R. I. 484, 490-492, 96 Atl. 340. Similar reasoning may be applied to cotton gin laborers in Texas; indeed, it was applied to them by the Supreme Court of that state, as we have seen. And the exclusion of domestic servants, farm laborers, casual employés, and railroad employés engaged in interstate commerce was sustained in *Mathison v. Minneapolis Street Ry. Co.*, 126 Minn. 286, 293, 148 N. W. 71, L. R. A. 1916D, 412.

The exclusion of employes where not more than four or five are under a single employer is common in legislation of this character, and evidently permissible upon the ground that the conditions of the industry are different and the hazards fewer, simpler, and more easily avoided where so few are employed together; the Legislature, of course, being the proper judges to determine precisely where the line should be drawn. Classification on this basis was upheld in *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576-577, 35 Sup. Ct. 167, 59 L. Ed. 364, and has been sustained repeatedly by the state courts. *State v. Creamer*, 85 Ohio St. 349, 404, 405, 97 N. E. 602, 39 L. R. A. (N. S.) 694; *Borgnis v. Falk Co.*, 147 Wis. 327, 355, 133 N. W. 209, 37 L. R. A. (N. S.) 489; *Shade v. Cement Co.*, 93 Kan. 257, 259, 144 Pac. 249; *Sayles v. Foley*, 38 R. I. 484, 491, 493, 96 Atl. 340.

[6] The discrimination that results from the operation of the act as between the employes of different employers engaged in the same kind of work, where one employer becomes a subscriber and another does not, furnishes no ground of constitutional attack upon the theory that there is a denial of the equal protection of the laws. That the acceptance of such a system may be made optional is too plain for question; and it necessarily follows that differences arising from the fact that all of those to whom the option is open do not accept it must be regarded as the natural and inevitable result of a free choice, and not as a legislative discrimination. They stand upon the same fundamental basis as other differences in the conditions of employment arising from the variant exercise by employers and employes of their right to agree upon the terms of employment. And see *Borgnis v. Falk Co.*, 147 Wis. 327, 354, 133 N. W. 209, 37 L. R. A. (N. S.) 489; *Mathison v. Minneapolis Street Ry. Co.*, 126 Minn. 286, 294, 148 N. W. 71, L. R. A. 1916D, 412.

In recent years many of the states have passed elective workmen's compensation laws not differing essentially from the one here in question, and they have been sustained by well-considered opinions of the state courts of last resort against attacks based upon all kinds of constitutional objections, including alleged denial of the equal protection of the laws; usually, however, from the standpoint of the employer. *Sexton v. Newark District Telg. Co.*, 84 N. J. Law, 85, 86 Atl. 451; *Id.*, 86 N. J. Law, 701, 91 Atl. 1070; *Opinion of Justices*, 209 Mass. 607, 96 N. E. 308; *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1; *Borgnis v. Falk Co.*, 147 Wis. 327; *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694; *Diebelkis v. Link-Belt Co.*, 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241; *Crooks v. Tazewell Coal Co.*, 263 Ill. 343, 105 N. E. 132, Ann. Cas. 1915C, 304;

¹ 133 N. W. 209, 37 L. R. A. (N. S.) 489.

Victor Chemical Works v. Industrial Board, 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627; *Mathison v. Minneapolis Street Ry. Co.*, 126 Minn. 286, 148 N. W. 71, L. R. A. 1916D, 412; *Shade v. Cement Co.*, 93 Kan. 257, 144 Pac. 249; *Sayles v. Foley*, 38 R. I. 484, 96 Atl. 340; *Greene v. Caldwell*, 170 Ky. 571, 186 S. W. 648, Ann. Cas. 1918B, 604; *Hunter v. Colfax Coal Co.*, 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917D, 15, Ann. Cas. 1917E, 803. The Ohio law was sustained by this court against special attacks in *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 35 Sup. Ct. 167, 59 L. Ed. 364, and the Iowa law in *Hawkins v. Bleakly*, 243 U. S. 210, 213, et seq., 37 Sup. Ct. 255, 61 L. Ed. 678, Ann. Cas. 1917D, 637.

[7] Stress is laid upon the point that the Texas act, while optional to the employer, is compulsory as to the employe of a subscribing employer. Our attention is not called to any express provision prohibiting a voluntary agreement between a subscribing employer and one or more of his employes taking them out of the operation of the act; but probably such an agreement might be held by the courts of the state to be inconsistent with the general policy of the act. The Supreme Court, in the case before us, did not intimate that such special agreements would be permissible; and hence it is fair to assume that all who remain in the employ of a subscribing employer, with notice that he has provided for payment of compensation by the association or by an authorized insurance company, will be bound by the provisions of the act.

But a moment's reflection will show the impossibility of giving an option both to the employer and to the employe and enabling them to exercise it in diverse ways. The provisions of the act show that the legislative purpose is that it shall take effect only upon acceptance by both employer and employe. The former accepts by becoming a subscriber; the latter by remaining in the service of the employer after notice of such acceptance. And we see in this no ground for holding that there is a denial of the equal protection of the laws as between employer and employe. They stand in different relations to the common undertaking, and it was permissible to recognize this in determining how they should accept or reject the new system. The employer provides the plant, the organization, the capital, the credit, and necessarily must control and manage the operation. In the nature of things his contribution has less mobility than that of the employe, who may go from place to place seeking satisfactory employment, while the employer's plant and business are comparatively, even if not absolutely, fixed in position. Again, in order that the new scheme of compensation should be a success, the Legislature deemed it proper, if not essential, that

the payment of compensation to the injured employes or their dependents should be rendered secure, and the losses to individual employers distributed, by a system of compensation insurance, in which it was deemed important that all employes of a given employer should be treated alike. Still further there are reasons affecting the contentment of the employes and the discipline of the force, rendering it desirable that all serving under a common employer should be subject to a single rule as to compensation in the event of injury or death arising in the course of the employment. These and other considerations that might be suggested fully justified the legislative body of the state in determining that acceptance of the new system should rest upon the initiative of the employer, and that any particular employe who with notice of the employer's acceptance dissented from the resulting arrangement should be required to exercise his option by withdrawing from the employment. The relation of employer and employe being a voluntary relation, it was well within the power of the state to permit employers to accept or reject the new plan of compensation, each for himself, as a part of the terms of employment; and in doing this there was no denial to employes of the equal protection of the laws within the meaning of the Fourteenth Amendment.

This disposes of all contentions made under the equal protection clause.

[8, 9] It is argued further that there is a deprivation of liberty and property without due process of law in requiring employes, willingly or unwillingly, to accept the new system where their employer has adopted it. Of course there is no suggestion of a deprivation of vested property *in the present case, since the law was passed in April and took effect in September, while the plaintiff's injuries were received in the following December, after he had been notified of his employer's acceptance of the act. What plaintiff has lost, therefore, is only a part of his liberty to make such contract as he pleased with a particular employer and to pursue his employment under the rules of law that previously had obtained fixing responsibility upon the employer for any personal injuries the plaintiff might sustain through the negligence of the employer or his agents. But, as has been held so often, the liberty of the citizen does not include among its incidents any vested right to have the rules of law remain unchanged for his benefit. The law of master and servant, as a body of rules of conduct, is subject to change by legislation in the public interest. The definition of negligence, contributory negligence, and assumption of risk, the effect to be given to them, the rule of respondeat superior, the imposition of liability without fault, and the exemption from liability in spite of fault—all these, as

rules of conduct, are subject to legislative modification. And a plan imposing upon the employer responsibility for making compensation for disabling or fatal injuries irrespective of the question of fault, and requiring the employe to assume all risk of damages over and above the statutory schedule, when established as a reasonable substitute for the legal measure of duty and responsibility previously existing, may be made compulsory upon employes as well as employers. *N. Y. Central R. R. Co. v. White*, 243 U. S. 188, 198-206, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 234, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642.

All objections to the act on constitutional grounds being found untenable, the judgment under review is

Affirmed.

(249 U. S. 12)

BUTTE & SUPERIOR COPPER CO., Limited, v. CLARK-MONTANA REALTY CO. et al.

(Argued Jan. 10 and 13, 1919. Decided March 3, 1919.)

No. 598.

1. COURTS ⚡382(5)—FEDERAL JURISDICTION—STATEMENT OF GROUNDS IN PLEADINGS—CONSTRUCTION OF STATUTES.

Plaintiffs' statement of grounds of suit in federal District Court, founded on Montana statute relating to determination of adverse claims, which showed that controversy was over extralateral rights in mining claim and involved more than \$3,000, and the construction of Rev. St. §§ 2322, 2324, 2325, and 2332 (Comp. St. §§ 4618, 4620, 4622, 4631), which are foundation of rights to mining claims, held to sufficiently show that jurisdiction of District Court was not rested on diversity of citizenship, and hence decision of Court of Appeals was not final.

2. MINES AND MINERALS ⚡29(5)—MINING LOCATION—DEFECTS—PARTIES ENTITLED TO OBJECT.

Locator of mining claim, claiming rights conflicting with adjoining claim having priority of location, but subsequent patent, could not, having knowledge of the possession and working of the claim, base any rights on failure of prior locator to comply with a Montana territorial statute relating to declaratory statement.

3. MINES AND MINERALS ⚡27(1), 38(17)—CONFLICTING LOCATIONS—PRIORITY OF RIGHTS.

Priority of right in mining claims is not determined by date of entries or patents of the respective claims, but by discovery and location, which may be shown by testimony other than the entries and patents.

4. MINES AND MINERALS ⇨44—LOCATIONS—PATENTS—PRESUMPTIONS.

In the absence from the record of an adverse suit, there is no presumption that anything was considered or determined on application for patent, except the question of rights to the surface.

5. MINES AND MINERALS ⇨27(1)—CONFLICTING LOCATIONS—PRIORITY.

A prior locator of a mining claim, after a valid discovery, has title to veins and lodes whose tops or apices are within location, though subsequent adjoining locator obtained a prior patent.

6. APPEAL AND ERROR ⇨1094(2)—REVIEW—FINDINGS OF FACT.

In a suit involving extralateral rights in mining claim, finding of facts by District Court on conflicting evidence, approved by the Circuit Court of Appeals, will not be disturbed by the Supreme Court.

7. MINES AND MINERALS ⇨34—QUITCLAIM DEED—RIGHTS CONVEYED.

Where owner of a mining location E., who also owned one-fourth interest in adjoining location B., quitclaimed to adjoining owner the one-fourth interest, with its rights, together with all dips, spurs, angles, etc., the deed passed no interest that did not belong to that claim, and did not denude E. of extralateral rights that the law conferred on it.

8. EQUITY ⇨427(1)—DECREE—SUIT TO DETERMINE MINING RIGHTS—RESERVATION OF QUESTION.

In a suit to determine extralateral rights in adjoining mining claims, where the court found as a fact that apex of veins in dispute was in location of plaintiff, but the facts as developed were not clear as to where the apex passed out of such location, the court properly reserved such question.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the Clark-Montana Realty Company and the Elm Orlu Mining Company against the Butte & Superior Copper Company. From a judgment of the Circuit Court of Appeals (248 Fed. 609, 160 C. C. A. 509), affirming a decree for complainants (233 Fed. 547), defendant appeals. Decree affirmed.

Messrs. William Wallace, Jr., of Helena, Mont., W. H. Dickson, of Salt Lake City, Utah, J. Bruce Kremer, of Butte, Mont., and William Scallon, of Helena, Mont., for appellant.

Mr. John P. Gray, of Cœur d'Alene, Idaho, for appellees.

*Mr. Justice McKENNA delivered the opinion of the Court.

A contest between mining claims as to the right to the ores that may be not only inside the surface lines of the claims but outside their vertical side lines—dip or extralateral rights. It was commenced in the United

States District Court for the District of Montana by a bill filed therein by the appellees Clark-Montana Realty Company and Elm Orlu Mining Company against appellant Butte & Superior Copper Company, Limited, under a statute of Montana authorizing an action to be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

The appellees (plaintiffs in the suit) obtained a decree in the District Court quieting their title and decreeing an accounting. Clark-Montana Realty Co. v. Butte & Superior Copper Co., 233 Fed. 547. The decree was affirmed by the Circuit Court of Appeals, 248 Fed. 609, 160 C. C. A. 509. To review the latter action this appeal is prosecuted.

We are confronted with a motion to dismiss on the ground that the decree of the Circuit Court of Appeals was final, the jurisdiction of the District Court having been, in legal effect, rested, it is asserted, upon diversity of citizenship. To judge of the motion requires a consideration of appellees' statement of their grounds of suit. An outline of them is only necessary.

[1] At the outset we may say there is a diversity of citizenship, the parties being respectively corporations of Washington and Arizona, and it was so averred.

The predecessors of appellees (so run the allegations) on April 18, 1875, discovered a vein or lode of mineral-bearing rock in the ground described as the Elm Orlu. Discovery was followed by location of the claim and other acts of its appropriation prescribed by the mining laws, proof of which was duly made; and such steps were taken that on December 30, 1882, application for patent was made and patent issued for the claim January 31, 1884. The locators and their successors in interest held, worked, possessed and actually occupied the claim continuously from the date of discovery for more than five years thereafter and during all that time were in the open, notorious, exclusive and uninterrupted possession of it.

The Clark-Montana Realty Company became the owner of the claim and entitled to its possession and of all veins, lodes or ledges having their tops or apices therein throughout their entire depth between the end lines of said claim extended northerly in their own direction. That company leased the claim to appellee, Elm Orlu Mining Company, which is occupying it by virtue of the lease.

The appellant is the owner of the Black Rock, Jersey Blue, Admiral Dewey and Silver Lode Mining Claims which adjoin the Elm Orlu claim on its north side. Their locations progressed to patent.

In the Elm Orlu claim there is a vein or lode known as the Rainbow lode, which crosses the west end line of the Elm Orlu

claim and proceeds in an easterly direction through it. It was upon this lode that the discovery of the claim was made. Its downward course through the side line of the claim drawn vertically is northerly and it extends downward and passes below the surface of appellant's claims.

Appellant claims an estate or interest adverse to appellees' in the Rainbow lode, the exact nature of which claim is unknown to appellees, but it is false and groundless.

The value of the Elm Orlu claim is given, and it is averred that appellant has by means of secret underground works in its possession willfully penetrated the *Rainbow lode and has extracted and is extracting large amounts of ore therefrom, the exact amount being unknown, but exceeding in value the sum of \$50,000.

It is prayed that appellant declare its title and, when declared, that it be adjudged without merit; that appellees' title be established and appellant enjoined from further assertion of rights adverse to appellees, and for an accounting.

There is an averment, however, that requires notice. It is as follows:

"That the jurisdiction of the United States District Court for the District of Montana over this suit is invoked and depends upon two grounds, to wit:

"(1) Upon the ground that the construction and application of sections 2322, 2324, 2325, and 2332 of the Revised Statutes of the United States (Comp. St. §§ 4618, 4620, 4622, 4631) are involved, and the amount in controversy exceeds in value the sum of three thousand (\$3,000) dollars, exclusive of interest and costs, all of which will appear from the facts hereinafter set forth.

"(2) * * *

The averment is explicit and, we may assume, had a purpose; but appellees do not wish to be taken at their word. The confidence they thought and expressed when invoking the powers of the court in the first instance—and providing, we may assume, for review in case of an adverse decision—they now recant and urge that it should not be used to question or disturb their success or become an avenue of relief to their antagonist. This is not unusual and counsel has cited prior examples and the action of the court therein.

The principle of decision which the court then announced is familiar. It is that the ground of jurisdiction in the District Court and ultimately in this court on appeal from the Circuit Court of Appeals is the statement of the suing party of his cause of suit. And there must *be substance in it, not mere verbal assertion or the anticipation of defenses. Taylor v. Anderson, 234 U. S. 74, 34 Sup. Ct. 724, 58 L. Ed. 1218; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557.

Has appellees' statement these defects? As we have seen, there is a confident asser-

tion that the construction and application of the designated sections of the Revised Statutes are involved, and, turning to them, we find that they are the foundation of the rights to mining claims and express the conditions of their acquisition and extent, and, it would seem, are often the basis of controversies as to them and the solution of the controversies. And realizing this, we may suppose, appellees were at pains to set out the conditions and steps they observed, and lest there might be omission, and in remedy of it if there should be, they availed themselves by appropriate allegations of section 2332, R. S.; that is, they alleged that they were in the actual, open, exclusive and uninterrupted possession of the Elm Orlu, working the same for more than five years (the period of limitation under section 2332) continuously from the date of discovery. And counsel admitted upon a question from the bench at the oral argument, that the allegation had jurisdictional purpose and that resort was had to the federal court that appellees might avail themselves of the provisions of section 2332 and of Clipper Mining Co. v. Eli Mining Co., 194 U. S. 220, 226, 24 Sup. Ct. 632, 48 L. Ed. 944, the Supreme Court of Montana having decided¹ that a notice of location which failed to comply, as appellees' did, with a statute of Montana was defective. The allegation, therefore, was part of appellees' case—fortified the other allegations as grounds of suit and recovery—and made the suit one involving the construction and application of that section. The motion to dismiss is, therefore, denied.

On the merits the case is not of novelty. It is the usual *one of priority of rights in a mineral-bearing vein. The averments of appellees we have given. They are met by appellant by denials, counter averments of location and rights, not only by grounds of defense but of affirmative relief; prayers for recompense for trespasses upon its rights and that its title be quieted against the assertion of appellees.

In summary description of the controversies in the case we may say they center in the Rainbow lode, so-called—in regard to which the parties are in absolute antagonism both in averment and contention—and incidentally in other lodes.

Upon the issues thus joined the District Court made certain findings which were affirmed by the Circuit Court of Appeals. We take them up in their order as we shall thereby be able to separate the questions of law from the questions of fact.

[2-4] 1. The court found that the Elm Orlu was located before the Black Rock. Of this finding there can be no doubt if the procedure of the law was observed in the location of the Elm Orlu. The steps in that procedure

¹ Hickey v. Anaconda Mining Co., 33 Mont. 46, 81 Pac. 806.

and their order are well established. The first of them is the discovery of mineral-bearing rock within the claim, and it must precede location. The subsequent steps—marking the boundaries, posting notice, recording—are the declaration of title; the patent is the final evidence of it. Such steps being observed, the right is acquired under the Revised Statutes to the vein on its course and dip to the extent that its top or apex is within the surface boundaries of the claim or within vertical planes drawn downward through them. *Lawson v. United States Mining Co.*, 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65; *Stewart Mining Co. v. Ontario Mining Co.*, 237 U. S. 350, 35 Sup. Ct. 610, 59 L. Ed. 989.

It is, however, provided by section 2322, R. S., that there must be not only compliance with the laws of the United States, but with "state, territorial and local *regulations" and appellant asserts that the location of appellees' predecessors did not comply with the territorial statute of Montana and that, therefore, the location preceded that of appellant, it was destitute of legal sufficiency. And it is contended that the Supreme Court of Montana has decided in several cases² that the requirements of the state statute are imperative and that one of these cases, *Baker v. Butte City Water Company*, was affirmed by this court. *Butte City Water Co. v. Baker*, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409.

It is further contended that "from the day when final entry of the Black Rock was made, certainly from the day when patent therefor issued, the patentee's title not only to the surface of the claim, but to every vein or lode, the top or apex of which was found within the boundaries thereof became unassailable."

The following is the relevant chronology: The location of the Elm Orlu, following discovery of mineral, was made April 18, 1875, the declaratory statement thereof recorded on the 22d of that month; the location of the Black Rock was made November 6, 1875, the declaratory statement recorded the 13th of the same month. The entry for patent of the Black Rock was made November 24, 1880, and patent issued February 15, 1882; the Elm Orlu made final entry December 30, 1882, and patent issued January 31, 1884.

Such being the order of procedure of the parties, which acquired the title? Or, to express the issue in conformity to the contentions of appellant, was there defect in the location of appellees by reason of the Montana statute and did the prior issue of patent to appellant give impregnability to its ti-

tle and right to the veins in controversy? The District Court, and the Circuit Court of Appeals affirming it, decided both issues against appellant on the *grounds: (1) That the Montana cases did not furnish the rule of decision for the federal courts, the better reasoning being (for which cases were cited) that as the Montana statute did not impose a forfeiture hence none resulted from defects in the declaratory statement of the Elm Orlu. (2) That the Elm Orlu people were in possession of their claim, working the same—of which the Black Rock people had knowledge—and that hence the latter could not avail themselves of the defects in the location of the Elm Orlu. *Yosemite Mining Co. v. Emerson*, 208 U. S. 25, 28 Sup. Ct. 196, 52 L. Ed. 374, was adduced. In the latter ground we concur, and we need not express opinion of the other although it has impressive strength and was conceded to have in *Yosemite Mining Co. v. Emerson*. Indeed, there was a revulsion in the state against the ruling of the cases and a law was enacted making the issue of a patent for a mining claim conclusive evidence of compliance with the requirements of the laws of the state and making valid all locations under them theretofore made "that in any respect had failed to comply with the requirements of such laws, except as against one who has located the same ground in good faith and without notice."

Yosemite Mining Co. v. Emerson was concerned with a regulation of the state of California which prescribed the manner of the location of a claim. The regulation had not been conformed to and the validity of the location was attacked on that ground by a subsequent locator who had had notice of the claim, he contending that there was forfeiture of it. The contention was rejected and we said, that to yield to it would work great injustice and subvert the very purpose for which the posting of notices was required, which was, we further said, "to make known the purpose of the discoverer to claim title to the" claim "to the extent described and to warn others of the prior appropriation." The comment is obviously applicable to the asserted defects in the declaratory statement of *appellees. It, like the California requirement, had no other purpose than "to warn others of the prior appropriation" of the claim, and such is the principle of constructive notice. It—constructive notice—is the law's substitute for actual notice, and to say that it and actual notice are equivalents would seem to carry the self-evidence of an axiom. Besides, in this case there was unequivocal possession of the Elm Orlu and it is elementary that such possession is notice to all the world of the possessor's rights thereunder. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063.

The other contention of appellant is, as we

² *McBurney v. Berry*, 5 Mont. 300, 5 Pac. 367; *O'Donnell v. Glenn*, 8 Mont. 248, 19 Pac. 302; *McGowan v. Maclay*, 16 Mont. 234, 40 Pac. 602; *Hickey v. Anaconda Mining Co.*, 33 Mont. 46, 81 Pac. 806; *Baker v. Butte City Water Co.*, 28 Mont. 222, 72 Pac. 617, 104 Am. St. Rep. 683.

have said, that the title not only to the surface of its claim but to every vein whose top or apex was found within it became impregnable by the issue of patent to it. We need not follow the details of counsel's argument to sustain the contention—its reliance is on the dates on which entries for the patents were made, the Black Rock entry preceding that of the Elm Orlu. It is, however, admitted that by the issue of the patent to the Elm Orlu "it was thereby conclusively adjudicated or determined that at the time of final entry the applicants were entitled to a patent to that claim." But the admission is combined with the declaration that "to authorize the courts to give effect to a mining patent as of a date anterior to the final entry, it must be made to appear that prior to that date there was a *valid location* [italics counsel's] upon which the patent issued." And to establish that appellees' was not a valid location appellant relies upon the asserted defect in the declaratory statement. With that defect we have dealt and have decided that it had not the consequences ascribed to it. We may say, however, that priority of right is not determined by dates of entries or patents of the respective claims, but by priority of discovery and location, which may be shown by testimony other than the entries and patents. In the absence from the record of an adverse *suit there is no presumption that anything was considered or determined except the question of the right to the surface. *Lawson v. United States Mining Co., supra.*

The relevancy of that case is resisted. Appellant urges that by the application of the Black Rock for patent appellees were "confronted with the necessity of either adversing or suffering the consequence of a failure to do so," and the consequence is said to be that the Elm Orlu was made subordinate in time and right to the Black Rock. We cannot assent. The application of the Black Rock for patent did not show a surface conflict and the doctrine of the *Lawson* Case is that on an application for a patent only surface rights are determined, and Lindley is quoted for the proposition that "'an application for a patent invites only such contests as affect the surface area. * * * Prospective underground conflicts are not the subject of adverse claims.'"

It is true, as we have seen, there was some overlapping of the lines of the claims. If, however, a conflict was thus indicated the Black Rock secured the advantage. The ground within the overlapping lines was included within the Black Rock patent and expressly excepted from the application of the Elm Orlu for its patent. And no part of the decree was determined by it.

[5, 6] 2. The District Court found from the testimony that the Elm Orlu was of prior location and right and in this was confirmed by

the Circuit Court of Appeals. The inevitable consequence is that appellees have title to the veins or lodes whose tops or apices are within the Elm Orlu. This consequence appellant admits at the very beginning of its argument, and says that one of the vital questions in the case is the priority of the claims and that if the Elm Orlu had priority over the Black Rock the appellees would be entitled to all the Rainbow lode between the planes designated by the court and would be also entitled *²²"to all ores within the intersection spaces of that vein with the Jersey Blue vein and the Creden vein."

We state the admission not in estoppel of appellant, but only in concentration of attention upon the question for decision. In its solution there are in dispute many elements of importance. Among these necessarily is the question: In which of the claims do the veins apex, course and dip? In the question there is complexity and grounds for diversity of judgment, and the District Court felt and expressed them after hearing and estimating the testimony and the admission of the parties.

The court (Judge Bourquin) said that the chief contesting claims, the Elm Orlu and the Black Rock, "have a common side line for 850 feet of the Elm Orlu east and of the Black Rock west end." And further said:

"It is now admitted that the Rainbow vein at the apex crosses the Elm Orlu west end line, courses easterly, crosses the common side line and branches in the Black Rock, one strand crossing the Black Rock north side line, and one coursing easterly a disputed distance; that the Pyle strand of the Rainbow at some depth in the Elm Orlu diverges from the south side of the said vein and coursing easterly unites with the Rainbow at the Black Rock 1,100 level; that the Jersey Blue vein at the apex crosses the Black Rock west end line and courses easterly a disputed distance, it and the Rainbow converging on strike and dip to union or crossing; that the Creden vein at some depth in the Elm Orlu near the Black Rock west end diverges from the north side of the Rainbow, courses northwesterly under both claims, and unites with or is cut off by the Jersey Blue. Very large ore bodies are in the Rainbow under both claims, at places bisected on strike by the common side line, and both parties have mined them under both claims. From various names of the veins those herein are chosen to avoid confusion."

And to all other elements of decision, presented in a trial *²³which occupied 16 days, the court gave a painstaking consideration and in estimate of them found the issues in favor of appellees, and carefully adjudged the rights of the contestants according to the lines of their respective properties and the relation of the mineral veins to them.

The Circuit Court of Appeals affirmed the findings, saying, by Circuit Judge Gilbert:

"The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends that they are contrary to the weight of the evidence. The trial court made its findings after an evidently careful and painstaking investigation of the testimony and the exhibits, and after a personal inspection of the mining properties. We have examined the record sufficiently to see that the findings are all supported by the credible testimony of reputable witnesses. Upon settled principles, which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal."

And we said in *Lawson v. United States Mining Co.*, supra, of the conclusion of the Circuit Court of Appeals in such case—and the concession is as great as appellant is entitled to—"that if the testimony does not show that it [the conclusion of the court] is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion. It is our duty to accept a finding of fact unless clearly and manifestly wrong." The findings accepted, the conclusions of law must be pronounced to be of necessary sequence.

[7] One of the defenses of appellant is that on October 29, 1906, the Clark-Montana Realty Company, then being the owner of an undivided one-fourth interest in the Black Rock claim, executed and delivered to the predecessors in interest of appellant a deed of release and quitclaim of all its "right, title, interest, claim and demand * * * in and to that certain portion, claim and mining right, title and property on those certain ledges, veins, lodes or deposits of quartz and other rock in place, containing precious metals of gold, silver and other metals. * * *". And it was stated that it was "the intention of the party of the first part to convey to the party of the second part all of its right, title and interest in and to the above-described property" (referring to the claim, which was described), "together with all the dips, spurs and angles, and also all the metals, ores, gold, silver and metal bearing quartz, rock and earth therein. * * *".

The deed is urged as an estoppel and appellant insists that it "operates to grant the fractional interest in 'all earth, rock and ores' found within the exterior limits of the Black Rock claim extended downward vertically," citing therefor *Montana Mining Co. v. St. Louis Mining & Milling Co.* of Montana, 204 U. S. 204, 27 Sup. Ct. 254, 51 L. Ed. 444, and *Bogart v. Amanda Consolidated Gold Mining Co.*, 32 Colo. 32, 74 Pac. 882.

The cited cases are distinguishable from that at bar. In *Montana Mining Co. v. St. Louis Mining & Milling Co.* the land was conveyed "together with all the mineral therein contained," and the words were distinguished from those conveying extralateral rights and considered as a subject of the grant. In the

other case the conveyance was of land in conflict between two claims which were in litigation, and in execution of the intention of the parties the deed was interpreted to convey "not merely the surface ground in conflict, as contradistinguished from the mineral wealth beneath, but with this surface ground all underlying minerals" except one vein which had been excluded.

In the case at bar the conveyance was of an undivided one-fourth interest in and to the "mining claim known as the 'Black Rock' quartz lode mining claim." It passed no rights or interest that did not belong to that claim or would not appertain to it. Or, to put it in another way, the deed passed the rights and interests that were derived from the United States by the location of that claim and conveyed by the patent to the locators. It was not intended to convey any of the rights of the Elm Orlu and denude it of the extralateral rights that the law conferred upon it. In other words, the contention of appellant would make the deed a conveyance of the Elm Orlu as well as of the Black Rock.

We do not stop to specialize either the contests of or the judgments on particular veins. Their relative locations and the rights in them are disposed of by what we have said. But an earnest and special contest is made on the finding of the court in regard to a vein designated as the Pyle strand. The District Court said, as we have seen, "that the Pyle strand of the Rainbow at some depth in the Elm Orlu diverges from the south side of the said vein and, coursing easterly, unites with the Rainbow at the Black Rock 1,100 level."* And the court decreed the appellees to be the owners of and entitled to the possession of it throughout its entire depth as far as its apex was within the Elm Orlu, but expressly reserved the question of the point where the apex passes out of the Elm Orlu. In other words, in the language of the Circuit Court of Appeals, "the court left to future development the question of how far the Pyle apex continued in the appellees' location, and to what extent beneath the Black Rock it united with the Rainbow in such position as to be controlled by the apex in the Elm Orlu." This action of the District Court is attacked by appellant. It admits, however, that the Pyle strand in its downward course unites with the Rainbow at or about a point which would be intersected by a vertical plane passed through the easterly end line of the Elm Orlu extended northerly in its own direction, but denies that the apex or any portion of the apex is within the Elm Orlu and asserts that where its apex is found is altogether con-
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* The formal finding of the District Court is as follows:

"That the Pyle strand of the Rainbow vein diverges from the south side of the latter vein in the Elm Orlu claim, and there and for some indefinite distance easterly has its apex in the Elm Orlu claim."

*23 tural and that "for aught that appears from the evidence, it may *have its apex in the Black Rock and, indeed, this is probably the case." And it is urged that a situation is presented not of the weight of evidence, but of the absence of evidence, or, to quote counsel, the decision is "one which finds no support whatever in the testimony." But manifestly these are but assertions—attacks on the estimate of the testimony made by the District Court and Circuit Court of Appeals and the conclusion it justifies.

[8] It is further said that issue was made upon the title to the Pyle strand and that it was the duty of the court to definitely pass upon it and to decide for appellant, but that "instead of entering such a decree, the court so framed, and intentionally so framed, its decree that it would not be a bar to a new suit which appellees might thereafter bring against this appellant to quiet title to all of the vein below the plane of union between it and the Pyle strand, if by further development they discovered additional evidence in support of their contention that the Pyle strand did apex in the Elm Orlu at the point of alleged forking and at its apex continued thence easterly to and across the east end line of the Elm Orlu."

It is true the apex of the Pyle strand was found to be within the Elm Orlu, but all else as to the vein was reserved and, in the circumstances, properly reserved. There was simply retention of the case for supplementary proceedings, as the Circuit Court of Appeals observed, to carry out the decree and make it effective under altered circumstances. *Joy v. St. Louis*, 138 U. S. 1, 47, 11 Sup. Ct. 243, 34 L. Ed. 843; *Union Pacific Ry. v. Chicago, etc., Ry. Co.*, 163 U. S. 564, 603, 16 Sup. Ct. 1173, 41 L. Ed. 265.

Decree affirmed.

(249 U. S. 134)

ARKADELPHIA MILLING CO. v. ST. LOUIS SOUTHWESTERN RY. CO. et al. HASTY et al. v. SAME. ST. LOUIS, I. M. & S. RY. CO. et al. v. SOUTHERN COTTON OIL CO. ST. LOUIS SOUTHWESTERN RY. CO. et al. v. SAME.

(Submitted Dec. 17, 1918. Decided March 3, 1919.)

Nos. 92-95.

1. COURTS ⇨385(7)—SUPREME COURT—APPEAL FROM DISTRICT COURT—"STATE LAWS."

Orders of State Railroad Commission, fixing rates, are "state laws," within Judicial Code, § 238 (Comp. St. § 1215), allowing appeal directly from District Courts to the Supreme Court in a case in which the law of a state is claimed to contravene the national Constitution.

[Ed. Note.—For other definitions, see Words and Phrases, State Law.]

2. COURTS ⇨385(7)—SUPREME COURT—APPEAL FROM DISTRICT COURT—SUBORDINATE ANCILLARY PROCEEDING.

The main action being appealable directly to the Supreme Court from the District Court, under Judicial Code, § 238 (Comp. St. § 1215), as a case in which the law of a state is claimed to contravene the national Constitution, a subordinate proceeding not merely ancillary to but in effect a part of the main cause, taken for purpose of carrying into effect the decree of the Supreme Court reversing the final decree in the main cause, and at the same time to give effect to a reservation of jurisdiction by the District Court, as contained in that final decree, is likewise so appealable.

3. APPEAL AND ERROR ⇨1197—SUPREME COURT—REVERSAL—PROCEEDINGS BELOW AFTER REMAND.

The mandate of the Supreme Court, on reversing decree of District Court enjoining, as confiscatory, enforcement of rates prescribed by Railroad Commission, containing a provision authorizing further proceedings, the District Court can, after remand, determine liability of the railroad company on its injunction bond.

4. APPEAL AND ERROR ⇨1199—SUPREME COURT—REVERSAL—PROCEEDINGS BELOW AFTER REMAND.

The clauses of the final decree of the District Court, whereby it, on enjoining enforcement of rates, prescribed by Railroad Commission, and vacating the injunction bond and releasing the sureties, retained jurisdiction for purpose of making such further orders as might become necessary, coupled with mandate of Supreme Court, permitting further proceedings in conformity to its opinion and decree and according to right and justice, empowered the District Court to set aside so much of its final decree as released the railroad and its sureties from liability previously incurred under such bond, irrespective of whether the reversal of the decree, in respect of its main provisions granting injunction, had the effect of reversing also the portion discharging liability on bond.

5. INJUNCTION ⇨235—BOND—CONDITIONS—BREACH OR FULFILMENT.

The condition of the bond of a railroad company in suit to enjoin rates prescribed by Railroad Commission—that if it should be eventually decided that the order inhibiting the enforcement of such rates should not have been made, complainant should refund—does not require express adjudication that the order should not have been made, but it is enough that complainant fails in its burden of proof that the rates were inadequate.

6. INJUNCTION ⇨239—BOND—EXTENT OF LIABILITY.

Claims for overcharges after the final decree of injunction, afterwards reversed, in suit by railroad company to enjoin enforcement of rates prescribed by Railroad Commission, are not recoverable on the injunction bond, nor against the sureties; obligation of the bond, given on granting of temporary injunction, conditioned to refund if it should eventually be decided that the

order inhibiting the enforcement of the rates ought not to have been made, expiring when the suit was brought to a final conclusion.

7. INJUNCTION ⚡260—WRONGFUL INJUNCTION—RECOVERY IN INJUNCTION SUIT.

Claims for overcharges by railroad company between final decree enjoining enforcement of rates, prescribed by Railroad Commission, and reversal thereof, though not recoverable on the bond given on issuance of temporary injunction, may be allowed by the court against the railroad company under the inherent power of the court, so long as it retains control of the subject-matter and the parties, to correct that which has wrongfully been done by virtue of its process.

8. CARRIERS ⚡18(6)—REGULATION OF RATES—RESTRAINING ENFORCEMENT—RELIEF TO SHIPPER.

A shipper, though not a party to suit by railroad to enjoin enforcement of rates prescribed by Railroad Commission, but coming in by intervention before the master, to whom, after reversal of the decree of injunction, reference was made for purpose of determining damages, is in a position to invoke the principle of restitution of overcharges during the continuance of the injunction; the Railroad Commission, in defending the rates, representing all shippers.

9. REFERENCE ⚡48—ORDER—QUESTION DETERMINABLE—INJUNCTION BOND—RESTITUTION.

Objection that order of reference was made under a rule of the court that related only to damages recoverable on injunction bond, given by railroad in suit to enjoin enforcement of rates prescribed by Railroad Commission, and furnished no foundation for decree against the railroad on the theory of restitution of the excess charges between permanent injunction and reversal of that decree, not recoverable on the bond, is without weight; the railroad having been fully heard on the merits, and there being no question about the facts.

10. JUDGMENT ⚡565—CONCLUSIVENESS—JUDGMENT WITHOUT PREJUDICE.

That the reversal by the Supreme Court of the decree enjoining enforcement as confiscatory of rates prescribed by the Railroad Commission was without prejudice did not deprive the Supreme Court's decree of conclusiveness as to past transactions, and so did not, as leaving the rights of the parties still in doubt, render it improper for the District Court to award damages against railroad, either on the basis of a breach of injunction bond or on the basis of restitution, but only prevented the decree from being a bar to future injunction suits on a showing of changed conditions.

11. INTEREST ⚡39(4)—OVERCHARGES—ACCRUAL.

Interest on overcharges by carrier, wrongfully made and without consent of shipper, runs from the date when made; the damage being then complete.

12. CARRIERS ⚡18(1)—RATES—FIXING BY COMMISSION—REVIEW BY COURT—DISCRIMINATION.

A rough material rate, constituting part of a general schedule established by a Railroad

Commission in the exercise of legislative authority of the state, cannot be set aside by the court on the ground of discrimination, unless it amounts to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

13. CONSTITUTIONAL LAW ⚡42—PERSONS WHO MAY RAISE QUESTION OF CONSTITUTIONALITY.

A rough material rate, working no discrimination against railroad companies, being applicable on all roads alike, cannot be complained of by one of them as denying equal protection of the laws, because of any possible discrimination therein against small shippers.

14. COMMERCE ⚡34—RATES APPLICABLE—“INTERSTATE COMMERCE.”

A shipment of rough material from forest to milling point, both within the state, is not interstate commerce, rendering state rates inapplicable thereto, though followed by forwarding of finished products to points outside the state, where it would eventually be sold not being known till after material was manufactured and stored, and this though previous experience indicated that 95 per cent. of it must be marketed outside the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Appeals from the District Court of the United States for the Eastern District of Arkansas.

Decree for complainants in separate suits by the St. Louis Southwestern Railroad Company and the St. Louis, Iron Mountain & Southern Railway Company against the Railroad Commission of Arkansas and two shippers, to enjoin enforcement of rates prescribed by the Commission, having been reversed by the Supreme Court, and its mandate having gone down, the District Court made a reference to determine damages, on which there intervened the Arkadelphia Milling Company, Joseph F. Hasty and others, partners as J. F. Hasty & Sons, and the Southern Cotton Oil Company. Exceptions to the report of the master in favor of the claims of the interveners were sustained by the District Court as to claims of the Arkadelphia Milling Company and J. F. Hasty & Sons, and overruled as to claims of the Southern Cotton Oil Company, and decree was made accordingly, from which the first two claimants and the Railway Companies appeal. Reversed on appeals of claimants, and modified and affirmed on appeal of Railway Companies, and cause remanded.

* Messrs. W. E. Hemingway, G. B. Rose, D. H. Cantrell, J. F. Loughborough, and V. M. Miles, all of Little Rock, Ark., for appellants in 92 and 93 and appellees in 94 and 95.

Messrs. J. M. Moore and George A. McConnell, both of Little Rock, Ark., for appellees in 92 and 93 and appellants in 94 and 95.

Mr. Justice PITNEY delivered the opinion of the Court.

These four cases were consolidated for the purposes of the hearing in the District Court, and have been treated as consolidated for the purposes of the hearing on appeal. They are so closely related that they may be dealt with in a single opinion.

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*On July 18, 1908, the two railway companies concerned—the St. Louis, Iron Mountain & Southern, which for brevity may be called the Iron Mountain, and the St. Louis Southwestern, which may be called the Southwestern—brought separate suits in equity in the Circuit Court (now the District Court) of the United States for the Eastern District of Arkansas against the members of the state Railroad Commission in their official capacity, and against two citizens of that state named as frequent shippers of freight upon the railroad lines, for injunctions to restrain the enforcement of certain intrastate freight and passenger rates; setting up that the commission was duly organized under an act of the Legislature, and was thereby authorized to fix rates to be charged by the railroads in the state of Arkansas for the transportation of freight and passengers in that state; that the commission had officially adopted a tariff of freight rates applying to all classes and commodities of freight on all railroads operated in the state, and had ordered it to take effect on June 15, 1908; that the rates were unreasonable, unjust, discriminatory, confiscatory, and void; that they did not yield an adequate return for the services rendered; and that the operation of said tariff would deprive complainants of their property without due process of law and deny to them the equal protection of the laws, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States. It was further alleged that the rates for the transportation of passengers in the state fixed by an act of the Legislature passed February 9, 1907, and promulgated by order of the railroad commissioners, were confiscatory and void in their effect upon the complainant railways and, therefore, violative of the Fourteenth Amendment; but the passenger rates are not involved in the present appeals, and need not be further mentioned.

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The jurisdiction of the federal court depended solely upon the ground that the cases arose under the Constitution of the United States, and that the matter in controversy in each case exceeded the jurisdictional amount.

Temporary injunctions were issued in September, 1908, and continued in force during the pendency of the suits. The Circuit Court upon granting them ordered in each case that the complainant should execute a bond in the penal sum of \$200,000, conditioned that complainant should keep a correct account respecting its carriage of passengers and freight,

showing the difference between the tariff actually charged and that which would have been charged had the rate inhibited been applied, also showing the particulars of the carriage, and the names of the persons affected as far as practicable, the record to be kept subject to the further order of the court, and further conditioned that if it should eventually be decided that so much of the order as inhibited the enforcement of the rates ought not to have been made, the complainant should within a reasonable time to be fixed by the court refund in every instance to the party entitled the excess in charge over what would have been charged had the inhibited rates been applied, together with lawful interest and damages. Complainants entered into such bonds with sureties. Later an additional injunction bond was required to be and was furnished by each complainant, but without sureties, conditioned substantially as above.

Full answers having been filed by the Railroad Commission, and testimony having been taken, the cases were brought on to final hearing, and on May 11, 1911, final decrees were made, the same in both cases. They enjoined the commissioners and their successors, the individual shippers named as defendants, and all other patrons of the road in the shipment of freight between stations in the state of Arkansas, from enforcing or attempting to enforce any of the provisions of the freight tariff in question. In addition to this, and after disposing of the question of costs, each decree ordered that the bond for injunction be released and the sureties thereon discharged from liability, and concluded as follows:

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"And the court reserves and retains unto itself jurisdiction of the subject-matter of this suit and of all parties hereto, to the end that such other and further orders and decrees may be made herein as may become necessary by reason of any changed conditions as to the facts, equities or rights that may hereafter take place or arise."

The railroad commissioners appealed to this court (the defendant shippers having been severed), the cases were heard together, and the decrees of the Circuit Court were reversed June 16, 1913, with directions to dismiss the bills without prejudice. *Allen v. St. Louis, Iron Mountain & Southern Ry.*, 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. 1625. The causes were remanded to the District Court, the mandate in each case reciting the reversal and the order remanding the cause with directions to dismiss the bill without prejudice, and concluding as follows:

"You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

Upon the going down of the mandates the District Court on July 18, 1913, entered decrees in obedience thereto dismissing the bills without prejudice and dissolving the injunctions; and at the same time and as a part of the same decrees made a reference under a rule of the court to a special master for the purpose of determining the damages alleged to have been sustained by the railroad commissioners by reason of the granting of the temporary and permanent injunctions, declaring:

"That in determining these damages, for the recovery of which the said commissioners are not acting for themselves but for the benefit of all persons, shippers, consignees and passengers, who *have sustained any damages by reason of the granting of said injunctions," the master was authorized to examine witnesses and to give notice by publication that all persons having claims against the complainants by reason of the granting of the injunctions should present them within a time specified for the purpose.

Under this reference the appellants in cases Nos. 92 and 93 and the appellees in Nos. 94 and 95 intervened and presented claims for a refund of the difference paid by them in freight rates between the rates prescribed by the commission and those put in force by the railway companies. The master reported favorably upon these claims, dividing the amounts allowed into three periods, the first and second of which included the time elapsed between September 3, 1908, when the interlocutory injunctions were issued, and May 11, 1911, the date of the final decrees, and the third period included the time elapsed between the latter date and July 18, 1913, the date of the decrees entered upon the mandates. The railway companies filed exceptions to the master's report, which were sustained by the District Court as to the claims involved in cases Nos. 92 and 93 and overruled as to those involved in Nos. 94 and 95, and a combined decree was made accordingly.

[1, 2] The parties aggrieved desiring to appeal, and being in doubt whether the appeal lay to this court or to the Circuit Court of Appeals, prayed for and were allowed appeals to both courts. Hence the first question that confronts us is whether the decree is the subject of a direct appeal to this court.

We are clear this question must be answered in the affirmative. The appeals from the final decrees in the main causes were brought direct to this court, because of the constitutional question, under section 5 of the Circuit Court of Appeals Act of March 3, 1891 (26 Stat. 827, c. 517), which provided for such an appeal in the following *cases, among others:

"In any case that involves the construction or application of the Constitution of the United States. * * * In any case in which the Constitution or law of a state is claimed to be in

contravention of the Constitution of the United States."

This section, of course, was the predecessor of section 238, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. § 1215]), under which the present appeals were taken. And it is plain that the orders of the Railroad Commission were state laws within the meaning of this provision. *Williams v. Bruffy*, 96 U. S. 176, 183, 24 L. Ed. 716; *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 555, 34 Sup. Ct. 364, 58 L. Ed. 721.

The provisions of the Judicial Code which regulate the jurisdiction of the Circuit Court of Appeals originated in section 6 of the act of 1891. They must be construed together with those provisions of law that confer upon the District Court (section 24, Judicial Code [Comp. St. § 991]), and formerly conferred upon the Circuit Court, original jurisdiction in suits of a civil nature arising under the Constitution or laws of the United States, and in suits between citizens of different states. By section 128 of the Code (Comp. St. § 1120), the Circuit Courts of Appeals are to exercise appellate jurisdiction over the final decisions of the District Courts "in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section 238, unless otherwise provided by law; and, except as provided in sections 239 and 240, the judgments and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely" upon diversity of citizenship. Section 239 (Comp. St. § 1216) provides for the certification of questions by the Circuit Court of Appeals to this court; section 240 (section 1217) permits this court to review by certiorari any case in which the judgment or decree of the Circuit Court of Appeals is made final; and, by section 241 (section 1218), in any case in which the judgment or decree of that court is not made final, there may be an appeal or writ of error *to this court where the matter in controversy exceeds \$1,000 besides costs.

The present appeals relate to a decree made in a subordinate action ancillary to the main causes, in which, as has been stated, the federal jurisdiction was invoked solely upon the ground that the cases arose under the Constitution of the United States. It has been held repeatedly that jurisdiction of subordinate actions is to be attributed to the jurisdiction upon which the main suit rested, and hence that where jurisdiction of the main cause is predicated solely on diversity of citizenship and the decree therein is for this reason made final in the Circuit Court of Appeals, the judgments and decrees in the ancillary litigation also are final. *Rouse v. Letcher*, 156 U. S. 47, 15 Sup. Ct. 266, 39 L. Ed. 341; *Gregory v. Van Ee*, 160 U. S. 643, 16 Sup. Ct. 431, 40 L. Ed.

566; Rouse v. Hornsby, 161 U. S. 588, 16 Sup. Ct. 610, 40 L. Ed. 817; Pope v. Louisville, etc., Ry., 173 U. S. 573, 577, 19 Sup. Ct. 500, 43 L. Ed. 814.

The proceeding out of which the decree now in question arose was not merely ancillary, but was in effect a part of the main causes, taken for the purpose of carrying into effect the decrees of this court, reversing the final decrees in the main causes, and, at the same time, for the purpose of giving effect to a reservation of jurisdiction by the court below as contained in those final decrees. The supplementary decree that is now before us, since it simply brings to a conclusion those former suits pursuant to our decrees therein, must be treated as involving the construction and application of the Constitution of the United States and as being made in a case in which a state law was claimed to be in contravention of the federal Constitution, within the meaning of section 238, Judicial Code.

Therefore the motions to dismiss must be denied.

Upon the merits, it will be convenient to take up first the case of the Southern Cotton Oil Company, appellee in Nos. 94 and 95, in whose favor claims were allowed by the master as against each of the two railways and for each of the periods referred to. The railways excepted upon two grounds: (1) Because the final decrees of May 11, 1911, discharging the injunction bonds, and releasing the makers thereof from liability had the effect to relieve the railways and their sureties from all liability by reason of the granting of the injunctions; and (2) as to such claims for overcharges as accrued subsequent to the date of the final decrees, on the ground that upon the rendition of those decrees the injunction bonds ceased to be operative and created no further liability, and that the railways incurred no liability to the claimants under the final decrees. The District Court overruled the exceptions and sustained the claims of the Oil Company as against the railway companies and the sureties with interest at 6 per cent. per annum from the respective dates that the overcharges were made.

[3] We deal first with so much of the overcharges as accrued prior to the final decrees. In *St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight*, 244 U. S. 368, 373, 37 Sup. Ct. 611, 61 L. Ed. 1200, doubt was expressed whether, in view of the form of the mandate, there was any power in the District Court to determine the liability of the railway companies upon the bonds. But at that time our attention was not called to the fact that the mandates contained a provision authorizing further proceedings—a provision that removes all question of the power of the District Court. In *re Louisville*, 231 U. S. 639, 645, 34 Sup. Ct. 255, 58 L. Ed. 413; *Louis-*

ville v. Cumberland Tel. Co., 231 U. S. 652, 34 Sup. Ct. 260, 58 L. Ed. 419.

[4] In support of the contention that the final decrees had the effect of discharging the complainants and their sureties from liability upon the bonds by reason of previous overcharges, it is pointed out that this part of the decrees was not appealed from, nor was error assigned to the court's action in vacating the bonds and releasing the sureties. Whether, under the circumstances, the action of this court in reversing the decrees in respect of their main provisions granting permanent injunctions had the effect of reversing also that portion which discharged the liability upon the injunction bonds is a question upon which we need not pass. For, irrespective of this, those clauses of the final decrees by which the District Court retained jurisdiction for the purpose of making such further orders and decrees as might become necessary, coupled with the subsequent mandates of this court permitting further proceedings to be taken in conformity with our opinion and decrees and according to right and justice, empowered the District Court to set aside so much of its final decrees as released the railways and their sureties from liabilities theretofore incurred under the injunction bonds. This is what the District Court in effect did when it ordered the reference and sustained the claims of the Oil Company so far as they accrued prior to the final decrees.

[5] It is argued that the condition of the bonds—that if it should eventually be decided that the order inhibiting the enforcement of the commission rates should not have been made the complainant should refund, etc.—never was broken because it was not at any time adjudged that the allowance of the temporary injunctions was improper. But this is to construe the bonds according to the letter and not according to the substance. The state statute and the orders of the Railroad Commission entitled shippers to the benefit of the rates thereby established; and they were thus entitled at all times except as it became necessary to stay the operation of the rates by equitable process in order to permit of a judicial investigation into the question of their adequacy. The burden of proof to show them inadequate was upon the railway companies; and when they failed to sustain this burden they at the same time showed that the injunctions ought not to have been allowed.

[6] *As to that portion of the claims which accrued after the final decrees, this, as we already have held in the *McKnight Case*, 244 U. S. 368, 374, 37 Sup. Ct. 611, 61 L. Ed. 1200, was not recoverable upon the injunction bonds, nor against the sureties therein. On a fair construction of the conditions of those instruments, their obligation expired by limitation when the suits were brought to a final

conclusion. Hence, to the extent that the supplemental decree now under review awards a recovery against the sureties for claims accruing after the final decrees, it must be modified.

[7] But, in our opinion, this portion of the claims is allowable against the railway companies themselves upon the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. This right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period. Where plaintiff had judgment and execution, and defendant afterwards sued out a writ of error, it was regularly a part of a judgment of reversal that the plaintiff in error "be restored to all things which he hath lost by occasion of the said judgment"; and thereupon, in a plain case, a writ of restitution issued at once, but if a question of fact was in doubt, a writ of scire facias was first issued. *Anonymous*, Salk. 588, citing *Goodyere v. Ince*, Cro. Jac. 246; *Sympson v. Juxon*, Cro. Jac. 699; *Vesey v. Harris*, Cro. Car. 328. See, also, *Lil. Ent.* 641, 650; *Arch. Append.* 195, 200. The doctrine has been mostly fully recognized in the decisions of this court. *Bank of the United States v. Bank of Washington*, 6 Pet. 8, 17, 8 L. Ed. 299; *Erwin v. Lowry*, 7 How. 172, 184, 12 L. Ed. 655; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 11 Sup. Ct. 523, 35 L. Ed. 151.

That a course of action so clearly consistent with the principles of equity is one proper to be adopted in an equitable proceeding goes without saying. It is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to correct that which has been wrongfully done by virtue of its process. *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219, 11 Sup. Ct. 523, 35 L. Ed. 151; *Johnston v. Bowers*, 69 N. J. Law, 544, 547, 55 Atl. 230.

[8] It is argued that the claimant is not in a position to invoke the principle of restitution in this proceeding because it was not a party to the original proceedings, but came in by intervening before the master. This point is unsubstantial. The Railroad Commission, in defending the rate schedules against the attack of the railway companies, represented all shippers; the permanent injunctions that were awarded by the final decrees restrained all shippers from taking advantage of the commission rates; and during the time that those decrees remained unreversed the railway companies obtained the benefit of the injunction by exacting from this claimant, among others, in addition to the commission rates, those excess charges that form the basis of the present claims. It is a

typical case for the application of the principle of restitution; and the District Court properly held the commission to be the representative of the shippers for this purpose.

[9] The suggestion that the order of reference was made under a rule of court that related only to damages recoverable on injunction bonds, and furnished no foundation for a decree against the railways on the theory of restitution, is without weight. The companies were fully heard upon the merits, and there is no question about the facts.

[10] In behalf of the railways, it is argued that the reversal of the decrees of May 11, 1911, "without prejudice," left the rights of the parties still in doubt, and thus rendered it improper for the District Court to award damages against the railways, either on the basis of a breach of the injunction bonds or on the basis of restitution.

*But it seems to us that the rights of the present shippers were so clear as to make an allowance of damages upon the injunction bonds and restitution upon the reversal of the decrees manifestly their due. That the reversal was "without prejudice" did not deprive the decrees of conclusiveness as to past transactions, but only prevented them from being a bar to future suits for injunction upon a showing of changed conditions. *Missouri v. C., B. & Q. R. R.*, 241 U. S. 533, 539, 36 Sup. Ct. 715, 60 L. Ed. 1148.

[11] The contention that there was error in allowing interest upon the amount of the overcharges is unsubstantial. The damage was complete when the overcharges were made, and as they were wrongfully made and without consent of the shippers, interest ran from that date on general principles.

For these reasons, the decree in favor of the Southern Cotton Oil Company, modified so as to relieve the sureties from that part of the claims which accrued after the final decrees of May 11, 1911, will be affirmed.

The claims of both the Arkadelphia Milling Company (No. 92) and Hasty & Sons (No. 93) were based upon the difference between rates charged on rough lumber from the forest to milling points and the rates provided in the commission tariff on such movements. The tariff contained certain maximum rates on lumber of this character applicable generally, and in addition certain "rough material rates" much lower than the others, conditioned upon a certain percentage of the manufactured product being shipped over the same line that brought in the rough material. The railway companies excepted to the allowance in favor of each of these appellants upon the ground that the "rough material rates" were discriminatory against shippers who did not reship the specified percentages of the finished product. As to the Hasty claim, there was an additional exception based upon the ground that the movement of rough material to milling

points in the state and the subsequent forwarding of the finished product to market points outside of the state constituted interstate commerce, so that the rough material rates prescribed by the state commission were not applicable. The court sustained the exceptions on both grounds.

[12,13] To take up first the question of discrimination: The tariff gave the benefit of the rough material rates only where the shipper transported over the line of the carrier a certain percentage of the product manufactured from the rough material. The master found that the condition was complied with by these shippers and sustained the allowances accordingly.

The District Court sustained the defense of discrimination upon the authority of *Lake Shore, etc., Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, and *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92.

We assume, without deciding, that, notwithstanding the general result adverse to the railway companies in the main suits, they were still at liberty to dispute the validity of the rate schedule as it related to particular shippers. See *Chicago, etc., Co. v. Minnesota*, 134 U. S. 418, 460, 10 Sup. Ct. 462, 702, 33 L. Ed. 970, concurring opinion of Mr. Justice Miller; *St. Louis & San Francisco Ry. v. Gill*, 156 U. S. 649, 659, 666, 15 Sup. Ct. 484, 39 L. Ed. 567; *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Missouri v. C., B. & Q. R. R.*, 241 U. S. 533, 538, 36 Sup. Ct. 715, 60 L. Ed. 1148.

In our opinion, however, the District Court erred in its ruling. The rough material rates were but parts of a general schedule that covered a wide field. This schedule was established in the exercise of the legislative authority of the state, and could not be set aside by the court on the ground of discrimination unless it amounted to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

*But there is nothing to show that the rough material rates wrought any discrimination against the railway companies. They were applicable upon all railways alike. If there was—not in the least intimating that there was—undue discrimination as against small shippers or those who had no occasion to obtain transportation for the manufactured product over the line of the same carrier, this was not a matter of which the railways could complain. It is most thoroughly established that before one may be heard to strike down state legislation upon the ground of its repugnancy to the federal Constitution he must bring himself within the class affected by the unconstitutional feature. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 34 Sup. Ct. 359, 58 L. Ed. 713; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 35 Sup. Ct. 167, 59 L. Ed. 364; *Mallinckrodt Works v.*

State of Missouri ex rel. Jones, 238 U. S. 41, 54, 35 Sup. Ct. 671, 59 L. Ed. 1192; *Cusack Co. v. City of Chicago*, 242 U. S. 526, 530, 37 Sup. Ct. 190, 61 L. Ed. 472, L. R. A. 1918A, 136, Ann. Cas. 1917C, 594.

Lake Shore, etc., Ry. Co. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, did not set aside this established principle. The discrimination in favor of certain patrons, there referred to, was laid hold of rather as showing the unreasonable character of the regulation. The authority of that case is not to be extended. *Louisville & Nashville R. R. Co. v. Kentucky*, 183 U. S. 503, 511, 22 Sup. Ct. 95, 46 L. Ed. 298; *Pennsylvania R. R. Co. v. Towers*, 245 U. S. 6, 38 Sup. Ct. 2, 62 L. Ed. 117, L. R. A. 1918C, 475.

Cotting v. Kansas City Stockyards Co., 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, is not at all in point. While the opinion of Mr. Justice Brewer covers a wide range of discussion, a majority of the court (183 U. S. 114, 22 Sup. Ct. 30, 46 L. Ed. 92) placed the decision upon the ground that the statute of Kansas applied only to a single company, and not to others engaged in like business in the state, and thereby denied to that company the equal protection of the laws.

[14] There remains the question whether the shipments by J. F. Hasty & Sons of rough material from the forest to the milling point, followed by the forwarding of the finished product to points outside of the state, constituted inter*state commerce. If they did, it is obvious that the state tariff was not applicable to them.

The following statement, taken from the record, shows the admitted facts as to the course of business:

"When the rough material reached the mills, it was manufactured into finished staves, headings and hoops, and in this condition shipped to whoever purchased them. The purchaser uses them in making barrels, casks, etc. The wastings in the finishing of said articles from the rough material were either disposed of for firewood, or destroyed. When the rough material left the woods, a bill of lading was issued from the woods to the mill. When the rough material reached the mill, it was finished into some or all of the articles described, when it was stacked in the yards or placed in kilns to dry. The process of manufacturing and drying occupied several months, or on an average this process would be gone through with, the finished products sold and shipped to the purchaser, in about five months from the date the rough material was received at the mill. The claimants classified the different parts after they came from the mill completely finished, and made sales from such stock. The markets for the manufactured articles were almost altogether in other states than Arkansas, or in foreign countries, and about 95 per cent. of the sale of finished articles, that is, of the total outbound shipments, were made for delivery at points outside the state of Arkansas, the remaining 5 per cent. being sold and delivered, or shipped to points within the state of Arkansas. At the

time the rough material was shipped to the mills, the mills did not know to whom they would sell the finished product, or to what points it would be shipped, but did know that there was little market for the finished articles in the state of Arkansas, and expected that they would sell 95 per cent. of said finished articles and ship them to points outside the state of Arkansas.

*"It was the intention of all the claimants herein, at the time they shipped the rough material into the milling points, to mill said rough material with the object of selling the said finished product and shipping it out as soon as practicable, and all of them knew and intended at the time they brought the rough material into the mill, on account of previous course of dealings in the business, that 95 per cent. of the finished product would be by them shipped to points outside the state of Arkansas.

"The claimants paid the usual property tax to the state of Arkansas on their stock of materials on hand at the milling point, whether said stock was in the rough or finished, the amount of the tax being arrived at according to the methods in use in the state of Arkansas by the use of an average basis."

Upon the facts as stated, it is our opinion that the District Court erred in treating the movement of the rough lumber from the woods to the milling point as interstate commerce. It is not merely that there was no continuous movement from the forest to the points without the state, but that when the rough material left the woods it was not intended that it should be transported out of the state, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its character, utility, and value. The raw material came to rest at the mill, and after the product was manufactured it remained stored there for an indefinite period—manufacture and storage occupying five months on the average—for the purpose of finding a market. Where it would eventually be sold no one knew. And the fact that previous experience indicated that 95 per cent. of it must be marketed outside of the state so that this entered into the purpose of the parties when shipping the rough material to the mill, did not alter the character of the latter movement. The question is too well settled by *previous decisions to require discussion. *Coe v. Errol*, 116 U. S. 517, 525, 6 Sup. Ct. 475, 29 L. Ed. 715; *Bacon v. Illinois*, 227 U. S. 504, 515-516, 33 Sup. Ct. 299, 57 L. Ed. 615; *McCluskey v. Marysville & Northern Ry. Co.*, 243 U. S. 36, 37 Sup. Ct. 374, 61 L. Ed. 578.

The distinction between these cases and those cited to sustain the decision of the District Court (*Swift & Co. v. United States*, 196 U. S. 375, 398, 25 Sup. Ct. 276, 49 L. Ed. 518; *Ohio R. R. Commission v. Worthington*, 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; *Texas & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 33 Sup. Ct. 229, 57 L. Ed. 442; *Louisiana R. R. Commission v. Texas & Pa-*

cific Ry. Co., 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215) is so evident that particular analysis may be dispensed with.

The exceptions sustained by the District Court to the claims of the Arkadelphia Milling Co. and Hasty & Sons having been found to be untenable, it results that these claims should be allowed as against the railway companies and their sureties, so far as they arose before the final decrees, and as against the railway companies only, so far as they arose after the final decrees.

Nos. 92 and 93, decree reversed; Nos. 94 and 95, decree modified and affirmed; and the cause remanded for further proceedings in conformity with this opinion.

(249 U. S. 1)

HARRIMAN NAT. BANK v. SELDOM- RIDGE.

(Argued Jan. 31, 1919. Decided March 3, 1919.)

No. 173.

1. COURTS — §382(5)—SUPREME COURT—JURISDICTION—NATIONAL BANK ACT.

Judgment of Circuit Court of Appeals affirming that of the District Court is reviewable by the Supreme Court; the case from its inception involving the enforcement of the National Banking Act, and therefore not being dependent in the trial court solely on diversity of citizenship.

2. BANKS AND BANKING — §178 — LOAN AGREEMENT—CANCELLATION.

Agreement for loan by bank held rightly canceled by bank, preventing it being a source of obligation against it, its conditions not being complied with, and forged collateral being fraudulently furnished.

3. BANKS AND BANKING — §178 — FRAUDULENT ENTRY OF DEPOSIT OF CHECK—LIABILITY OF OTHER BANK.

The making by C., cashier of the M. Bank, of a fraudulent and false deposit slip purporting to show deposit by W. of his check for \$30,000 on the H. Bank, and payment by the M. Bank of check for \$35,000 in favor of T. purporting to be drawn by W., all before the H. Bank, which had agreed to make a loan of \$30,000 to W., afterwards rightly canceled for noncompliance with conditions, had received the collateral note or made any entries on its books concerning it, gave the M. Bank no right of action against the H. Bank.

4. BANKS AND BANKING — §178—ENTRY OF CREDIT TO OTHER BANK—RIGHT OF OTHER BANK.

Mere bookkeeping entry by the H. Bank of credit to the M. Bank gave the M. Bank no right of action against the H. Bank in the absence of consideration moving from the M. Bank to the H. Bank, or of conditions on which to base an estoppel.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Action by Harry H. Seldomridge, receiver of the Mercantile National Bank of Pueblo, against the Harriman National Bank. Judgment for plaintiff was affirmed by the Circuit Court of Appeals (240 Fed. 111, 153 C. C. A. 147), and defendant brings error. Reversed and remanded, with instructions.

Messrs. Charles E. Hughes and Henry B. Wesselman, both of New York City, for plaintiff in error.

Messrs. Stuart G. Gibboney and William A. Barber, both of New York City, for defendant in error.

*Mr. Chief Justice WHITE delivered the opinion of the Court.

Following the failure in March, 1915, of the Mercantile National Bank of Pueblo, Colo., the receiver appointed by the comptroller commenced this suit to recover from the Harriman National Bank of New York City \$30,000 alleged to be due to the Mercantile Bank. On issue joined before a jury, the court, after refusing a request of the Harriman National Bank for a peremptory instruction directing a verdict in its favor, granted a request of like character made by the receiver, and a judgment on the resulting verdict for the amount claimed was entered.

[1] The case is before us on error to the judgment of the court below affirming that of the trial court, our jurisdiction to review resulting because the case from its inception involved the enforcement of the National Banking Act, and therefore, was not dependent in the trial court solely upon diversity of citizenship. *Auten v. United States National Bank*, 174 U. S. 125, 141, 19 Sup. Ct. 628, 43 L. Ed. 920; *International Trust Co. v. Weeks*, 203 U. S. 364, 366, 27 Sup. Ct. 69, 51 L. Ed. 224.

The case is this: W. B. Slaughter, through stock ownership, controlled the Mercantile National Bank of Pueblo, Colo. He was president and his son, C. C. Slaughter, was cashier. Prior to 1915, Slaughter, the president, removed his residence from Pueblo to Texas, engaging there in the cattle business and leaving his son, the cashier, in complete control of the Mercantile Bank and of all its affairs. W. B. Slaughter was also the president of the Silverton National Bank of Silverton, Colo., and controlled the affairs of that bank by the ownership of a majority of its stock. At Silverton there was another national bank carrying on business, the First National, the majority of whose stock was owned by one Thatcher.

The correspondent of the Mercantile Bank in New York City was the Harriman National, with which it had a checking account. On January 28, 1915, C. C. Slaughter, the cashier of the Mercantile, dictated a letter to the Harriman which was dated at Pueblo

and written on the letter head of the Mercantile Bank, purporting to be from W. B. Slaughter, whose signature was affixed by a rubber stamp. By this letter its assumed writer, after referring to his ownership and control of the Silverton National, stated his purpose to buy out the interest of Thatcher in the First National Bank of Silverton and after doing so to consolidate the two banks, and requested a loan of \$30,000 to enable him to accomplish the purpose. It was stated that it was proposed to evidence the loan by a note at 60 days, to be signed by the writer, W. B. Slaughter, and by his son C. C. Slaughter, if the bank so desired, and to secure the note by the pledge of 500 shares of the Mercantile and 400 shares of the First National of Silverton. The Harriman Bank received this letter on the 1st of February and at once telegraphed W. B. Slaughter, president of the Mercantile Bank at Pueblo, *that, whenever desired, the Harriman would be willing to make the loan, as requested. On the same day the bank wrote a letter to W. B. Slaughter, president at Pueblo, but marked it personal, repeating and confirming the telegram, and inclosing a blank form of collateral note to be executed and sent to the bank with the collateral when the money was desired.

The telegram of the 1st of February announcing the willingness of the Harriman Bank to make the loan having come into the hands of C. C. Slaughter on the day it was sent, he ordered a seal to be made which he said was intended as the seal of the First National Bank of Silverton, and on the 5th of February bought from a printer blank forms of certificates of stock. On the next day, Saturday, the 6th, purporting to act as agent of W. B. Slaughter, C. C. Slaughter bought from Thatcher his interest in the First National of Silverton, and gave a check in the name of W. B. Slaughter and as his representative, on the Mercantile National, for \$35,000 in part payment. On Sunday, February 7th, C. C. Slaughter caused a letter to be prepared falsely purporting to be written and signed by W. B. Slaughter, acknowledging the receipt of the telegram sent by the Harriman Bank on the 1st and asking that the loan be consummated. In this letter there was returned the collateral note which the bank had sent for execution, along with the promised collateral, that is, certificates for 400 shares of the First National of Silverton and 500 shares of the Mercantile at Pueblo. The signature of W. B. Slaughter to the note was forged and the collaterals were also forged, the first, the certificates of the Silverton Bank stock, because they were fabricated by the use of the printed certificates and seal which had been acquired a few days before and described shares which had no existence, and the second, the Mercantile Bank stock, because, although the certificates represented stock standing in the

name of W. B. Slaughter on the *books of that bank, the powers of attorney purporting to have been given by W. B. Slaughter to enable them to be transferred to the Harriman Bank were forged.

To meet the check for \$35,000 given on Saturday for the Thatcher purchase, on Monday morning, February 8th, C. C. Slaughter made out a deposit slip to show the deposit by W. B. Slaughter of a check on the Harriman National for \$30,000, although no such check was in fact deposited; and on that day the check in favor of Thatcher for \$35,000 was paid and debited by the Mercantile to W. B. Slaughter's account. The letter of the 7th sending the note to the Harriman reached that bank on the 10th, and, complying with the request it contained, a credit in favor of W. B. Slaughter for \$30,000, the amount covered by the loan, was entered by the Harriman on its books.

On the 17th of February the Mercantile Bank overdraw its account in the Harriman to the extent of \$8,000, which that bank honored. It, however, telegraphed the Mercantile, calling attention to the overdraft and asked whether a remittance to cover it had been made. The telegram, moreover, referred to the \$30,000 credit in favor of W. B. Slaughter and asked whether possibly it was intended that the amount of the loan credit should be placed to the account of the bank. In reply, C. C. Slaughter dictated a telegram in the name of the Mercantile Bank instructing that the amount of the credit of W. B. Slaughter be transferred to the credit of the Mercantile. On the receipt of this telegram the Harriman made the necessary bookkeeping entries to transfer the credit of \$30,000 from the account of W. B. Slaughter to that of the Mercantile National Bank. On the next day, the 18th, however, the Harriman wrote W. B. Slaughter, Mercantile National Bank, Pueblo, informing him of the instructions they had received from C. C. Slaughter and what they had done under them, and asking the former's approval. This letter was replied to on February 22d by C. C. Slaughter confirming his previous telegram and saying that the original intention was that the money borrowed should go to the credit of the Mercantile Bank for the use of W. B. Slaughter.

Thus things stood until the 23d of March, when the Harriman received a telegram from W. B. Slaughter, president of the Mercantile Bank, telling them to cancel all authority of C. C. Slaughter to act as an officer of the Mercantile because he had resigned. The Harriman thereupon telegraphed and wrote W. B. Slaughter, informing him of what had transpired on the subject of the credit for the loan under the note and its transfer, and saying that, as he had given no personal instructions on the subject, they had made bookkeeping entries taking the \$30,000 out of the account of the Mercantile so as to hold it for a full understanding of the situation; and

when, a few days later, the Harriman learned of the failure of the Mercantile, such entries were made as to cancel the loan without diminishing or changing the credits which otherwise existed in favor of the Mercantile.

Subsequently W. B. Slaughter notified the Harriman that he had never applied for the loan in question, or signed the note which evidenced it, and denied all liability. The appointment of the receiver and the bringing of the suit which we have stated at the outset followed in due season.

[2] Passing the fact that both parties to the loan agreement, the Harriman Bank on the one side and W. B. Slaughter on the other, insist, although for different reasons, that the loan agreement has no existence, there nevertheless can be no room for dispute that such contract, by the failure to comply with its conditions and by the fraud and forgery committed concerning the collaterals as between the parties to it and those in privity, was rightly canceled and can be the source of no obligation against *the Harriman Bank. The right of the Mercantile Bank as here asserted, if it has any existence, must rest, therefore, not in the loan agreement, but on some condition or consideration extraneous to that contract creating as against the Harriman and in favor of the Mercantile the duty to pay the amount which both the courts below awarded.

[3, 4] No semblance of ground, however, supporting that view results from the undisputed facts which we have stated unless it can be sustained from two considerations: (1) The payment which was made by the Mercantile on February 8th of the check purporting to be drawn by W. B. Slaughter in favor of Thatcher and the making by C. C. Slaughter on the 8th of the fraudulent and false deposit slip purporting to show the deposit on that day by W. B. Slaughter of a check drawn by him on the Harriman for \$30,000; and (2) the bookkeeping entries which were made by the Harriman on the 18th transferring the credit for the amount of the agreed loan from the account of W. B. Slaughter to that of the Mercantile Bank. But a moment's thought demonstrates that the circumstances referred to cannot possibly sustain the conclusions stated. This is true as to the first because both the payment of the check by the Mercantile and the making of the false deposit slip took place before the Harriman had even received the collateral note or made any entry on its books concerning the same; and the second because the mere bookkeeping entry made by the Harriman of credit to the Mercantile, in the very nature of things, was incapable alone of conferring rights on the Mercantile to which it was not otherwise entitled, especially in the absence of all consideration moving from the Mercantile to the Harriman and the non-existence of any condition upon which to base even the pretext of estoppel in favor of

the Mercantile as against the Harriman resulting from action taken by the former upon the faith of the book*keeping credit. Indeed, when the reasoning upon which the relief below was awarded is considered, and the arguments pressed at bar sustaining that result are weighed, they all at last come to the assumption that by some undisclosed process the Mercantile Bank was entitled to enforce as against the Harriman the contract for the loan agreement made with W. B. Slaughter, without the duty to comply with the obligations of that contract, and therefore became possessed of the power to enforce the contract against the Harriman despite the fraud and forgery practiced upon the Harriman in the attempt which was made to procure the benefits of the loan agreement.

It follows that the judgment of the Circuit Court of Appeals (240 Fed. 111, 153 C. C. A. 147) and that of the District Court must be and they are reversed, and the case be remanded to the District Court with instructions, that after setting aside its judgment, it take such further proceedings as may be in conformity with this opinion.

And it is so ordered.

(249 U. S. 47)

SCHENCK v. UNITED STATES.

BAER v. SAME.

(Argued Jan. 9 and 10, 1919. Decided March 3, 1919.)

Nos. 437, 438.

1. ARMY AND NAVY 40—ESPIONAGE ACT—CONSPIRACY—EVIDENCE.

Evidence on prosecution for conspiracy to violate the Espionage Act, tit. 1, § 3 (Comp. St. 1918, § 10212c), by obstructing recruiting, held sufficient to show conspiracy to send the documents mailed.

2. CRIMINAL LAW 393(1)—RIGHTS OF ACCUSED—DOCUMENTS OBTAINED ON SEARCH WARRANT.

Documentary evidence is not inadmissible against defendants, because obtained on a search warrant, valid so far as appears.

3. CRIMINAL LAW 393(1)—RIGHT OF ACCUSED—DOCUMENTS OBTAINED ON SEARCH WARRANT.

Documents are not inadmissible against defendants, though obtained on a search warrant; the warrant having issued, not against them, but the Socialist headquarters, and the documents technically not even having been in defendants' possession.

4. CRIMINAL LAW 393(1)—SELF-INCRIMINATING EVIDENCE.

Evidence even directly proceeding from defendants in a criminal proceeding is not excluded in all cases by the Fifth Amendment.

5. ARMY AND NAVY 40—ESPIONAGE ACT—INTENT AND TENDENCY OF CIRCULAR.

A circular held such that the jury could find it was intended, and its tendency was, to influence persons subject to the draft to obstruct the carrying of it out.

6. ARMY AND NAVY 40—CONSTITUTIONAL LAW 90—OBSTRUCTING DRAFT—CONSPIRACY—FREE SPEECH.

A circular, the tendency of which is to influence persons subject to the draft to obstruct the carrying of it out, is not protected by the First Amendment, against Espionage Act June 15, 1917, because unsuccessful; title 1, § 4 (Comp. St. 1918, § 10212d), punishing conspiracy, accompanied by act to effect its object, the character of every act depending on the circumstances in which it is done, and the question of right of protection against abridging freedom of speech in every case being whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent, a question of proximity and degree.

7. ARMY AND NAVY 40—ESPIONAGE ACT—"RECRUITING"—"ENLISTMENT."

"Recruiting," in Espionage Act June 15, 1917, tit. 1, § 3 (Comp. St. 1918, § 10212c), denouncing the offense of obstructing the "recruiting or enlistment service," is gaining fresh supplies for the forces, as well by draft as otherwise, and put as an alternative to enlistment or voluntary enrollment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Enlistment.]

8. CRIMINAL LAW 14—EFFECT OF AMENDMENT OF ACT—PENDING INDICTMENT.

An indictment under Espionage Act June 15, 1917, tit. 1, §§ 3, 4 (Comp. St. 1918, §§ 10212c, 10212d), for conspiracy to obstruct recruiting, held not affected by the fact that the act was enlarged by amending Act May 16, 1918.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Charles T. Schenck and Elizabeth Baer were convicted of violation of the Espionage Act, denied a new trial (253 Fed. 212), and bring error. Affirmed.

*Messrs. Henry John Nelson and Henry Johns Gibbons, both of Philadelphia, Pa., for plaintiffs in error.

Mr. John Lord O'Brian, of Buffalo, N. Y., for the United States.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 217, 219 (Comp. St. 1918, § 10212c), by causing and attempt*ing to cause

insubordination, &c., in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire, to-wit, that the defendant wilfully conspired to have printed and circulated to men who had been called and accepted for military service under the Act of May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, §§ 2044a-2044k), a document set forth and alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. "The second count alleges a conspiracy to commit an offense against the United States, to-wit, to use the mails for the transmission of matter declared to be non-mailable by title 12, § 2, of the Act of June 15, 1917 (Comp. St. 1918, § 10401b), to-wit, the above mentioned document, with an averment of the same overt acts. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press, and bringing the case here on that ground have argued some other points also of which we must dispose.

[1] It is argued that the evidence, if admissible, was not sufficient to prove that the defendant Schenck was concerned in sending the documents. According to the testimony Schenck said he was general secretary of the Socialist party and had charge of the Socialist headquarters from which the documents were sent. He identified a book found there as the minutes of the Executive Committee of the party. The book showed a resolution of August 13, 1917, that 15,000 leaflets should be printed on the other side of one of them in use, to be mailed to men who had passed exemption boards, and for distribution. Schenck personally attended to the printing. On *August 20 the general secretary's report said "Obtained new leaflets from printer and started work addressing envelopes" &c.; and there was a resolve that Comrade Schenck be allowed \$125 for sending leaflets through the mail. He said that he had about fifteen or sixteen thousand printed. There were files of the circular in question in the inner office which he said were printed on the other side of the one sided circular and were there for distribution. Other copies were proved to have been sent through the mails to drafted men. Without going into confirmatory details that were proved, no reasonable man could doubt that the defendant Schenck was largely instrumental in sending the circulars about. As to the defendant Baer there was evidence that she was a member of the Executive Board and that the minutes of its

transactions were hers. The argument as to the sufficiency of the evidence that the defendants conspired to send the documents only impairs the seriousness of the real defence.

[2-4] It is objected that the documentary evidence was not admissible because obtained upon a search warrant, valid so far as appears. The contrary is established. *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575; *Weeks v. United States*, 232 U. S. 383, 395, 396, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177. The search warrant did not issue against the defendant but against the Socialist headquarters at 1326 Arch street and it would seem that the documents technically were not even in the defendants' possession. See *Johnson v. United States*, 228 U. S. 457, 33 Sup. Ct. 572, 57 L. Ed. 919, 47 L. R. A. (N. S.) 263. Notwithstanding some protest in argument the notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth Amendment is plainly unsound. *Holt v. United States*, 218 U. S. 245, 252, 253, 31 Sup. Ct. 2, 54 L. Ed. 1021.

[5] The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the conscription act and that a conscript is little better than a *convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said, "Do not submit to intimidation," but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that any one violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on, "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up, "You must do your share to maintain, support and uphold the rights of the people of this country." Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the

draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

[6] But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the *main purpose, as intimated in *Patterson v. Colorado*, 205 U. S. 454, 462, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin*, 195 U. S. 194, 205, 206, 25 Sup. Ct. 3, 49 L. Ed. 154. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 439, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in section 4 (Comp. St. 1918, § 10212d) punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. *Goldman v. United States*, 245 U. S. 474, 477, 38 Sup. Ct. 166, 62 L. Ed. 410. Indeed that case might be said to dispose of the present contention if the precedent covers all media concludendi. But as the right to free speech was not referred to specially, we have thought fit to add a few words.

[7, 8] It was not argued that a conspiracy to obstruct the draft was not within the words of the Act of 1917. The *words are "obstruct the recruiting or enlistment serv-

ice," and it might be suggested that they refer only to making it hard to get volunteers. Recruiting heretofore usually having been accomplished by getting volunteers the word is apt to call up that method only in our minds. But recruiting is gaining fresh supplies for the forces, as well by draft as otherwise. It is put as an alternative to enlistment or voluntary enrollment in this act. The fact that the Act of 1917 was enlarged by the amending Act of May 16, 1918, c. 75, 40 Stat. 553, of course, does not affect the present indictment and would not, even if the former act had been repealed. Rev. St. § 13 (Comp. St. § 14).

Judgments affirmed.

(249 U. S. 204)

FROHWERK v. UNITED STATES.

(Argued Jan. 27, 1919. Decided March 10, 1919.)

No. 685.

1. CONSTITUTIONAL LAW ⇨90—FREE SPEECH—PROTECTION BY AMENDMENT.

First Amendment to Constitution, while prohibiting legislation against free speech, as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language.

2. CONSPIRACY ⇨28—VIOLATION OF ESPIONAGE ACT—NEWSPAPER ARTICLES AS BASIS FOR CONVICTION.

Articles published in German language newspaper relative to Wall Street's having forced country into European war, to England's controlling the country, and to the draft as a measure it was excusable to resist, *held* to furnish basis for conviction of writer on count charging conspiracy between him and another, both having been engaged in preparation and publication of newspaper, to violate Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c).

3. CONSPIRACY ⇨28, 43(6)—CONSPIRACY TO OBSTRUCT RECRUITING—ABSENCE OF AGREEMENT ON MEANS.

Conspiracy between defendant and another to obstruct recruiting would be criminal, even if no means were agreed upon specifically whereby to accomplish intent; it being enough if parties agree to set to work for common purpose which could be accomplished or aided by persuasion as well as by false statements, although indictment need not allege false reports were intended to be made, or made.

4. CONSPIRACY ⇨43(4)—INDICTMENT—ALLEGATION OF INTENT.

Indictment for conspiracy to violate Espionage Act June 15, 1917, § 3 (Comp. St. 1918, § 10212c), by obstructing recruiting, sufficiently alleged defendant's intent in stating that he and another conspired to accomplish it.

5. CONSPIRACY ⚡43(5)—VIOLATION OF ESPIONAGE ACT—OBSTRUCTION OF RECRUITING—INDICTMENT.

Under Espionage Act June 15, 1917, § 4 (Comp. St. 1918, § 10212d), it is sufficient that indictment for conspiracy to violate the law by obstructing recruiting allege overt acts to have been done to effect object of conspiracy.

6. INDICTMENT AND INFORMATION ⚡125(5½)—CONSPIRACY—DUPLICITY OF COUNT.

Single count in indictment for conspiring to commit two offenses is not bad for duplicity; the conspiracy being the crime, and single, however diverse its objects.

7. ARMY AND NAVY ⚡40—ACTS DENOUNCED BY ESPIONAGE ACT.

The contention that some of the matters dealt with in Espionage Act June 15, 1917, are punishable under the Constitution as treasonable, or not at all, and that alleged attempt to cause disloyalty, mutiny, and refusal of military and naval duty, denounced by the law, cannot be punished, not being treason, is unsound.

8. ARMY AND NAVY ⚡40—ESPIONAGE ACT—AMENDMENT.

Indictment for conspiring to and attempting to violate Espionage Act June 15, 1917, by obstructing recruiting, held not affected by amendment by Act May 16, 1918.

9. CRIMINAL LAW ⚡1151—SETTING TIME FOR TRIAL—DISCRETION OF COURT—REVIEW.

Where, before demurrer to indictment for conspiring to violate Espionage Act was disposed of, trial court had ordered jurymen to be summoned to serve for April term, and to report June 25th, as it might, and demurrer was overruled June 24th, and the day following the court ordered plea of not guilty to be entered, a continuance refused, a jury impaneled, and trial set to begin the next morning, and trial judge's discretion is not shown to have been wrongly exercised, reversal is not justified.

In Error to the District Court of the United States for the Western District of Missouri.

Jacob Frohwerk was convicted of a conspiracy to violate the Espionage Act, and he brings error. Judgment affirmed.

*Messrs. Joseph D. Shewalter, of Independence, Mo., and Frans E. Lindquist, of Kansas City, Mo., for plaintiff in error.

Mr. John Lord O'Brian, of Buffalo, N. Y., for defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an indictment in thirteen counts. The first alleges a conspiracy between the plaintiff in error and one Carl Gleaser, they then being engaged in the preparation and publication of a newspaper, the Missouri Staats Zeitung, to violate the Espionage Act of June 15, 1917, c. 30, § 3, 40 Stat. 217,

219 (Comp. St. 1918, § 10212c). It alleges as overt acts the preparation and circulation of twelve articles &c. in the said newspaper at different dates from July 6, 1917, to December 7 of the same year. The other counts allege attempts to cause disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, by the same publications, each count being confined to the publication of a single date. Motion to dismiss and a demurrer on constitutional and other grounds, especially that of the First Amendment as to free speech, were overruled, subject to exception, and the defendant refusing to plead the Court ordered a plea of not guilty to be filed. There was a trial and Frohwerk was found guilty on all *the counts except the seventh, which needs no further mention. He was sentenced to a fine and to ten years imprisonment on each count, the imprisonment on the later counts to run concurrently with that on the first.

[1] Owing to unfortunate differences no bill of exceptions is before us. Frohwerk applied to this Court for leave to file a petition for a writ of mandamus requiring the judge to sign a proper bill of exceptions, but a case was not stated that would warrant the issuing of the writ and leave was denied. *United States ex rel. Frohwerk v. Youmans* (December 16, 1918) 248 U. S. 540, 39 Sup. Ct. 132, 63 L. Ed. —. The absence of a bill of exceptions and the suggestions in the application for mandamus have caused us to consider the case with more anxiety than if it presented only the constitutional question which was the theme of the principal argument here. With regard to that argument we think it necessary to add to what has been said in *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470, only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. *Robertson v. Baldwin*, 165 U. S. 275, 281, 17 Sup. Ct. 326, 41 L. Ed. 715. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.

[2] Whatever might be thought of the other counts on the evidence, if it were before us, we have decided in *Schenck v. United States*, that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion. The Government argues that on the record the question is narrowed simply to the power of Congress to punish such a conspiracy to obstruct, but we shall take it in favor of the defendant that the publica-

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tions set forth as overt acts were the only means and, when coupled with the joint activity in producing them, the only evidence of *the conspiracy alleged. Taking it that way, however, so far as the language of the article goes there is not much to choose between expressions to be found in them and those before us in *Schenck v. United States*.

The first begins by declaring it a monumental and inexcusable mistake to send our soldiers to France, says that it comes no doubt from the great trusts, and later that it appears to be outright murder without serving anything practical; speaks of the unconquerable spirit and undiminished strength of the German nation, and characterizes its own discourse as words of warning to the American people. Then comes a letter from one of the counsel who argued here, stating that the present force is a part of the regular army raised illegally; a matter discussed at length in his voluminous brief, on the ground that before its decision to the contrary the Solicitor General misled this Court as to the law. Later, on August 3, came discussion of the causes of the war, laying it to the administration and saying "that a few men and corporations might amass unprecedented fortunes we sold our honor, our very soul" with the usual repetition that we went to war to protect the loans of Wall Street. Later, after more similar discourse, comes "We say therefore, cease firing."

Next, on August 10, after deploring "the draft riots in Oklahoma and elsewhere" in language that might be taken to convey an innuendo of a different sort, it is said that the previous talk about legal remedies is all very well for those who are past the draft age and have no boys to be drafted, and the paper goes on to give a picture, made as moving as the writer was able to make it, of the sufferings of a drafted man, of his then recognizing that his country is not in danger and that he is being sent to a foreign land to fight in a cause that neither he nor any one else knows anything of, and reaching the conviction that this is but a war to protect some rich men's money. *Who then, it is asked, will pronounce a verdict of guilty upon him if he stops reasoning and follows the first impulse of nature: self-preservation; and further, whether, while technically he is wrong in his resistance, he is not more sinned against than sinning; and yet again whether the guilt of those who voted the unnatural sacrifice is not greater than the wrong of those who now seek to escape by illadvised resistance. On August 17 there is quoted and applied to our own situation a remark to the effect that when rulers scheme to use it for their own aggrandizement loyalty serves to perpetuate wrong. On August 31 with more of the usual discourse, it is said that the sooner the

public wakes up to the fact that we are led and ruled by England, the better; that our sons, our taxes and our sacrifices are only in the interest of England. On September 28 there is a sneering contrast between Lord Northcliffe and other Englishmen spending many hundreds of thousands of dollars here to drag us into the war and Count Bernstorff spending a few thousand to maintain peace between his own country and us. Later follow some compliments to Germany and a statement that the Central powers are carrying on a defensive war. There is much more to the general effect that we are in the wrong and are giving false and hypocritical reasons for our course, but the foregoing is enough to indicate the kind of matter with which we have to deal.

It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the country is at war. It does not appear that there was any special effort to reach men who were subject to the draft; and if the evidence should show that the defendant was a poor man, turning out copy for Gleeser, his employer, at less than a day laborer's pay, for Gleeser to use or reject as he saw fit, in a newspaper of small circulation, there would be a natural inclination to test every question of law to be found in the record very thoroughly before upholding the very severe penalty imposed. But we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out. Small compensation would not exonerate the defendant if it were found that he expected the result, even if pay were his chief desire. When we consider that we do not know how strong the Government's evidence may have been we find ourselves unable to say that the articles could not furnish a basis for a conviction upon the first count at least. We pass therefore to the other points that are raised.

[3-8] It is said that the first count is bad because it does not allege the means by which the conspiracy was to be carried out. But a conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically by which to accomplish the intent. It is enough if the parties agreed to set to work for that common purpose. That purpose could be accomplished or aided by persuasion as well as by false statements, and there was no need to allege that false reports were intended to be made or made. It is argued that there is no sufficient allegation of intent, but intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it.

The overt acts are alleged to have been done to effect the object of the conspiracy and that is sufficient under section 4 of the Act of 1917 (Comp. St. 1918, § 10212d). Countenance we believe has been given by some Courts to the notion that a single count in an indictment for conspiring to commit two offences is bad for duplicity. This Court has given it none. *Buckeye Powder Co. v. E. I. Dupont de Nemours Powder Co.*, 248 U. S. 55, 60, 61, 39 Sup. Ct. 38, 63 L. Ed. 123; *Joplin Mercantile Co. v. United States*, 236 U. S. 531, 548, 35 Sup. Ct. 291, 59 L. Ed. 705. The conspiracy is the crime, and that is one, however diverse its objects. Some reference was made in the proceedings and in argument to the provision in the Constitution concerning treason, and it was suggested on the one hand that some of the matters dealt with in the Act of 1917 were treasonable and punishable as treason or not at all, and on the other that the acts complained of not being treason could not be punished. These suggestions seem to us to need no more than to be stated. The amendment of the Act of 1917 in 1918 (Act May 16, 1918, c. 75) did not affect the present indictment. *Schenck v. United States*. Without pursuing the matter further we are of opinion that the indictment must stand.

[9] Before the demurrer was disposed of the Court had ordered jurymen to be summoned to serve for the April term of the Court and to report for service on June 25, 1918, as of course it might. The demurrer was overruled on June 24, and on the following day the plea of not guilty was ordered to be entered, a continuance was refused, a jury was empanelled and the trial set to begin the next morning. There is nothing before us that makes it possible to say that the judge's discretion was wrongly exercised. Upon the whole case we are driven to the conclusion that the record shows no ground upon which the judgment can be reversed.

Judgment affirmed.

(249 U. S. 211)

DEBS v. UNITED STATES.

(Argued Jan. 27 and 28, 1919. Decided March 10, 1919.)

No. 714.

1. ARMY AND NAVY ⚡40—ESPIONAGE ACT—OBSTRUCTING RECRUITING.

If a purpose of defendant's speech, even though incidental, was, as the jury were warranted in finding, to oppose, not only war in general, but the existing war, and the opposition was so expressed that its natural effect would be to obstruct recruiting, and that was intended, and in all the circumstances would be its probable effect, it would not be protected by reason of it being part of a general program

and expressions of a general and conscientious belief.

2. ARMY AND NAVY ⚡40—OBSTRUCTING RECRUITING—INDICTMENT.

Indictment under Espionage Act June 15, 1917, tit. 1, § 3, as amended by Act May 16, 1918, § 1 (Comp. St. 1918, § 10212c), alleging that defendant obstructed and attempted to obstruct the recruiting and enlistment service of the United States, and to that end and with that intent delivered the speech set out, held sufficient in form.

3. ARMY AND NAVY ⚡40—CRIMINAL LAW ⚡361(1)—OBSTRUCTING ENLISTMENT—INTENT—EXPLANATORY EVIDENCE.

Defendant, indicted for obstructing and attempting to obstruct recruiting, having, in his speech complained of, purported to understand the grounds on which certain persons were imprisoned, the records of their convictions were admissible to show what those grounds were, to show what he was talking about, to explain the true import of his expression of sympathy, and to throw light on the intent of the address.

4. ARMY AND NAVY ⚡40—OBSTRUCTING ENLISTMENT—INTENT—EVIDENCE.

Defendant, indicted for obstructing and attempting to obstruct the draft, having just before his speech, complained of, stated that he approved of the Socialist Anti-War Proclamation and Program, adopted at St. Louis in April, 1917, which recommended opposition by all means to the war, it was admissible as evidence that, if in his speech he used words tending to obstruct recruiting, he meant that they should have that effect.

In Error to the District Court of the United States for the Northern District of Ohio.

Eugene V. Debs was convicted of violation of the Espionage Act, and he brings error. Affirmed.

Mr. Seymour Stedman, of Chicago, Ill., for plaintiff in error.

*Mr. John Lord O'Brian, of Buffalo, N. Y., for the United States.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an indictment under the Espionage Act of June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 219, as amended by the Act of May 16, 1918, c. 75, § 1, 40 Stat. 553 (Comp. St. 1918, § 10212c). It has been cut down to two counts, originally the third and fourth. The former of these alleges that on or about June 16, 1918, at Canton, Ohio, the defendant caused and incited and attempted to cause and incite insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States and with intent so to do delivered, to an assembly of people, a public speech, set forth. The fourth count alleges that he obstructed and attempted to obstruct the recruiting and enlistment service of the United States and to that end and with that

intent delivered the same speech, again set forth. There was a demurrer to the indictment on the ground that the statute is unconstitutional as interfering with free speech, contrary to the First Amendment, and to the several counts as insufficiently stating the supposed offence. This was overruled, subject to exception. There were other exceptions to the admission of evidence with which we shall deal. The defendant was found guilty and was sentenced to ten years' imprisonment on each of the two counts, the punishment to run concurrently on both.

*212 [1] The main theme of the speech was Socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do, but if a part or the manifest intent of the *more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech. The speaker began by saying that he had just returned from a visit to the workhouse in the neighborhood where three of their most loyal comrades were paying the penalty for their devotion to the working class—these being Wagenknecht, Baker and Ruthenberg, who had been convicted of aiding and abetting another in failing to register for the draft. *Ruthenberg v. United States*, 245 U. S. 480, 38 Sup. Ct. 168, 62 L. Ed. 414. He said that he had to be prudent and might not be able to say all that he thought, thus intimating to his hearers that they might infer that he meant more, but he did say that those persons were paying the penalty for standing erect and for seeking to pave the way to better conditions for all mankind. Later he added further eulogies and said that he was proud of them. He then expressed opposition to Prussian militarism in a way that naturally might have been thought to be intended to include the mode of proceeding in the United States.

*214 After considerable discourse that it is unnecessary to follow, he took up the case of Kate Richards O'Hare, convicted of obstructing the enlistment service, praised her for her loyalty to Socialism and otherwise, and said that she was convicted on false testimony, under a ruling that would seem incredible to him if he had not had some experience with a Federal Court. We mention this passage simply for its connection with evidence put in at the trial. The defendant spoke of other cases, and then, after dealing with Russia, said that the master class has always declared the war and the subject class has always fought the battles—that the subject class has had nothing to gain and all to lose, including their lives; that the working class, who furnish the corpses, have never yet had a voice in declaring war and have never yet had a voice in declar*ing peace. "You have your lives to lose; you certainly ought to

have the right to declare war if you consider a war necessary." The defendant next mentioned Rose Pastor Stokes, convicted of attempting to cause insubordination and refusal of duty in the military forces of the United States and obstructing the recruiting service. He said that she went out to render her service to the cause in this day of crises, and they sent her to the penitentiary for ten years; that she had said no more than the speaker had said that afternoon; that if she was guilty so was he, and that he would not be cowardly enough to plead his innocence; but that her message that opened the eyes of the people must be suppressed, and so after a mock trial before a packed jury and a corporation tool on the bench, she was sent to the penitentiary for ten years.

There followed personal experiences and illustrations of the growth of Socialism, a glorification of minorities, and a prophecy of the success of the international Socialist crusade, with the interjection that "you need to know that you are fit for something better than slavery and cannon fodder." The rest of the discourse had only the indirect though not necessarily ineffective bearing on the offences alleged that is to be found in the usual contrasts between capitalists and laboring men, sneers at the advice to cultivate war gardens, attribution to plutocrats of the high price of coal, &c., with the implication running through it all that the working men are not concerned in the war, and a final exhortation, "Don't worry about the charge of treason to your masters; but be concerned about the treason that involves yourselves." The defendant addressed the jury himself, and while contending that his speech did not warrant the charges said, "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone." The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental *or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.

*216 [2, 3] The chief defences upon which the defendant seemed willing to rely were the denial that we have dealt with and that based upon the First Amendment to the Constitution, disposed of in *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470. His counsel questioned the sufficiency of the indictment. It is sufficient in form. *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. 249, 63 L. Ed. 561. The most important question that remains is raised by the admis-

sion in evidence of the record of the conviction of Ruthenberg, Wagenknecht and Baker, Rose Pastor Stokes, and Kate Richards O'Hare. The defendant purported to understand the grounds on which these persons were imprisoned and it was proper to show what those grounds were in order to show what he was talking about, to explain the true import of his expression of sympathy and to throw light on the intent of the address, so far as the present matter is concerned.

[4] There was introduced also an "Anti-War Proclamation and Program" adopted at St. Louis in April, 1917, coupled with testimony that about an hour before his speech the defendant had stated that he approved of that platform in spirit and in substance. The defendant referred to it in his address to the jury, seemingly with satisfaction and willingness that it should be considered in evidence. But his counsel objected and has argued against its admissibility at some length. This document contained the usual suggestion that capitalism was the cause of the war and that our entrance into it "was instigated by the predatory capitalists in the United States." It alleged that the war *of the United States against Germany could not "be justified even on the plea that it is a war in defence of American rights or American 'honor.'" It said:

"We brand the declaration of war by our Government as a crime against the people of the United States and against the nations of the world. In all modern history there has been no war more unjustifiable than the war in which we are about to engage."

Its first recommendation was, "continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power." Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect. The principle is too well established and too manifestly good sense to need citation of the books. We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c., and unless the defendant had the specific intent to do so in his mind.

Without going into further particulars we are of opinion that the verdict on the fourth count, for obstructing and attempting to obstruct the recruiting service of the United States, must be sustained. Therefore it is less important to consider whether that upon the third count, for causing and attempt-

ing to cause insubordination, &c., in the military and naval forces, is equally impregnable. The jury were instructed that for the purposes of the statute the persons designated by the Act of May 18, 1917, c. 15, 40 Stat. 76 (Comp. St. 1918, §§ 2044a-2044k), registered and enrolled under it, and thus subject to be called into the active service, were a part of the military forces of the United States. The Government presents a strong argument from the history of the statutes that the instruction *was correct and in accordance with established legislative usage. We see no sufficient reason for differing from the conclusion but think it unnecessary to discuss the question in detail.

Judgment affirmed.

(249 U. S. 217)

BALTIMORE & O. R. CO. et al. v. LEACH.

(Argued Jan. 15 & 16, 1919. Decided March 10, 1919.)

No. 132.

CARRIERS  218(10) — CARRIAGE OF LIVE STOCK—PROVISION IN BILL OF LADING—NECESSITY FOR COMPLIANCE.

A shipper of live stock must comply with provision in bill of lading, issued as required by Act of Congress, that no claim for damages shall be allowed or paid, or sued for, unless claim shall be made in writing, verified by affidavit of shipper or his agent, and delivered to general freight agent of carrier at his office in given city within five days from time live stock is removed from cars.

Mr. Justice Clarke and Mr. Justice McKenna, dissenting.

On Writ of Certiorari to the Court of Appeals of the State of Kentucky.

Action by J. G. Leach against the Baltimore & Ohio Railroad Company and the Baltimore & Ohio Southwestern Railroad Company. From judgment for plaintiff, the first defendant appealed to the Court of Appeals of the state of Kentucky, moving for rehearing and to set aside judgment, which motion was overruled (173 Ky. 452, 191 S. W. 310), and defendants bring certiorari. Reversed and remanded.

Messrs. Wm. W. Crawford and Charles H. Gibson, both of Louisville, Ky., for petitioners.

Messrs. Frank W. Hackett and John S. Blair, both of Washington, D. C., for respondent.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Respondent Leach sued the petitioners for damages sustained en route by cattle delivered at East St. Louis, *Ill., October 1, 1914, for

shipment to Georgetown, Ky. In defense the carriers set up non-compliance with the following provision contained in bill of lading issued as required by act of Congress.

"That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for loss or damages shall be made in writing verified by the affidavit of the shipper or his agent, and delivered to the general freight agent of said carrier at his office in Cincinnati, Ohio, within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs."

This averment was not denied; but the shipper replied that he promptly advised the railroad's agent at Georgetown of all essential facts and maintained that requirement in respect of written notice to general freight agent had been waived.

The point involved has been discussed in our recent opinions and we can find nothing which takes this case out of the rule requiring compliance with a provision in a bill of lading like the one above quoted. *St. L. I. Mt. & So. Ry. Co. v. Starbird*, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. Ed. 917; *Southern Pacific Co. v. Stewart*, 248 U. S. 446, 39 Sup. Ct. 139, 63 L. Ed. 350, decided January 13, 1919.

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice PITNEY and Mr. Justice BRANDEIS concur in the result.

Mr. Justice CLARKE dissenting.

In this case the shipper sued two connecting interstate carriers for damages to a carload of cattle, caused by delay in transit. Three died in the car and four more within three or four days of arrival at destination and the defense sustained by the court is failure to notify the carrier of claim for damages within five days of unloading.

The carrier pleaded that one of the terms of the bill of lading was the five-day limitation, quoted in the opinion of the court. This was immediately preceded, in the same paragraph, by the following:

"That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employés, or its connecting carriers, or their employés, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper in the purchase of food and water for said live stock, while so detained."

In *Boston & Maine Railroad v. Piper*, 246 U. S. 439, 38 Sup. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469, a provision in exactly these terms was held "illegal and consequently void," as an attempt by the carrier to exonerate itself from loss negligently caused by it. This is the only provision in the bill of lading, as pleaded, which is applicable to a claim for delay, such as the shipper made in this case, and since it is void there is nothing in the contract for carriage on which the five-day limitation could operate, for it applied in terms only to claims "for damages which may accrue to said shipper under this contract."

The suit of the shipper was based on the common-law liability of the carrier, not at all on the bill of lading; the five-day limitation is in terms applicable only to claims under the bill of lading; the only provision in the bill of lading applicable to claims for delay was void, and therefore it seems very clear that the five-day limitation was not available as a defense.

Permit me to add that the many cases coming into this *and other courts show that this five-day limitation is unreasonably short and in my judgment, for this reason, it should be declared void upon its face. Certainly it should not be made a favorite of the law and extended beyond its strict terms, in presence of the Act of Congress approved March 4, 1915 (38 Stat. 1196, c. 176), declaring that where in such suit the damage complained of is due to delay or damage in transit by carelessness or negligence, "then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." While the case before us arose prior to the passing of this act, it is an important declaration of public policy by Congress, which should not be overlooked.

For the reasons thus briefly stated, I cannot concur in the opinion of the court.

Mr. Justice McKENNA also dissents.

(249 U. S. 200)

SHAFFER v. HOWARD, Auditor of State of Oklahoma, et al.

(Argued Dec. 13, 1918. Decided March 10, 1919.)

No. 375.

APPEAL AND ERROR 6781(5)—MOOT CAUSE—SUIT TO ENJOIN PUBLIC OFFICIALS—EXPIRATION OF TERM.

In suit to enjoin state auditor and sheriff of county from enforcing tax as repugnant to Constitution of United States, term of office of defendant officials having expired, and their successors having qualified, and there being no law of state authorizing revival or continuance of cause against successors, controversy, after argument on appeal, has become merely moot, and

Supreme Court has no authority further to consider or dispose of it, in absence of parties defendant, despite importance to people of state that subject-matter be determined.

Appeal from the District Court of the United States for the Eastern District of Oklahoma.

Suit for Injunction by Charles B. Shaffer against E. B. Howard, Auditor of the State of Oklahoma, and John S. Woofter, Sheriff of Creek County, Okl. From a decree refusing injunction and dismissing the bill for want of equity (250 Fed. 873), complainant appeals. Decree reversed, and cause remanded, with directions to dismiss bill for want of proper parties.

Messrs. Malcolm E. Rosser and George S. Ramsey, both of Muskogee, Okl., for appellant.

Mr. S. P. Freeling, of Oklahoma City, for appellees.

Memorandum opinion by Mr. Chief Justice WHITE.

This suit was commenced against E. B. Howard, auditor of the state of Oklahoma, and John S. Woofter, sheriff of Creek county in that state, to enjoin such officials from enforcing a tax levied under the law of Oklahoma on the ground of the repugnancy of such tax to the Constitution of the United States. The court refused an injunction and dismissed the bill for want of equity, and the case was brought here.

* Counsel for both parties having stated in answer to an inquiry on the subject submitted to them by the court while the cause was pending after argument under submission that the term of office of the defendant officials had expired and their successors had

qualified, and that there was no law of the state of Oklahoma authorizing a revival or continuance of the cause of action against such successors, it follows that the controversy has become merely moot and that we have no authority to further consider or dispose of it. Warner Valley Stock Co. v. Smith, 165 U. S. 28, 34, 17 Sup. Ct. 225, 41 L. Ed. 621; Chandler v. Dix, 194 U. S. 590, 592, 24 Sup. Ct. 766, 48 L. Ed. 1129; Pullman Co. v. Croom, 231 U. S. 571, 575, 34 Sup. Ct. 182, 58 L. Ed. 375.

True it is that counsel in agreeing as to the statement above referred to suggest that, although the successors in office of the former defendants intend in the discharge of their official duties to enforce the tax complained of unless enjoined from doing so, nevertheless, in view of the importance to the people of the state that the subject-matter of the controversy be here determined, now request a decision of the pending cause irrespective of the disappearance of the parties defendant. But the absence of power which results from such disappearance cannot be supplied by the request referred to, since after all it amounts to but a suggestion that that be done which there is no authority to do; in other words that the cause be decided in the absence of the parties whose presence is essential to its decision. United States v. Boutwell, 17 Wall. 604, 609, 21 L. Ed. 721; United States ex rel. Bernardin v. Butterworth, 169 U. S. 600, 609, 18 Sup. Ct. 441, 42 L. Ed. 873; Pullman Co. v. Croom, 231 U. S. 571, 576, 34 Sup. Ct. 182, 58 L. Ed. 375.

It follows therefore that the decree below must be reversed, and the cause be remanded, with directions to dismiss the bill for want of proper parties;

And it is so ordered.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1918.

(249 U. S. 579)

No. 206. L. C. WATSON, as trustee in bankruptcy of Duncan & Company, F. P. Duncan and F. A. Duncan, bankrupts, plaintiff in error, v. George D. MOTLEY. March 3, 1919. In error to the Supreme Court of the State of Alabama. For opinion below, see 75 South. 147. Mr. Rutherford Lapsley, of Anniston, Ala., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(249 U. S. 579)

No. 223. Alfred W. CHURCH, appellant, v. Horace M. SWETLAND et al. March 3, 1919. Appeal from the United States Circuit Court of Appeals for the Second Circuit. For opinion below, see 243 Fed. 289, 156 C. C. A. 69. Mr. Hector M. Hitchings, of New York City, for appellant. Mr. Daniel P. Hays, of New York City, for appellees.

PER CURIAM. Dismissed for the want of jurisdiction upon the authority of (1) section 128 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. § 1120]); Stevenson v. Fain, 195 U. S. 165, 166, 25 Sup. Ct. 6, 49 L. Ed. 142; Hull v. Burr, 234 U. S.

(249 U. S. 598)

712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; *St. Anthony's Church v. Pennsylvania R. R. Co.*, 237 U. S. 575, 577, 35 Sup. Ct. 729, 59 L. Ed. 1119; *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397; (2) *Farrell v. O'Brien*, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; *Empire State-Idaho Mining, etc., Co. v. Hanley*, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; *Goodrich v. Ferris*, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544.

(249 U. S. 580)

No. 356. *The UNITED STATES ex rel. George W. BILLERMAN*, appellant, v. *Matthew J. LONG*, Criminal Sheriff of the Parish of Orleans, State of Louisiana. March 3, 1919. Appeal from the District Court of the United States for the Eastern District of Louisiana. Mr. William Winans Wall, of New Orleans, La., for appellant.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Farrell v. O'Brien*, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; *Empire State-Idaho Mining, etc., Co. v. Hanley*, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; *Goodrich v. Ferris*, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544.

(249 U. S. 618)

No. 482. *DORSEY LAND & LUMBER COMPANY*, plaintiff in error, v. *BOARD OF DIRECTORS OF GARLAND LEVEE DISTRICT*. March 3, 1919. In Error to the Supreme Court of the State of Arkansas. For opinion below, see 203 S. W. 33. Mr. William H. Arnold, of Texarkana, Ark., for plaintiff in error. Dismissed with costs per stipulation.

(249 U. S. 599)

No. 658. *Ed C. LASATER*, petitioner, v. *MAGNOLIA PETROLEUM COMPANY et al*. March 3, 1919. For opinion below, see 193 S. W. 773. Messrs. W. E. Pope and Gordon Boone, both of Corpus Christi, Tex., and James R. Dougherty, of Beeville, Tex. (Messrs. G. R. Scott and Boone & Pope, all of Corpus Christi, Tex., and Dougherty & Dougherty, of Beeville, Tex., of counsel), for petitioner. Messrs. George C. Greer, of Dallas, Tex., Barry Mohun, of Washington, D. C., W. H. Francis, of Dallas, Tex., Robert W. Stayton, of Corpus Christi, Tex., and T. C. Mann, of Laredo, Tex. (Messrs. Kleberg & Stayton, of Corpus Christi, Tex., and Hamilton & Mann, of Laredo, Tex., of counsel), for respondents. Petition for a writ of certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas denied.

(249 U. S. 598)

No. 784. *The CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY*, petitioner, v. *O. W. SEAY*. March 3, 1919. For opinion below, see *Dickinson v. Seay*, 175 Pac. 216. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

39 SUP. CT.—17

No. 798. *Kate Richards O'HARE*, petitioner, v. *The UNITED STATES of America*. March 3, 1919. For opinion below, see 253 Fed. 538. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(249 U. S. 598)

No. 801. *FOX TYPEWRITER COMPANY*, petitioner, v. *August J. OEHRING and Pratt & Whitney Company*. March 3, 1919. For opinion below, see 251 Fed. 584. Messrs. Fred L. Chappell and Chappell & Earle, all of Kalamazoo, Mich., for petitioner. Mr. Hans v. Briesen, of New York City, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(249 U. S. 599)

No. 812. *ATLANTA NATIONAL BANK*, petitioner, v. *William A. FULLER*, Trustee, etc. March 3, 1919. For opinion below, see 254 Fed. 278. Messrs. Jack J. Spalding, and Hughes Spalding, both of Atlanta, Ga., John A. Sibley, of Milledgeville, Ga., Daniel McDougald, Eugene Dodd, and Harry Dodd, all of Atlanta, Ga. (Messrs. King & Spalding and Dodd & Dodd, all of Atlanta, Ga., of counsel), for petitioner. Messrs. Walter S. Dillon and J. H. Porter, both of Atlanta, Ga. (Mr. Luther Z. Rosser, of Atlanta, Ga., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(249 U. S. 599)

No. 814. *NORFOLK SOUTHERN RAILROAD COMPANY*, petitioner, v. *Furney KING*. March 3, 1919. For opinion below, see 97 S. E. 29. Messrs. Robert N. Simms, of Raleigh, N. C., and William B. Rodman, of Norfolk, Va., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of North Carolina denied.

(249 U. S. 599)

No. 821. *EL I. DU PONT DE NEMOURS & COMPANY*, petitioner, v. *George C. BRISCO*. March 3, 1919. For opinion below, see 254 Fed. 962. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(249 U. S. 600)

No. 817. *JAMES KENNEY*, petitioner, v. *The UNITED STATES of America*. March 3, 1919. For opinion below, see 254 Fed. 262. Messrs. J. Q. Mahaffey, John J. King, and W. L. Estes, all of Texarkana, Tex., for petitioner. Messrs. Alex. C. King, Sol. Gen., of Atlanta, Ga., and Claude R. Porter, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(249 U. S. 600)

No. 826. *F. R. GLASCOCK and the Deming Investment Company*, petitioner, v. *Ellis McDANIEL et al*, minors, by *J. O. Cravens*, guardian. March 3, 1919. For opinion below, see 175 Pac. 737. Messrs. William B. Moore and George S. Ramsey, both of Muskogee, Okl.,

for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(249 U. S. 600)

No. 830. LEHIGH VALLEY RAILROAD COMPANY, petitioner, v. NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY. March 3, 1919. For opinion below, see 105 Atl. 206. Messrs. Lindley M. Garrison, of New York City, Gilbert Collins, of Jersey City, N. J., Edgar H. Boles, of Philadelphia, Pa., Richard W. Barrett, of New York City, and Geo. S. Hobart, of Jersey City, N. J., for petitioner. Mr. Maximilian M. Stallman, of Newark, N. J. (Mr. Jeremiah F. Hoover, of Newark, N. J., of counsel), for respondent. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied.

(249 U. S. 619)

No. 834. U. B. BUSKIRK and S. M. Croft, as partners composing Kentucky River Hardwood Company, plaintiffs in error, v. Isham CAUDILL, as Administrator, etc. March 3, 1919. In error to the Court of Appeals of the State of Kentucky. For opinions below, see 182 Ky. 685, 206 S. W. 867, and 181 Ky. 45, 203 S. W. 864. Dismissed with costs, on motion of counsel for the plaintiffs in error.

(249 U. S. 582)

No. —, Original. Ex parte in the matter of John F. DEITZ, petitioner. March 10, 1919. Motion for leave to file petition for a writ of habeas corpus herein denied.

No. —, Original. STATE OF GEORGIA, complainant, v. STATE OF SOUTH CAROLINA. March 10, 1919. Motion for leave to file bill of complaint herein granted, and process ordered to issue returnable on the first day of the next term.

No. —, Original. Ex parte in the matter of the UNITED STATES, petitioner. March 10, 1919. Motion for leave to file petition for writs of prohibition and mandamus herein granted and a rule to show cause awarded returnable Monday, April 14, next.

(249 U. S. 580)

No. 161. SOUTHERN PACIFIC COMPANY, plaintiff in error, v. John NEWMAN. March 10, 1919. In error to the Superior Court of Los Angeles County, State of California. Messrs. Henry T. Gage and William I. Gilbert, both of Los Angeles, Cal., for plaintiff in error.

PER CURIAM. Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(249 U. S. 581)

No. 208. The STATE OF CALIFORNIA, plaintiff in error, v. MONO COUNTY IRRIGATION COMPANY. March 10, 1919. In error to the District Court of Appeal, Third Appellate District, State of California. For

opinion below, see 32 Cal. App. 184, 167 Pac. 199. Messrs. U. S. Webb and John T. Nourse, both of San Francisco, Cal., for plaintiff in error.

PER CURIAM. Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(249 U. S. 581)

No. 209. The STATE OF CALIFORNIA, plaintiff in error, v. PACIFIC POWER COMPANY. March 10, 1919. In error to the District Court of Appeal, Third Appellate District, State of California. For opinion below, see 32 Cal. App. 175, 162 Pac. 643. Messrs. U. S. Webb and John T. Nourse, both of San Francisco, Cal., for plaintiff in error.

PER CURIAM. Dismissed for the want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

No. 439. William P. RICHARDSON, plaintiff in error, v. LIBERTY OIL COMPANY et al. March 10, 1919. For opinion below, see 143 La. 130, 78 South. 326. Mr. E. J. Jacquet, of New Orleans, La., for plaintiff in error. Motion to dismiss denied.

(249 U. S. 600)

No. 543. Gideon M. FREEMAN, petitioner, v. The UNITED STATES of America. March 10, 1919. For opinion below, see 243 Fed. 353, 156 C. C. A. 133. Mr. C. W. Pendleton, Jr., of Los Angeles, Cal., for petitioner. The Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(249 U. S. 581)

No. 606. H. A. JASTRO et al., plaintiffs in error, v. Elias FRANCIS et al. March 10, 1919. In error to the Supreme Court of the State of New Mexico. For opinion below, see 172 Pac. 1139. Messrs. Alonzo B. McMillen, of Albuquerque, N. M., and Alex Britton and Evans Browne, both of Washington, D. C., for plaintiffs in error. Mr. Bernard S. Rodey, of Albuquerque, N. M., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Farrell v. O'Brien, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; Empire State-Idaho Mining, etc., Co. v. Hanley, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; Goodrich v. Ferris, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; Brolan v. United States, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544.

(249 U. S. 582)

No. 682. Bessie TYRRELL, etc., petitioner, v. Charles B. SHAFFER et al. March 10, 1919. On writ of certiorari to the Supreme Court of the State of Oklahoma. For opinion below, see 174 Pac. 1074. Messrs. Henry B. Martin and Richard Clyde Allen, both of Tulsa,

Okl., for petitioner. Messrs. Malcolm E. Ross, of Muskogee, Okl., and William S. Cochran, of Tulsa, Okl., for respondents.

PER CURIAM. Affirmed upon the authority of *Gilcrease v. McCullough et al.*, 249 U. S. 178, 39 Sup. Ct. 198, 63 L. Ed. 547, decided March 3, 1919.

(249 U. S. 600)

No. 810. AMERICAN RAILROAD COMPANY OF PORTO RICO, petitioner, v. The PEOPLE OF PORTO RICO. March 10, 1919. For opinion below, see 254 Fed. 369. Mr. Francis H. Dexter, of San Juan, P. R., for petitioner. Messrs. Edward S. Bailey, of Washington, D. C., and Howard L. Kern, of San Juan, P. R., for the People of Porto Rico. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(249 U. S. 601)

No. 818. Frances B. FOSTER, suing for herself and surviving children of A. G. Foster, deceased, petitioner, v. J. L. LANCASTER and Pearl Wight, receivers, etc. March 10, 1919. For opinion below, see 260 Fed. 5. Mr. W. H. Winter, of El Paso, Tex., for petitioner. Mr. George Thompson, of Ft. Worth, Tex., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(249 U. S. 601)

No. 823. The CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, petitioner, v. J. F. McBRIDE. March 10, 1919. For opinion below, see 206 S. W. 149. Mr. Thomas S. Buzbee, of Little Rock, Ark., for petitioner. Messrs. Thomas M. Seawell and Frank Pace, both of Little Rock, Ark., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied.

(249 U. S. 601)

No. 824. RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, petitioner, v. J. C. ALLEN et al. March 10, 1919. For opinion below, see 175 Pac. 466. Mr. Douglas Brookman, of San Francisco, Cal., for petitioner. Messrs. Henry Goodcell and Hugh L. Dickson, both of San Bernardino, Cal., for respondents. Petition for a writ of certiorari to the Supreme Court of the State of California denied.

(249 U. S. 601)

No. 825. ELGIN, JOLIET & EASTERN RAILWAY COMPANY, petitioner, v. The UNITED STATES of America. March 10, 1919. For opinion below, see 253 Fed. 907. Mr. William D. McKenzie, of Chicago, Ill., for petitioner. Mr. Alex. C. King, Sol. Gen., of Atlanta, Ga., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(249 U. S. 602)

No. 827. Joseph P. KEEFE, trustee, etc., petitioner, v. WORCESTER TRUST COMPANY. March 10, 1919. For opinion below, see 253 Fed. 536. Mr. Arthur T. Johnson, of Boston, Mass., for petitioner. Mr. Edmund K. Arnold, of Boston, Mass. (Messrs. Peabody,

Arnold, Batchelder & Luther, of Boston, Mass., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit denied.

(249 U. S. 602)

No. 829. J. F. WEEKS et al., petitioners, v. The ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY. March 10, 1919. For opinion below, see 254 Fed. 513. Mr. Geo. Wallace, of Rockville Center, N. Y., for petitioners. Messrs. Gardiner Lathrop, of Chicago, Ill., J. W. Terry, of Galveston, Tex., and A. H. Culwell, of El Paso, Tex. (Messrs. Turney, Culwell, Holliday & Pollard, of El Paso, Tex., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(249 U. S. 594)

No. 831. CANADIAN NORTHERN RAILWAY COMPANY, petitioner, v. Gus EGGEN. March 10, 1919. For opinion below, see 255 Fed. 937. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(249 U. S. 602)

No. 836. John RUDOLPH, petitioner, v. The UNITED STATES of America. March 10, 1919. For opinion below, see 256 Fed. 990. Mr. Alexander S. Drescher, of Brooklyn, N. Y. (Mr. Isidore Oshlag, of Brooklyn, N. Y., of counsel), for petitioner. Messrs. John Lord O'Brian and Alfred Bettman, Special Assts. Atty. Gen., for the United States. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(249 U. S. 602)

No. 839. The CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, petitioner, v. William SHERIDAN. March 10, 1919. Messrs. Edward Colston and George Hoadly, both of Cincinnati, for petitioner. Messrs. R. B. Cassell, of Harriman, Tenn., and J. H. Frantz, and Charles M. Seymour, both of Knoxville, Tenn., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Tennessee denied.

(249 U. S. 594)

No. 842. George R. BROADWELL, petitioner, v. The BOARD OF COUNTY COMMISSIONERS OF CARTER COUNTY, OKL. March 10, 1919. For opinion below, see 175 Pac. 828. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted.

(249 U. S. 603)

No. 844. The COMMONWEALTH OF MASSACHUSETTS, petitioner, v. The LIQUID CARBONIC COMPANY. March 10, 1919. For opinion below, see 121 N. E. 514. Messrs. Henry C. Attwill, of Boston, Mass., and Wm. Harold Hitchcock, Asst. Atty. Gen., for petitioner. Messrs. Charles A. Snow and William P. Everts, both of Boston, Mass., for respondent. Petition for a writ of certiorari to the Supreme Judicial Court of the State of Massachusetts denied.

(249 U. S. 595)

No. 857. **H. E. KIRCHNER**, petitioner, v. **The UNITED STATES of America**. March 10, 1919. For opinion below, see 255 Fed. 301. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit granted.

(249 U. S. 603)

No. 858. **The CITY OF NEW YORK**, petitioner, v. **Arthur Carter HUME**, as receiver, etc. March 10, 1919. For opinion below, see 255 Fed. 488. Mr. William P. Burr, of New York City, for petitioner. Mr. Joseph A. Kellogg, of New York City (Mr. Arthur Carter Hume, of New York City, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(249 U. S. 603)

No. 859. **L. P. LARSON, JR., COMPANY**, petitioner, v. **MINT PRODUCTS COMPANY**. March 10, 1919. Mr. George I. Haight, of Chicago, Ill. (Messrs. Charles H. Aldrich, of Chicago, Ill., and Frank F. Reed, of Minneapolis, Minn., of counsel), for petitioner. Mr. James R. Offield, of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. For opinion below, see 257 Fed. 270.

(249 U. S. 603)

No. 861. **Charles K. DUNCAN**, as trustee, etc., petitioner, v. **AMERICAN TRUST & SAVINGS BANK**. March 10, 1919. For opinion below, see 254 Fed. 780. Messrs. Claude D. Ritter and W. J. Wynn, both of Birmingham, Ala., for petitioner. Mr. Forney Johnston, of Birmingham, Ala., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(249 U. S. 595)

No. 863. **The PENNSYLVANIA RAILROAD COMPANY**, petitioner, v. **KITTANING IRON & STEEL MANUFACTURING COMPANY**. March 10, 1919. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania granted. For opinion below, see 263 Pa. 205, 106 Atl. 207.

(249 U. S. 603)

No. 882. **David J. KREUZER**, petitioner, v. **The UNITED STATES of America**. March 10, 1919. For opinion below, see 254 Fed. 34. Messrs. S. Mayner Wallace and Shepard Barclay, both of St. Louis, Mo., for petitioner. Mr. Claude R. Porter, of Centerville, Iowa, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(249 U. S. 604)

No. 884. **The ST. CHARLES AMUSEMENT & TRANSPORTATION COMPANY**, petitioner, v. **Ludwig B. ELHARDT et al**. March 10, 1919. For opinion below, see 254 Fed. 275. Mr. Lowrie C. Barton, of Pittsburgh, Pa., for petitioner. Messrs. H. C. Mead, T. A. Wright, Robt. M. Jones, and Will D. Wright, all of Knoxville, Tenn., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(249 U. S. 604)

No. 885. **Samuel BERNSTEIN**, petitioner, v. **The UNITED STATES of America**. March 10, 1919. For opinion below, see 254 Fed. 967. Mr. Robert H. Talley, of Richmond, Va., for petitioner. Mr. Claude R. Porter, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(249 U. S. 619)

No. 152. **DOUGLAS PARK JOCKEY CLUB**, plaintiff in error, v. **T. H. TALBOTT et al**, composing Kentucky State Racing Commission. March 13, 1919. In error to the Court of Appeals of the State of Kentucky. For opinion below, see 173 Ky. 685, 191 S. W. 474. Mr. John Bryce Baskin, of Louisville, Ky., for plaintiff in error. Messrs. John T. Shelby, Robert L. Northcutt, and John Craig Shelby, all of Lexington, Ky., for defendant in error. Dismissed with costs per stipulation.

(249 U. S. 202)

PEOPLE OF STATE OF NEW YORK v.
STATE OF NEW JERSEY et al.(Argued Nov. 8, 11, and 12, 1918. Decided
March 10, 1919.)

No. 3.

COURTS ⇨379—ORIGINAL SUIT IN SUPREME
COURT—TAKING FURTHER TESTIMONY.

Taking of further proof, deemed proper, relative to methods of sewerage disposal and as to present degree of pollution of waters of New York Harbor, ordered in an original suit in the Supreme Court between states and sewerage commissioners; it having been begun ten years before final argument, and the taking of testimony having closed five years before such argument.

Original suit by the People of the State of New York against the State of New Jersey and the Passaic Valley Sewerage Commissioners. Taking of further testimony authorized, and cause restored to docket.

See, also, 35 Sup. Ct. 207.

Messrs. Charles E. Hughes, Maurice B. Dean, William A. McQuaid, and William J. O'Sullivan, all of New York City, and Merton E. Lewis, of Rochester, N. Y., for People of State of New York.

Messrs. Adrian Riker, Robert H. McCarter, and Chandler W. Riker, all of Newark, N. J., and John W. Wescott, of Camden, N. J., for defendants.

Mr. Chief Justice WHITE.

This cause came on to be heard at this term and was argued by counsel; and it appearing that the suit was begun by bill filed October 17, 1908, that answer was filed January 24, 1909, and that the cause was put at issue by replication filed November 8, 1909; that the taking of testimony was begun on June 26, 1911, and closed on June 27, 1913, more than five years before the final argument of the cause in this court; and the court deeming it proper that additional and supplemental proofs should be taken for the following purposes:

It is ordered that the defendants may proceed with all convenient dispatch to take the testimony of not exceeding three sanitary or engineering experts, deemed by them best qualified, concerning the following subject-matters:

(1) Any practicable modification of the proposed system of sewage disposal of the Passaic Valley Sewerage Commissioners, either as to construction, arrangement, or operation, and the nature and character of sanitary or engineering appliances that may be added thereto or introduced therein, in order to lessen the alleged polluting effect of the effluent upon the waters of New York Harbor.

(2) Any practicable plan of sewage disposal or treatment capable of being applied to the sewage of the city of New York and the several boroughs thereof in order *to lessen the alleged polluting effect of said sewage upon the waters of New York Harbor.

(3) Additional testimony (to the extent reasonably practicable within the time herein limited) as to the present degree of pollution of the waters of New York Harbor, including those parts affected or to be affected by the proposed Passaic Valley sewerage system and by the sewage of the city of New York; and the change, if any, in the degree of such pollution since the time to which the testimony heretofore taken relates.

The taking of the above testimony by the defendants as stated in paragraphs 1 and 2, including also any testimony which said defendants may choose to offer on the subject-matter specified in paragraph 3, shall be concluded on or before the fifteenth day of June next.

The complainant shall thereupon be authorized to take the testimony of not exceeding three sanitary or engineering experts as specified in paragraphs 1 and 2, including such proof as they may elect to offer on the subject-matter covered by paragraph 3, the testimony relating to these subjects to be concluded on or before the fifteenth day of August next.

The defendants may thereupon, if they are so advised, recall in rebuttal the sanitary or engineering experts who may have been examined by them in accordance with paragraphs 1 and 2, and may also introduce rebuttal evidence relating to the subject-matter of paragraph 3, all such testimony in rebuttal to be concluded on or before the fifteenth day of September next.

James D. Maher, Esq., of the District of Columbia, is hereby appointed a commissioner to take and return the above-mentioned testimony, with the powers of a master in chancery as provided in the rules of this court.

This cause is hereby restored to the docket for further argument on a day to be fixed upon the coming in of the said testimony.

(249 U. S. 220)

STATE OF SOUTH DAKOTA v. COLLINS.

(Submitted March 4, 1919. Decided March 17,
1919.)

No. 10. Original.

STATES ⇨76—STATE TREASURER—LIABILITY
FOR INTEREST ON FUNDS.

The treasurer of South Dakota is liable to it for interest received by him on its money deposited in banks; its Constitution providing that he shall not receive any fees or perquisites for performance of any duties connected with

his office; and Pol. Code S. D. 1903, § 333, providing all moneys belonging to the state, deposited in banks by its treasurer, shall be deposited, not to his credit as an individual, but in his name as state treasurer.

In Equity.

Suit by the State of South Dakota against Charles B. Collins. Judgment for plaintiff.

Messrs. Clarence C. Caldwell and Edward E. Wagner, both of Sioux Falls, S. D., for the State of South Dakota.

*Mr. Justice McKENNA delivered the opinion of the Court.

Suit by the state of South Dakota for an accounting and to recover from defendant interest received by him as treasurer of the the state upon moneys of the state deposited by him in various banks.

There is no dispute about the facts, which are detailed at very great length in the bill of complaint.

Collins was treasurer for four years, beginning January, 1903. As such he was entitled to the salary of \$1,800 a year, and it is provided by the Constitution of the state that neither the treasurer nor any other officer of the state shall "receive any fees or perquisites whatever for the performance of any duties connected with his office." And there are statutory provisions supplementing the Constitution, one of which is that:

"All moneys belonging to the state, deposited in banks by the state treasurer shall be deposited not to his credit as an individual, but in his name as state treasurer, and not otherwise." Section 333, Revised Political Code of 1903.

It is alleged that defendant received the sum of \$10,000 and more, and it is prayed that he be required to make a full and correct accounting of the moneys received by him and wrongfully withheld from the state.

Defendant answered as follows:

"I hereby deny the allegation as set forth in the complaint and plead not guilty to the charge of misappropriating, withholding or converting to my personal use any money belonging to the state of South Dakota during my term of office."

On motion of plaintiff a referee was appointed to take the testimony on its part and that of defendant and make findings and recommendations.

On May 9, 1918, the referee made return of his proceedings, with the evidence adduced, from which he concluded as follows:

*"That between January 1, 1903, and January 10, 1907, there was paid to the defendant as

interest upon the moneys of the state of South Dakota, which was received by him as treasurer of said state, and paid to him on deposits in the several banks above named, interest amounting to \$32,094.27; that said sum was received by the defendant as interest upon the public moneys of the state of South Dakota deposited by him as such state treasurer in said banks in excess of his salary and all other sums due him from said state as state treasurer, and that the same was received and retained by him and he rendered no account thereof to the plaintiff nor any of its officers and paid no part of the same to the plaintiff or any of its officers, and that the said defendant appropriated the said sum to his own use."

And the referee recommended that judgment be entered in favor of plaintiff and against defendant in the sum of \$32,094.27, with interest thereon at the rate of 7 per cent. per annum from January 1, 1907, and for plaintiff's costs and disbursements of the suit.

The case was put down for argument and subsequently submitted on brief, the defendant filing none.

Counsel for the state submits quite a long argument to sustain the report, with citation of authorities to establish the liability of defendant. It is not necessary to review them. There is no doubt of defendant's liability. He has not appeared to contend to the contrary, and at the taking of the testimony his defense or extenuation was that he acted upon his faith in a decision of the Supreme Court of Colorado, and, to evade or to withhold aid from any possible criminal prosecution, he declined to answer in regard to transactions concerning the receipt of interest on the public moneys he had deposited in various banks.

Further discussion is unnecessary. The Supreme Court of the state has decided (December 4, 1917), construing *section 333, supra, and other statutory provisions, that in cases like that at bar it is state funds that are deposited and that earn the interest and not the money of the treasurer, and that, therefore, the interest becomes a mere increment of the principal fund and when it is paid to the treasurer it is in effect paid into the state treasury and the treasurer becomes liable for it. *State v. Schamber et al.*, 39 S. D. 492, 165 N. W. 241, L. R. A. 1918B, 803.

The report of the referee is approved and judgment directed to be entered against defendant in the sum of \$32,094.27 with interest thereon at the rate of 7 per cent. per annum from January 1, 1907, and for costs and disbursements of the suit.

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(249 U. S. 246)

GRATIOT COUNTY STATE BANK v. JOHNSON.

(Submitted Jan. 20, 1919. Decided March 17, 1919.)

No. 148.

1. BANKRUPTCY — 100(1) — ADJUDICATION — EFFECT.

Adjudication in bankruptcy, while establishing as against the world, for the purpose of administering the debtor's property, his status as a bankrupt, is, like other adjudications in rem not res judicata as to the facts or the subsidiary questions of law on which it is based, except as between the parties to the proceeding or privies thereto, and so not as to the facts found, that the debtor had been insolvent for a certain time, and while so insolvent had made certain preferences.

2. BANKRUPTCY — 100(1) — ADJUDICATION — PARTIES BOUND.

The mere right of any creditor under Bankruptcy Act, §§ 18b, 59f (Comp. St. §§ 9602, 9643), to intervene in the bankruptcy proceedings, and join in or contest the petition, not being exercised, is not equivalent to intervention, making him a party, but he remains a stranger thereto, and so not bound by the adjudication, except as declaring the debtor's status as a bankrupt.

On Writ of Certiorari to the Supreme Court of the State of Michigan.

Action by D. Lloyd Johnson, trustee of the St. Louis Chemical Company, bankrupt, against the Gratiot County State Bank. Judgment for plaintiff was affirmed by the Supreme Court of Michigan (193 Mich. 452, 160 N. W. 544), and defendant brings certiorari. Reversed.

*Messrs. William L. Carpenter and Elliott G. Stevenson, both of Detroit, Mich., for petitioner.

Messrs. Edward J. Moinet, of St. Johns, Mich., and William A. Bahlke, of Alma, Mich., for respondent.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The trustee in bankruptcy of the St. Louis Chemical Company brought suit in a state court of Michigan against the Gratiot County State Bank to recover, as illegal preferences, payments made to it within four months before the filing of the involuntary petition. The bank denied the allegation that the Chemical Company was insolvent when the payments were made. To establish that fact, the trustee offered in evidence the adjudication together with the petition on which it was based and the special master's report which it confirmed. The latter found *that the debtor had been insolvent for four months or more before the filing of the petition and

had made, while so insolvent, certain preferences. The bank was not actually a party to the bankruptcy proceedings and had taken no part therein. The trial court held that this evidence was not only admissible but established conclusively that the debtor was insolvent throughout the four months; and it entered judgment for the trustee which was affirmed by the Supreme Court of Michigan. *Johnson v. Gratiot County State Bank*, 193 Mich. 452, 160 N. W. 544. The case comes here on writ of certiorari. 243 U. S. 645, 37 Sup. Ct. 406, 61 L. Ed. 944. The only question presented is whether the state courts erred in holding that the record of the adjudication made the fact of insolvency at the time of the payments res judicata as against the bank.

[1] First. The trustee contends that adjudication in bankruptcy, being in the nature of a judgment in rem, establishes not only the status of the debtor as a bankrupt, but also the essential findings of fact on which that judgment was based. The adjudication is, for the purpose of administering the debtor's property, that is, in its legislative effect, conclusive upon all the world. Compare *Shawham v. Wherritt*, 7 How. 627, 643, 12 L. Ed. 847. So far as it declares the status of the debtor, even strangers to the decree may not attack it collaterally. *Michaels v. Post*, 21 Wall. 398, 428, 22 L. Ed. 520; *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U. S. 656, 661, 662, 23 L. Ed. 336. Compare *Hebert v. Crawford*, 228 U. S. 204, 208, 209, 33 Sup. Ct. 484, 57 L. Ed. 800. But an adjudication in bankruptcy, like other judgments in rem, is not res judicata as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto. *Manson v. Williams*, 213 U. S. 453, 455, 29 Sup. Ct. 519, 53 L. Ed. 869.¹ This court applied the *principle in *Wood v. Davis*, 7 Cranch, 271, 3 L. Ed. 339, where a judgment that a mulatto woman was born free was held, as between strangers, not conclusive that her children were free. The rule finds abundant illustration in cases dealing with decedents' estates, *Tilt v. Kelsey*, 207 U. S. 43, 52, 28 Sup. Ct. 1, 52 L. Ed. 95; *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 265; and in cases involving the marriage status, *Luke v. Hill*, 137 Ga. 159, 73 S. E. 345, 38 L. R. A. (N. S.) 559; *Burlen v. Shannon*, 3 Gray (Mass.) 387; *Wilson v. Mitchell*, 48 Colo. 454, 469, 111 Pac. 21, 30 L. R. A. (N. S.) 507; *Corry v. Lackey*, 105 Mich. 363, 63 N. W. 418; *Belknap v. Stewart*,

¹ See, also, *In re Henry Ulfelder Clothing Co.* (D. C.) 98 Fed. 409, 413, 414; *In re Schick*, 2 Ben. 5, Fed. Cas. No. 12,455; *Silvey & Co. v. Tift*, 123 Ga. 804, 51 S. E. 748, 1 L. R. A. (N. S.) 386; *Durant v. Abendroth*, 97 N. Y. 132; *Lewis v. Sloan*, 68 N. C. 557, 562, 563.

38 Neb. 304, 56 N. W. 881, 41 Am. St. Rep. 729; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73.

[2] Second. The trustee contends, however, that since by sections 18b and 59f² of the Bankruptcy Act any creditor is entitled to intervene in the bankruptcy proceedings, the bank should be considered a party thereto. These sections are permissive, not mandatory. They give to a creditor, who fears that he will be prejudiced by an adjudication of bankruptcy, the right to contest the petition. Whether he does so or not, he will be bound, like the rest of the world, by the judgment, so far as it is strictly an adjudication of bankruptcy. But he is under no obligation to intervene, and the existence of the right is not equivalent to actual intervention. Unless he exercises the right to become a party, he remains a stranger to the litigation and, as such, unaffected by the decision of even essential subsidiary issues. In *re McCrum*, 214 Fed. 207, 213, 130 C. C. A. 555; *Cullinane v. Bank*, 123 Iowa, 340, 342, 98 N. W. 887. The rule is general that persons who might have *made themselves parties to a litigation between strangers, but did not, are not bound by the judgment.³ Compare *Western Union Tel. Co. v. Foster*, 247 U. S. 105, 115, 38 Sup. Ct. 438, 62 L. Ed. 1006. No good reason exists for making an exception in the case of bankruptcy proceedings.

The purpose of Congress in expressly authorizing creditors, as well as the debtor, to answer an involuntary petition in bankruptcy was to guard against an improvident adjudication and to protect those whose peculiar interests might be prejudiced by establishing the status of bankruptcy. See *Blackstone v. Everybody's Store*, 207 Fed. 752, 756, 125 C. C. A. 290; *Jackson v. Wauchula Mfg. & Timber Co.*, 230 Fed. 409, 411, 144 C. C. A. 551. The grant of this right of intervention was harmonized with the general purpose of Congress to secure a prompt adjudication, by requiring that the appearance and answers of creditors be made within five days after the return day on the petition. Had the adjudication been made determinative also of claims of the several creditors against the estate or of claims of the estate against

individual creditors, such expedition in proceedings would be impossible, if each of the many widely scattered creditors is to be afforded a fair opportunity to be heard. Furthermore, to require every creditor to acquaint himself with the issues raised in every proceeding in bankruptcy against his debtors, in order to determine whether a decision on any such issue might conceivably affect his interests; and, if so, either to participate in the litigation, or, at his peril, suffer the decision of every question therein litigated to become *res judicata* as against him, would be an intolerable hardship upon creditors. And the resulting volume of litigation would often so delay the adjudication as to defeat the purposes of the Bankruptcy Act.

*The unreasonableness of the rule contended for by the trustee is well illustrated in cases of alleged fraudulent preference. The claim may be made in respect to any creditor paid off within four months of the filing of an involuntary petition, that he received a fraudulent preference. Is every such former creditor to be deemed an existing creditor within the meaning of sections 18b and 59f and a party to the bankruptcy proceeding? Compare *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790. And shall the decision of the bankruptcy court be binding on all these former creditors in respect to individual claims, although that court could not (without consent) obtain jurisdiction of any creditor who is not a resident of the district in which it sits, *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 311, 32 Sup. Ct. 96, 56 L. Ed. 208; and would not (prior to the Act of February 5, 1903, c. 487, §§ 8, 13, 32 Stat. 797, 798, 800 [Comp. St. §§ 9607, 9644]) have had jurisdiction, even as against a resident creditor, of a claim to recover a fraudulent preference; such claim being enforceable (without consent) only in courts of general jurisdiction, *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Wall v. Cox*, 181 U. S. 244, 21 Sup. Ct. 642, 45 L. Ed. 845; *Jaquith v. Rowley*, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620; and, even now, only by plenary suit, *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; *Babbitt v. Dutcher*, 216 U. S. 102, 113, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969.

The decisions of the lower federal courts upon which the state court relied⁴ in hold-

² Act of July 1, 1898, c. 541, 30 Stat. 544.

Section 18b provides: "The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow." (As amended by the Act of February 5, 1903, c. 487, § 6, 32 Stat. 797, 798 [Comp. St. § 9602].)

Section 59f provides: "Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition." (Comp. St. § 9643.)

³ *Lee v. School District*, 149 Iowa, 345, 354, 128 N. W. 533, 37 L. R. A. (N. S.) 383; *Weber v. Mick*, 131 Ill. 520, 529, 23 N. E. 646; *State v. Johnson*, 123 Mo. 43, 55, 27 S. W. 399; *Hickok v. Eastman*, 21 S. D. 591, 595, 114 N. W. 706; *Carney v. Emmons and Van Lyke*, 9 Wis. 114, 117.

⁴ *Cook v. Robinson*, 194 Fed. 785, 114 C. C. A. 505; *In re American Brewing Co.*, 112 Fed. 752, 50 C. C. A. 517; *Bear v. Chase*, 99 Fed. 920, 40 C. C. A. 182. See, also, *Lazarus v. Eagen* (D. C.) 206 Fed. 518. In *re Hecox*, 164 Fed. 823, 90 C. C. A. 627, also relied upon, is a case of a different character. There, as in *Shawham v. Wherritt*, 7 How. 627, 643, 12 L. Ed. 847, one not actually a party to the proceeding sought to attack the legislative effect of the adjudication—and it was properly held to be conclusive. *Hackney v. Hargreaves Bros.* (*Hackney v. Raymond*

ing that sections 18b and 59f made all creditors parties to the proceeding so as to render the adjudication binding on them as to all essential issues clearly misconceived the intention of Congress. The allegation in the involuntary petition that the bank was among those who had received preferences did not impose upon it the duty to appear and answer; and, since it did not do so, even a finding to that effect by the bankruptcy court would not have bound it. The Supreme Court of Michigan erred in holding that the adjudication in bankruptcy established conclusively as against the bank that the debtor was insolvent at the time the payments were made. We have no occasion to consider whether the record introduced was admissible merely as evidence of insolvency.

Reversed.

(249 U. S. 252)

POSTAL TELEGRAPH-CABLE CO. v.
CITY OF RICHMOND.

(Argued Jan. 22, 1919. Decided March 17, 1919.)

No. 169.

1. COMMERCE — 69—LICENSES — TAX ON
LOCAL TELEGRAPH BUSINESS.

A city, so authorized by the state, may, as against federal constitutional limitations of power, impose on a telegraph company a license tax, restricted to right to do business within it, where the tax does not burden, or discriminate against interstate business, and the local business is so substantial that it does not clearly appear the tax is a disguised attempt to tax interstate commerce; such tax not being an inspection measure, limited in amount to cost of issuing license or supervising the business, but being an exercise of the police power of the state for revenue purposes, restricted to internal commerce, and therefore within the state's taxing power.

2. COMMERCE — 69—OCCUPATION OF STREETS
—TAXES.

A tax imposed by city of \$2 on each pole maintained in streets of city by telegraph company, though it is engaged in interstate commerce and has accepted Act July 24, 1866 (Comp. St. §§ 10072-10077), being reasonably proportionate to compensation for use of street and for expense of inspection, is valid, though necessitating contribution from interstate business.

Appeal from the District Court of the United States for the Eastern District of Virginia.

Suit by the Postal Telegraph-Cable Company against the City of Richmond. Bill

Bros. Clarke Co.) 68 Neb. 633, 639, 94 N. W. 822, 99 N. W. 675, involved only the admissibility of the schedule of liabilities as evidence tending to prove insolvency.

dismissed, and complainant appeals. Affirmed.

Messrs. John N. Sebrell, Jr., of Norfolk, Va., and Bynum E. Hinton, of Washington, D. C., for appellant.

Mr. H. R. Pollard, of Richmond, Va., for appellee.

*Mr. Justice CLARKE delivered the opinion of the Court.

The appellant, the Telegraph Company, in its bill filed in the District Court of the United States for the Eastern District of Virginia, sought to enjoin the city of Richmond and its officers from collecting an annual license tax of \$300 imposed upon the company by ordinance "for the privilege of doing business within the city of Richmond, but not including business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents," and also from attempting to collect an annual fee of \$2, imposed by another ordinance, for each telegraph pole which the company maintained or used in the streets of the city.

The allegations of the voluminous bill essential to be considered are: That the company accepted the act of Congress of July 24, 1866 (14 Stat. 221, c. 230 [Comp. St. §§ 10072-10077]), entitled, "An act to aid in the construction of telegraph lines," etc., and is engaged in transmitting messages by telegraph, intrastate and interstate—this is admitted; and the following which are denied, viz. that the cost of doing the intrastate business transacted by the company at Richmond is greater than the receipts from it, and that since both taxes must be paid, if at all, from receipts from interstate commerce they constitute such a burden upon that commerce of the company as to render them unconstitutional and void.

The evidence introduced on the trial was largely in the form of affidavits, together with a transcript of the evidence taken in a former case, which was stipulated into the record.

The District Court held the taxes valid and dismissed the bill. On the constitutional questions involved a direct appeal brings the case into this court for review.

*Except for the contention that this record shows affirmatively and clearly that the taxes complained of are necessarily unreasonable and a burden upon interstate commerce, the case could well be disposed of, without discussion, on the authority of decided cases.

[1] That the city of Richmond has authority, under the statutes of Virginia and its charter, to impose an occupation or license tax on the business of the telegraph company done within the city is clear enough. Virginia Code, § 1042; Charter of the City of

Richmond, § 67; Postal Telegraph-Cable Co. v. Norfolk, 101 Va. 125, 43 S. E. 207; Postal Telegraph-Cable Co. v. Norfolk, 118 Va. 455, 87 S. E. 555. Assuming the existence of this power in the city, since interstate and government service are expressly excluded from liability for the license charge, the following cases sustain the validity of the tax: Postal Telegraph-Cable Co. v. Charleston, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. Ed. 871; Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; Kehrer v. Stewart, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; Western Union Telegraph Co. v. Richmond, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710; Williams v. Talladega, 226 U. S. 404, 416, 33 Sup. Ct. 116, 57 L. Ed. 275.

The principle of these cases, and of many others cited in the opinions, is that, as against federal constitutional limitations of power, a state may lawfully impose a license tax, restricted, as it is in this case, to the right to do local business within its borders, where such tax does not burden, or discriminate against, interstate business, and where the local business purporting to be taxed, again as in this case, is so substantial in amount that it does not clearly appear that the tax is a disguised attempt to tax interstate commerce. Such a tax is not, as is argued, an inspection measure, limited in amount to the cost of issuing the license or supervising the business, but is an exercise of the police power of the state for revenue purposes, restricted to internal commerce, and therefore within the taxing power of the state. Postal Telegraph-Cable Co. v. Charleston, Williams v. Talladega, supra, and *Western Union Telegraph Co. v. Alabama State Board of Assessment, 132 U. S. 472, 473, 10 Sup. Ct. 161, 33 L. Ed. 409.

A statute of Virginia requires all telegraph companies doing business in the state to transmit all messages, state or interstate, which are tendered by other companies or by individuals upon payment of the usual charges. This requirement that the appellant shall engage in intrastate business, construed with the ordinance imposing the license tax, results, it is argued, in imposing a burden upon its interstate business for the reason that the net receipts from its intrastate business are insufficient to pay the tax, and therefore payment, if compelled, must be made from the interstate receipts. If the facts were as thus asserted it well might be that this tax would be invalid (Pullman Co. v. Adams, 189 U. S. 420, 23 Sup. Ct. 494, 47 L. Ed. 887; Williams v. Talladega, 226 U. S. 404, 416, 417, 33 Sup. Ct. 116, 57 L. Ed. 275), but a careful examination of the record fails to convince us that it contains that clear and convincing evidence that the tax thus falls upon interstate commerce which is necessary to justify a finding that the ordinance is unconstitutional and void.

[2] There remains to be considered the fee, as it is called in the ordinance imposing it, of \$2 for each pole maintained or used in the streets of the city of Richmond. This character of tax has also been the subject of definite decision by this court and has been sustained where not clearly shown to be a direct burden upon interstate commerce or unreasonable in amount, having regard to the purpose for which it may lawfully be imposed. St. Louis v. Western Union Telegraph Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; Western Union Telegraph Co. v. Borough of New Hope, 187 U. S. 419, 23 Sup. Ct. 204, 47 L. Ed. 240; Postal Telegraph-Cable Co. v. Baltimore, 156 U. S. 210, 15 Sup. Ct. 356, 39 L. Ed. 399; Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 23 Sup. Ct. 817, 47 L. Ed. 995; Western Union Telegraph Co. v. Richmond, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710. These decisions do not conflict with Postal Telegraph-Cable Co. v. New Hope, 192 U. S. 55, 24 Sup. Ct. 204, 48 L. Ed. 338, or Postal Telegraph-Cable Co. v. Taylor, 192 U. S. 64, 24 Sup. Ct. 208, 48 L. Ed. 342. In the former of these cases the decision of this court rests upon its conclusion that the jury found the tax unreasonable in amount and in the latter the ordinance involved was disposed of on exception to the affidavit of defense, admitting the allegations of the bill that no inspection of the poles or wires or supervision of the business of the company had been, or was intended to be, made by the borough, and that if made the cost could not reasonably be one-twentieth of the tax imposed. This showing, taken with other facts in the case, it was held, rendered the charge unreasonable and void.

The decisions cited sustaining this character of tax proceed upon the principle that, although the occupation of its streets by a telegraph company engaged in interstate commerce, which has accepted the act of Congress of 1866, cannot be denied by a city, yet since the use of its streets for its poles by such a company is necessarily, in a measure, permanent and exclusive in character, and different in kind and extent from that of the general public, and since such use imposes contingent liabilities upon a city, it is competent for it, in the exercise of its police power, to exact reasonable compensation "in the nature of rental" for the use of its streets, having regard to the duties and responsibilities which such use imposes on the municipality. Even if the net returns from the intrastate business should not equal such tax, and it must be paid from interstate earnings, this alone would not be conclusive against its validity. If the method of doing interstate business necessarily imposes duties and liabilities upon a municipality, it may not be charged with the cost of these without just compensation. Even interstate business

*200 must pay its way—in this case for its right of way and the expense to others incident to the use of it. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. supra, p. 98 et seq., 13 Sup. Ct. 485, 37 L. Ed. 380; *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160, 163, 23 Sup. Ct. 817, 47 L. Ed. 995; *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810. Such compensation should also include the expense of inspection of the poles and wires used, and of such supervision of the business of the company conducted in the streets as may be reasonably necessary to secure the safety of life and property of the inhabitants and of the users of the streets; but with the authority in the courts, on proper application, to determine whether, under the conditions prevailing in a given case, the charge made is reasonably proportionate to the service to be rendered and the liabilities involved, or whether it is a disguised attempt to impose a burden on interstate commerce. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810; *Postal Telegraph-Cable Co. v. Baltimore*, 156 U. S. 210, 15 Sup. Ct. 356, 39 L. Ed. 399; *Atlantic, etc., Co. v. Philadelphia*, 190 U. S. 160, 163, 23 Sup. Ct. 817, 47 L. Ed. 995; *Western Union Telegraph Co. v. Pennsylvania R. R. Co.*, 195 U. S. 540, 566, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160, 169, 32 Sup. Ct. 449, 56 L. Ed. 710.

These decisions and principles dispose of the "pole tax" before us.

The total amount of this tax was in 1911, \$344, in 1914, \$384, and in 1915, owing to the extension of the city limits, it became \$666. There is evidence, which must be credited, that poles and wires in the streets of a city require official inspection and supervision to secure their being kept in proper position and repair, so that they will not interfere with street traffic and may not, especially in time of storm, become crossed with wires carrying high-tension currents and thus cause fires and loss of life and property. There is conflict in the evidence as to the cost to the city of such inspection and regulation, but the amount stated does not seem excessive for the service which should be rendered, and which witnesses for the city tes-

tified was rendered, in looking after the many poles of the appellant, part of which, at least, carried many wires. As great or greater charges were sustained in *St. Louis v. Western Union*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Postal *Telegraph-Cable Co. v. Baltimore*, 156 U. S. 210, 15 Sup. Ct. 356, 39 L. Ed. 399; *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160, 172, 32 Sup. Ct. 449, 56 L. Ed. 710. J 122 *

The contention cannot be allowed that the ordinance is shown to be void by a formula, devised by an officer of the appellant and pressed upon our attention, for determining the division of costs and expenses between interstate and intrastate business, which it is claimed shows that the pole tax must be paid wholly from receipts from interstate business.

Regardless of obvious criticisms which might be advanced to this formula and to the inadequacy of the data furnished by the record for testing its validity, the charge imposed upon the company, as we have seen, was so moderate in amount, having regard to the necessary burdens which the poles and wires in the streets must impose upon the city and is so well within the prior holdings of this court, which we have cited, that it cannot be accepted as a sufficient basis for declaring the ordinance invalid.

There is no disposition on the part of this court to modify in the least the law as it has been stated in many cases, that "neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than it can be imposed upon foreign commerce; and that all acts of legislation producing any such result, are * * * unconstitutional and void." *Crutcher v. Kentucky*, 141 U. S. 47, 62, 11 Sup. Ct. 851, 855 (35 L. Ed. 649); *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355. But municipal ordinances, which for constitutional inquiry are deemed state laws, will be declared void only where clearly shown to be unconstitutional, and this very certainly cannot be said of the ordinances in this case, assailed, as they are, upon inadequate evidence and upon purely empirical calculations which we are asked to adopt.

It results that the decree of the District Court must be Affirmed.

(249 U. S. 236)

PUBLIC UTILITIES COMMISSION FOR STATE OF KANSAS et al. v. LANDON et al. (two cases). KANSAS CITY, MO., et al. v. SAME. KANSAS CITY GAS CO. et al. v. KANSAS NATURAL GAS CO. et al.

(Argued Nov. 6, 1918. Decided March 17, 1919.)

Nos. 277, 329, 330, 353.

1. COURTS —264(3)—JURISDICTION OF FEDERAL COURT—RECEIVERSHIP—CONFISCATORY RATES.

A federal court, which in suit, wherein it had jurisdiction, to foreclose mortgage on the property of a natural gas company, operating in three states, with pipe lines between them, appointed, under Judicial Code, § 56 (U. S. Comp. St. § 1038), as receiver of its property in two of the states, one who had by court of the third state been appointed receiver of its property therein, and directed him to operate the business and properties in the three states as a unit, under the direction of the state court, till further orders of the federal court held to have jurisdiction, on petition of the receiver, to enjoin, as confiscatory, rates for gas prescribed by state commissions.

2. COMMERCE —33—"INTERSTATE COMMERCE"—TRANSPORTATION AND SALE OF NATURAL GAS—STATE REGULATION OF RATES.

While transportation of gas through pipe lines, from one state to another by a natural gas company, is "interstate commerce," as part of which it may sell and deliver gas so transported to local distributing companies free from unreasonable interference from the state, such commerce ceases when the gas passes into the mains of local companies, which, having the necessary special franchises and authority, lacked by the producing and transporting company, to engage in retail transactions, receive the gas and agree to pay therefor two thirds of their receipts from customers; so that establishment of rates to consumers by state boards is not an interference with interstate commerce.

3. COMMERCE —16—"INTERSTATE COMMERCE."

"Interstate commerce" is a practical conception, and what falls within it must be determined on consideration of established facts and known commercial methods.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

4. CONSTITUTIONAL LAW —42—FIXING GAS RATES—PERSONS ENTITLED TO COMPLAIN.

Receivers of a company engaged in piping natural gas from one state to others, and in the latter selling it to distributing companies for a certain proportion of what such companies should receive from consumers, may not complain of orders of state boards establishing rates to consumers, as they relate only indirectly to the receivers' business, and as the receivers are under no compulsion to accept unremunerative prices; the original supply contracts not having been adopted and being subject to rejection.

Appeals from the District Court of the United States for the District of Kansas.

Suit by John M. Landon, receiver of the Kansas Natural Gas Company, and others, against the Public Utilities Commission of Kansas and others. From decrees for complaint (234 Fed. 152; 242 Fed. 658; 245 Fed. 950), various groups of defendants appeal. Reversed and remanded.

Messrs. F. S. Jackson and H. O. Caster, both of Topeka, Kan., for Public Utilities Commission of Kansas and others.

Messrs. Robert Stone, of Topeka, Kan., and Chester I. Long, of Wichita, Kan., for Landon.

Mr. James B. Lindsay, for Public Service Commission of Missouri.

Mr. A. F. Smith, of Kansas City, Mo., for Kansas City.

Mr. Charles Blood Smith, of Topeka, Kan., for Fidelity Title & Trust Co.

Mr. J. W. Dana, of Kansas City, Mo., for Kansas City Gas Co. and others.

*Mr. Justice McREYNOLDS delivered the opinion of the Court.

These are appeals by different groups of defendants below from decrees prohibiting public commissions and officers of Kansas and Missouri, certain municipalities and many local gas distributing companies from interfering with establishment and maintenance of selling rates for gas to consumers sufficiently high to compensate receivers of the Kansas Natural Gas Company. 234 Fed. 152; 242 Fed. 658; 245 Fed. 950.

The Kansas Natural Gas Company—hereinafter, the Gas Company—a Delaware corporation, owned a system of pipe lines extending from Oklahoma and Kansas points to some forty terminal towns and cities in Kansas and Missouri and produced, purchased, transported, distributed and sold natural gas prior to October 9, 1912. During the years 1904-1908 by separate agreements it undertook to supply many local companies with gas for ultimate sale to their customers and to accept therefor a definite proportion—generally two-thirds—of the gross amounts paid by such customers. Permanent physical connections permitted gas to pass from the Gas Company's pipe lines into the several local companies' mains. The latter operated under special ordinances usually specifying the rates which customers should pay; and, except in four relatively unimportant places, the former had no local franchise permitting either distribution or sale of gas, nor did it own any interest in a defendant distributing company.

The Gas Company procured gas by drilling, purchase or otherwise in Southern Kansas and Oklahoma—6 per cent. in the former—forced it through pipe lines and delivered it in the local mains at the connection points. None was obtained in Missouri. Having received gas at the connection points the several local companies distributed and sold it, collected established rates and settled with the Gas Company as agreed. Approximately 44 per cent. of the total was thus sold to customers in Kansas and 56 per cent. in Missouri.

October 9, 1912, the United States District

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Court for Kansas appointed receivers for the Gas Company and shortly thereafter, acting under section 56, Judicial Code, extended the receivership to Missouri and Oklahoma. It is unnecessary to detail subsequent changes in respect of this receivership. The receivers took over the company's property, affairs and business and operated them under orders of the court; without specifically adopting or disavowing the supply contracts of 1904-1908 they continued to deliver gas to local distributing companies and to accept payments as originally agreed.

Available gas diminished; pipe lines to new wells became necessary; operating costs increased; and the sums received from local distributing companies were inadequate for the receivers' demands. In 1915 they petitioned the Kansas Public Utilities Commission to permit higher charges to customers by local companies. Responding the Commission authorized, December 10, 1915, what is known as the "28-Cent Schedule"—much below the rates requested.

Claiming jurisdiction over distribution and sale of gas in that state and power to fix the rates which local companies should both pay and charge therefor, the Missouri Public Service Commission suspended some proposed advanced rates to consumers and threatened to enforce further appropriate orders if found necessary. Certain local companies, notably the Kansas City Gas Company, insist that the receivers should comply with the original supply contracts between them and the Gas Company.

*244 In December, 1915, the receivers began this proceeding against Kansas Public Utilities Commission, Missouri Public Service Commission, thirty-two local distributing companies and forty-seven cities and towns in those states. After setting out the history of the Gas Company the bill alleged that the above-described actions by state commissions resulted in imposing upon the receivers inadequate and confiscatory rates and unduly burdened the interstate commerce which they were carrying on by transporting and selling gas; that the original supply contracts with distributing companies, although never adopted by them, were improvident, wasteful, a fraud upon creditors and no longer obligatory; that the city ordinances fixing prices to customers were unreasonable, noncompensatory and confiscatory of estate and property in the receivers' hands. They asked an appropriate injunction restraining the commissions, municipalities and distributing companies from interfering with establishment of reasonable and compensatory rates for selling gas to consumers.

The court below held the business carried on by the receivers—transportation of natural gas and its disposition and sale to consumers through the distributing companies—

was interstate commerce of a national character; that the commissions' actions interfered with establishment and maintenance of reasonable sale rates and thereby burdened interstate commerce and took the receivers' property without due process of law; that the original supply contracts were not binding upon the receivers. And it accordingly enjoined the commissions, their members, the Attorneys General of both states, the various municipalities and the distributing companies from interfering with establishment of such reasonable and compensatory rates as the court might approve.

[1-3] We think the trial court properly overruled the objections offered to its jurisdiction and nothing need be added to the reasons which it gave. 234 Fed. 152, 155. But we cannot agree with its conclusions that local companies in distributing and selling gas to their customers *acted as mere agents, immediate representatives or instrumentalities of the receivers and as such carried on without interruption interstate commerce set in motion by them. *245

That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state. *American Express Co. v. Iowa*, 196 U. S. 133, 143, 25 Sup. Ct. 182, 49 L. Ed. 417; *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217, 32 Sup. Ct. 442, 56 L. Ed. 738.

But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burnertips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their own local business. Payment to the receivers of sums amounting to two-thirds of the product of these sales did not make them integral parts of their interstate business. In fact, they lacked authority to engage by agent or otherwise in the retail transactions carried on by the local companies. Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods. *Rearick v. Pennsylvania*, 203 U. S. 507, 512, 27 Sup. Ct. 159, 51 L. Ed. 295; *The Pipe Line Cases*, 234 U. S. 548, 560, 34 Sup. Ct. 956, 58 L. Ed. 1459. The thing which the receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the latter distributed and sold

the commodity so obtained upon their own account and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains. The court below erroneously *adopted the contrary view and upon it rested the conclusion that the Public Commissions were interfering with establishment of compensatory rates by the receivers in violation of their rights under the Fourteenth Amendment.

[4] The challenged orders related directly to prices for gas at burner-tips and only indirectly to the receivers' business. They were under no compulsion to accept unremunerative prices; even the original supply contracts had not been adopted and were subject to rejection. See *Newark Natural Gas & Fuel Co. v. Newark*, 242 U. S. 405, 37 Sup. Ct. 156, 61 L. Ed. 393, Ann. Cas. 1917B, 1025. Our conclusion concerning relationship between the receivers and local companies renders it unnecessary to discuss the effect of rates prescribed for the latter. The receivers were in no position to complain of them.

The decrees below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

(249 U. S. 223)

CROCKER et al. v. MALLEY, Collector of Internal Revenue.

(Argued March 6, 1919. Decided March 17, 1919.)

No. 649.

1. INTERNAL REVENUE 38—INCOME TAX—ASSOCIATION."

Plaintiffs, to whom, as trustees, a corporation thereafter dissolved, after conveying most and leasing the balance of its mills and lands to the M. corporation and receiving the stock of M. in return, transferred the fee of the property subject to lease, and in whose hands it left said stock, the trust being declared to be for the benefit of the stockholders of the dissolved corporation who were to receive certificates, and the functions of the trustees being to collect the rents and incomes, with a large discretion in its application, but with a recognition that the receipt holders are entitled to it subject to the powers confided to the trustees, held neither by themselves nor together with the beneficiaries to be an "association," within Income Tax Act Oct. 3, 1913, § II, G (a), subjecting to the normal tax thereinbefore imposed on individuals the entire net income accruing to "every corporation, joint-stock company or association, * * * no matter how created," but to be fiduciaries within section II, D, whereby all acting in a fiduciary capacity have the exemption that individual stockholders have from taxation on

dividends of a corporation that itself pays an income tax.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Association.]

2. INTERNAL REVENUE 38—INCOME TAX—RECOVERY OF TAXES PAID.

The collector of internal revenue, having with probable cause for his act collected from plaintiffs too great an income tax, may, when sued to recover it, as the recovery will be against the United States under Rev. St. § 989 (Comp. St. § 1635), retain what plaintiffs should have paid.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Action by Alvah Crocker and others, trustees, against John F. Malley, Collector of Internal Revenue. Judgment of the District Court for plaintiffs was reversed by the Circuit Court of Appeals, and plaintiffs bring certiorari. Judgment of Circuit Court of Appeals (250 Fed. 817) reversed and judgment of District Court affirmed.

Mr. Felix Rockemann, of Boston, Mass., for petitioners.

Mr. Assistant Attorney General Frierson, for respondent.

*Mr. Justice HOLMES delivered the opinion of the Court.

[1] This is an action to recover taxes paid under protest to the Collector of Internal Revenue by the petitioners, the plaintiffs. The taxes were assessed to the plaintiffs as a joint-stock association within the meaning of the Income Tax Act of October 3, 1913, c. 16, Section II, G (a), 38 Stat. 114, 166, 172, and were levied in respect of dividends received from a corporation that itself was taxable upon its net income. The plaintiffs say that they were not an association but simply trustees, and subject only to the duties imposed upon fiduciaries by Section II, D. The Circuit Court of Appeals decided that the plaintiffs, together, it would seem, with those for whose benefit they held the property, were an association, and ordered judgment for the defendant, reversing the judgment of the District Court. 250 Fed. 817, — C. C. A. —.

*The facts are these: A Maine paper manufacturing corporation with eight shareholders had its mills on the Nashua River in Massachusetts and owned outlying land to protect the river from pollution. In 1912 a corporation was formed in Massachusetts. The Maine corporation conveyed to it seven mills and let to it an eighth that was in process of construction, together with the outlying lands and tenements, on a long lease, receiving the stock of the Massachusetts cor-

poration in return. The Maine corporation then transferred to the plaintiffs as trustees the fee of the property subject to lease, left the Massachusetts stock in their hands, and was dissolved. By the declaration of trust the plaintiffs declared that they held the real estate and all other property at any time received by them thereunder, subject to the provisions thereof, "for the benefit of the cestui que trusts (who shall be trust beneficiaries only, without partnership, associate or other relation whatever inter sese)" upon trust to convert the same into money and distribute the net proceeds to the persons then holding the trustees' receipt certificates—the time of distribution being left to the discretion of the trustees, but not to be postponed beyond the end of twenty years after the death of specified persons then living. In the meantime the trustees were to have the powers of owners. They were to distribute what they determined to be fairly distributable net income according to the interests of the cestui que trusts but could apply any funds in their hands for the repair or development of the property held by them, or the acquisition of other property, pending conversion and distribution. The trust was explained to be because of the determination of the Maine corporation to dissolve without waiting for the final cash sale of its real estate and was declared to be for the benefit of the eight shareholders of the Maine Company who were to receive certificates subject to transfer and sub*division. Then followed a more detailed statement of the power of the trustees and provision for their compensation, not exceeding one per cent. of the gross income unless with the written consent of a majority in interest of the cestui que trusts. A similar consent was required for the filling of a vacancy among the trustees, and for a modification of the terms of the trust. In no other matter had the beneficiaries any control. The title of the trust was fixed for convenience as The Massachusetts Realty Trust.

The declaration of trust on its face is an ordinary real estate trust of the kind familiar in Massachusetts unless in the particular that the trustees' receipt provides that the holder has no interest in any specific property and that it purports only to declare the holder entitled to a certain fraction of the net proceeds of the property when converted into cash "and meantime to income." The only property expressly mentioned is the real estate not transferred to the Massachusetts corporation. Although the trustees in fact have held the stock of that corporation and have collected dividends upon it, their doing so is not contemplated in terms by the instrument. It does not appear very clearly that the eight Maine shareholders might not have demanded it had they been so minded. The function of the trustees is not to manage the mills but simply to collect the rents and

income of such property as may be in their hands, with a large discretion in the application of it, but with a recognition that the receipt holders are entitled to it subject to the exercise of the powers confided to the trustees. In fact, the whole income, less taxes and similar expenses, has been paid over in due proportion to the holders of the receipts.

There can be little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more. "The certificate holders * * * are in no way associated together nor is there any provision in the * * * (*) [instrument] for any meeting to be held by them. The only act which (under the [declaration of] trust * * *) they can do is consent to an alteration * * * of the trust" and to the other matters that we have mentioned. They are confined to giving or withholding assent, and the giving or withholding it "is not to be had in a meeting but is to be given by them individually." "The sole right of the cestuis que trust is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end." *Williams v. Milton*, 215 Mass. 1, 8, 10, 11, 102 N. E. 355, 358. The question is whether a different view is required by the terms of the present act. As by D above referred to trustees and associations acting in a fiduciary capacity have the exemption that individual stockholders have from taxation upon dividends of a corporation that itself pays an income tax, and as the plaintiffs undeniably are trustees, if they are to be subjected to a double liability the language of the statute must make the intention clear. *Gould v. Gould*, 245 U. S. 151, 153, 38 Sup. Ct. 53, 62 L. Ed. 211; *United States v. Isham*, 17 Wall. 496, 504, 21 L. Ed. 728.

The requirement of G (a) is that the normal tax thereinbefore imposed upon individuals shall be paid upon the entire net income accruing from all sources during the preceding year "to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships." The trust that has been described would not fall under any familiar conception of a joint-stock association, whether formed under a statute or not. *Smith v. Anderson*, 15 Ch. D. 247, 273, 274, 277, 282; *Eliot v. Freeman*, 220 U. S. 178, 186, 31 Sup. Ct. 360, 55 L. Ed. 424. If we assume that the words "no matter how created or organized" apply to "association" and not only to "insurance company," still it would be a wide departure *from normal usage to call the beneficiaries here a joint-stock association when they are admitted not to be partners in any sense, and when they have no joint action or interest and no con-

trol over the fund. On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees in D is to be made meaningless. We perceive no ground for grouping the two—beneficiaries and trustees—together, in order to turn them into an association, by uniting their contrasted functions and powers, although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law.

We do not see either that the result is affected by any technical analysis of the individual receipt holder's rights in the income received by the trustees. The description most in accord with what has been the practice would be that, as the receipts declare, the holders, until distribution of the capital, were entitled to the income of the fund subject to an unexercised power in the trustees in their reasonable discretion to divert it to the improvement of the capital. But even if it were said that the receipt holders were not entitled to the income as such until they got it, we do not discern how that would turn them into a joint-stock company. Moreover the receipt holders did get it and the question is what portion it was the duty of the trustees to withhold.

We presume that the taxation of corporations and joint-stock companies upon dividends of corporations that themselves pay the income tax was for the purpose of discouraging combinations of the kind now in disfavor, by which a corporation holds controlling interests in other corporations which in their turn may control others, and so on, and in this way concentrates a power that is disapproved. There is nothing of that sort here. Upon the whole case we are of opinion that the statute fails to show a clear intent to subject the dividends on the Massachusetts corporation's stock to the extra tax imposed by G (a).

[2] Our view upon the main question opens a second one upon which the Circuit Court of Appeals did not have to pass. The District Court while it found for the plaintiffs, ruled that the defendant was entitled to retain out of the sum received by him the amount of the tax that they should have paid as trustees. To this the plaintiffs took a cross writ of error to the Circuit Court of Appeals. There can be no question that although the plaintiffs escape the larger liability, there was probable cause for the defendant's act. The Commissioner of Internal Revenue rejected the plaintiff's claim, and the statute does not leave the matter clear. The recovery therefore will be from the United States. Rev. St. § 989 (Comp. St. § 1635). The plaintiffs, as they themselves

alleged in their claim, were the persons taxed, whether they were called an association or trustees. They were taxed too much. If the United States retains from the amount received by it the amount that it should have received, it cannot recover that sum in a subsequent suit.

Judgment of the Circuit Court of Appeals reversed.

Judgment of the District Court affirmed.

(249 U. S. 262)

BOARD OF PUBLIC UTILITY COMRS v.
MANILA ELECTRIC R. & LIGHT CO.

(Argued March 14, 1919. Decided March 24, 1919.)

No. 230.

1. COURTS ⇐387(2)—PHILIPPINE ISLANDS—
REVIEW BY SUPREME COURT.

Construction of a franchise ordinance, requiring free transportation of members of police department wearing official badges, as not applying to detectives with such badges concealed, and consequent ruling by Supreme Court of Philippine Islands that railroad company was not obliged to give such transportation ordered by Board of Public Utility Commissioners, does not involve Constitution, statute, treaty, title, right of privilege of the United States, within Judicial Code, § 248.

2. COURTS ⇐387(2)—PHILIPPINE ISLANDS—
REVIEW BY SUPREME COURT—AMOUNT INVOLVED.

The value in controversy in proceeding by railroad company against Board of Public Utility Commissioners, to revoke board's order that railroad carry detectives free, decided adversely to board by Supreme Court of Philippine Islands, cannot be said to exceed \$25,000, within Judicial Code, § 248; the record disclosing no ground for concluding the board had any such pecuniary interest.

On Appeal from and in Error to the Supreme Court of the Philippine Islands.

Proceeding in the Supreme Court of the Philippine Islands by the Manila Electric Railroad & Light Company against the Board of Public Utility Commissioners to revoke an order of the Board. There was a decree vacating, setting aside and annulling the order, and the Board appeals and brings error. Dismissed.

Messrs. Edward S. Bailey and S. T. Ansell, both of Washington, D. C., for appellant and plaintiff in error.

Messrs. Robert H. Neilson and Paul D. Cravath, both of New York City, for appellee and defendant in error.

Memorandum opinion by Mr. Chief Justice WHITE.

The Manila Electric Railroad & Light

Company, the appellee, operated in the city of Manila a street railway and an electric light and power plant by virtue of a franchise conferred by an ordinance adopted in 1902 by the city in the exercise of a power given it by the local legislative authority.

*From the beginning, in giving effect to the provision of the franchise ordinance requiring that "members of the police and fire departments of the city of Manila wearing official badges shall be entitled to ride free upon the cars of the grantee," that requirement was treated by the grantee as not embracing members of the detective branch of the police department who did not publicly wear official badges, although having such badges concealed upon their persons in such manner that they could be exposed or inspected when desired.

In 1914 the Board of Public Utility Commissioners deeming that members of the detective force not publicly wearing their badges were entitled to ride free under the provisions of the ordinance, after notice and hearing to the railroad on the subject, entered an order directing that members of the detective force be allowed to ride free under the circumstances stated. The railroad, challenging the validity of the order, refused to obey it and availing of the remedy provided by the local law invoked the jurisdiction of the Supreme Court. In that court it disputed not only the correctness of the interpretation which had been given the ordinance by the Utility Commissioners, but charged that if such interpretation were enforced a violation would result of the rights of the company in particulars stated guaranteed to it by the Bill of Rights provided by Congress for the Philippine Islands. The court, passing as unnecessary to be considered all the contentions made by the railroad but the single one concerning the duty of the company under the franchise ordinance to furnish the free transportation ordered, decided that under the text of that ordinance the duty to furnish such transportation did not exist, and therefore set aside the order of the Commissioners. That body, both by error and appeal, brought the subject here for consideration.

[1, 2] As the action of the court complained of was taken *before the Act of September 6, 1916 (39 Stat. 726, c. 448), and the appellate jurisdiction of this court was invoked before that act went into effect, our power to review is governed by section 248 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1158). By that section the authority to review under the situation here disclosed can depend only upon one or both of two considerations: (a) Whether the Constitution or any statute, treaty, title or privilege of the United States is involved, or (b) whether the value in controversy exceeds \$25,000. Compa-

nia General de Tabacos de Filipinas v. Alhambra Cigar & Cigarette Manufacturing Co., 249 U. S. 72, 39 Sup. Ct. 224, 63 L. Ed. 484, decided March 3, 1919.

We are of opinion that the mere construction by the court of the franchise ordinance, and its consequent ruling that the duty did not rest on the railroad company to give the free transportation which the orders of the Commissioners had directed to be given affords no ground for bringing the case within the first consideration, and indeed, that the contention that it does is too unsubstantial, not to say frivolous, to afford any basis for jurisdiction; and that the same conclusion is inevitably required as to the second consideration as the record discloses no ground whatever for concluding that the Utility Commissioners had any such pecuniary interest as to bring the case within the statute.

Dismissed for want of jurisdiction.

(249 U. S. 265)

DOMINION HOTEL, Inc., v. STATE OF ARIZONA.

(Submitted March 11, 1919. Decided March 24, 1919.)

No. 178.

CONSTITUTIONAL LAW — 238(2) — MASTER AND SERVANT — 13 — HOURS OF LABOR — EQUAL PROTECTION OF LAWS.

In view of the deference due to the judgment of the Legislature, of existence of public considerations for the distinction, the equal protection of the law cannot, on judicial knowledge, be said to be denied hotel keepers by the proviso to Pen. Code Ariz. § 717, excepting employes in railroad restaurants from the provision that the 8 hours of labor per day, to which women employed in certain industries are limited, shall be performed within a period of 12 hours.

In Error to the Supreme Court of the State of Arizona.

The Dominion Hotel, Incorporated, was convicted of violation of the law of Arizona as to hours of employment of women, conviction was sustained by the Supreme Court of Arizona (18 Ariz. 345, 161 Pac. 682), and defendant brings error. Affirmed.

Mr. Harvey M. Friend, of Washington, D. C., for plaintiff in error.

Mr. Wiley E. Jones, Atty. Gen., Ariz., for the State of Arizona.

*Mr. Justice HOLMES delivered the opinion of the Court.

This is an information alleging that the defendant, the plaintiff in error, was engaged in the hotel business and permitted

a woman to work in the hotel for eight hours and that the "said eight hours of work was not then and there performed within a period of twelve hours," with a denial that the defendant was within the exceptions made by the statute governing the case. The statute provides as follows:

"Provided further, that the said eight hour period of work shall be performed within a period of twelve hours, the period of twelve hours during which such labor must be performed not to be applicable to railroad restaurants or eating houses located upon railroad rights of way and operated by or under contract *with any railroad company." Penal Code of Arizona, § 717.

The defendant by demurrer and otherwise set up that the exceptions in the statute made it void under the Fourteenth Amendment of the Constitution of the United States as depriving the defendant of the equal protection of the laws. There was a trial and judgment against the defendant which was sustained by the Supreme Court of the State, Arizona.

The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State "may be determined by degrees of evil or exercised in cases where detriment is specially experienced." *Armour & Co. v. North Dakota*, 240 U. S. 510, 517, 36 Sup. Ct. 440, 60 L. Ed. 771, Ann. Cas. 1916D, 548. It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. The only question is whether we can say on our judicial knowledge that the Legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the Legislature on the matter has been emphasized again and again. *Hebe Co. v. Shaw*, 248 U. S. 297, 303, 39 Sup. Ct. 125, 63 L. Ed. 255. Of course, this is especially true when local conditions may affect the answer, conditions that the Legislature does but that we cannot know. *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 530, 531, 37 Sup. Ct. 190, 61 L. Ed. 472, L. R. A. 1918A, 136, Ann. Cas. 1917C, 594.

Presumably, or at least possibly, the main custom of restaurants upon railroad rights of way comes from the passengers upon trains that stop to allow them to eat. The work must be adjusted to the hours of the trains. This fact makes a practical and, it may be, an important *distinction between

such restaurants and others. If in its theory the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's, are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines.

"Upholding the Act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things." *Louisville & Nashville R. R. Co. v. Barber Asphalt Co.*, 197 U. S. 430, 434, 25 Sup. Ct. 466, 467 (49 L. Ed. 819).

We cannot pronounce the statute void.
Judgment affirmed.

(249 U. S. 269)

ST. LOUIS POSTER ADVERTISING CO. v.
CITY OF ST. LOUIS et al. (two cases).

(Argued March 12 and 13, 1919. Decided
March 24, 1919.)

Nos. 220, 2.

1. CONSTITUTIONAL LAW ⚡87 — BILLBOARD ORDINANCES—REASONABLENESS OF RESTRICTIONS.

Restrictions by ordinance limiting area of any billboard to 400 square feet and height above ground to 14 feet, requiring space of 4 feet between them and ground, forbidding them nearer than 6 feet to building or side of lot, or 2 feet to each other, or than 15 feet to street line are not unreasonable and unconstitutional limitations of the liberty of the individual or of rights of property in land.

2. MUNICIPAL CORPORATIONS ⚡602 — BILLBOARD ORDINANCES—PUBLIC WELFARE.

Billboards properly may be put in a class by themselves, and prohibited in the residence districts of a city, in the interest of the safety, morality, health, and decency of the community.

3. MUNICIPAL CORPORATIONS ⚡602 — BILLBOARD RESTRICTIONS.

Restrictions may be put on billboards in a city, though dangers from fire and wind be done away with in their construction, as they are or may be the least of the objections thereto.

4. MUNICIPAL CORPORATIONS ⚡625 — BILLBOARD RESTRICTIONS.

That one or two relatively trifling details of an ordinance as to erection of billboards in a city, especially the requirement of conformity to building line, have aesthetic considerations in view, more prominently than anything else, does not render them invalid, the main burdens imposed standing on other ground.

5. LICENSES 29 — BILLBOARD FEE — REASONABLENESS.

A city desiring to discourage billboards by a high tax may do so.

6. CONSTITUTIONAL LAW 154(1)—OBLIGATION OF CONTRACTS.

A billboard company's contracts for maintaining advertisements on its boards, though made before passage of an ordinance placing restrictions on such boards, are subject thereto as against objection of its incidental effect on them.

In Error to the Supreme Court of the State of Missouri.

Appeal from the District Court of the United States for the Eastern District of Missouri.

Two suits by the St. Louis Poster Advertising Company against the City of St. Louis and others—one in a state court of Missouri; the other in a federal District Court. Judgment adverse to plaintiff in the first suit was affirmed by the Supreme Court of Missouri (195 S. W. 717), and plaintiff brings error; and in the second suit, bill was dismissed, and plaintiff appeals. Affirmed.

Mr. Marion C. Early, of St. Louis, Mo., for plaintiff in error and appellant.

Messrs. Everett Paul Griffin and Charles H. Daues, both of St. Louis, Mo., for defendants in error and appellees.

*Mr. Justice HOLMES delivered the opinion of the Court.

The first mentioned of these cases was brought by the plaintiff in error in a State Court of Missouri to prevent the City of St. Louis and its officials from enforcing an ordinance regulating the erection of billboards, on the ground that the ordinance is contrary to the Fourteenth Amendment in various respects. The suit was begun on March 21, 1914, and on May 22, 1917, a judgment of that Court dismissing it upon demurrer was affirmed by the Supreme Court of the State. 195 S. W. 717. *The other case was begun a little earlier, on January 30, 1914, in the District Court of the United States, by a bill in equity substantially to the same effect as in the State case. The bill was dismissed upon motion on February 29, 1914. The two cases appear to have proceeded to a conclusion without any reference to each other, but as they involve the same parties and the same questions they have been argued as one case here.

The ordinance complained of is number 22,022, passed on April 7, 1905. It allows no billboard of twenty-five square feet or more to be put up without a permit and none to extend more than fourteen feet high above the ground. It requires an open space of four feet to be left between the lower edge and the ground, forbids an approach of near-

er than six feet to any building or to the side of the lot, or nearer than two feet to any other billboard, or than fifteen feet to the street line, and with qualifications requires conformity to the building line. No billboard is to exceed four hundred square feet in area. The fee for a permit is one dollar for every five lineal feet. The bill states that the size of posters has been standardized and cannot be changed without great expense and that the limits in size fixed for the boards are too small for such posters and will affect the plaintiff's business disastrously. The billboards are all upon private ground owned by or let to the plaintiff. They are built to withstand a windstorm of eighty-three miles an hour, a greater velocity than any known in St. Louis, and the frames and facing are of galvanized iron so as to exclude all danger of fire. The plaintiff has contracts running from six months to three years binding it to maintain advertisements upon its boards. The defendants are proposing to tear down these boards unless the plaintiff complies with the ordinance. This is a greatly abbreviated statement of the case but is sufficient, we believe, to present the questions that we have to decide.

[1-4] *Of course, the several restrictions that have been mentioned are said to be unreasonable and unconstitutional limitations of the liberty of the individual and of rights of property in land. But the argument comes too late. This Court has recognized the correctness of the decision in *St. Louis Gunning Advertising Co. v. St. Louis*, 235 Mo. 99, 137 S. W. 929, followed in this case, that billboards properly may be put in a class by themselves and prohibited "in the residence districts of a city in the interest of the safety, morality, health and decency of the community." *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 529, 530, 37 Sup. Ct. 190, 191 (61 L. Ed. 472, L. R. A. 1918A, 136, Ann. Cas. 1917C, 594). It is true that according to the bill the plaintiff has done away with dangers from fire and wind, but apart from the question whether those dangers do not remain sufficient to justify the general rule, they are or may be the least of the objections adverted to in the cases. 235 Mo. 99, 137 S. W. 929; *Kansas City Gunning Advertising Co. v. Kansas City*, 240 Mo. 659, 671, 144 S. W. 1099. Possibly one or two details, especially the requirement of conformity to the building line, have æsthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground, we should not be prepared to deny the validity of relatively trifling requirements that did not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary. *Hubbard v. Taunton*, 140 Mass. 467, 468, 5 N. E. 157.

[5, 6] If the city desired to discourage billboards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether asserted in *Thomas Cusack Co.'s Case*. *Citizens' Telephone Co. v. Fuller*, 229 U. S. 322, 329, 33 Sup. Ct. 833, 57 L. Ed. 1206. As to the plaintiff's contracts, so far as appears they were made after the ordinance was passed, but if made before it they were subject to legislation not invalid otherwise than for its incidental effect upon them. *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 558, 34 Sup. Ct. 364, 58 L. Ed. 721. The same thing may be said, apart from other answers, with regard to the alleged standardizing of the size of posters. In view of our recent decision we think further argument unnecessary to show that the ordinance must be upheld.

Judgment in No. 220 and decree in No. 2 affirmed.

(249 U. S. 275)

UNION TANK LINE v. WRIGHT, Comptroller General of Georgia.

(Argued and Submitted Jan. 22, 1919. Decided March 24, 1919.)

No. 170.

1. CONSTITUTIONAL LAW 283—TAXATION—DUE PROCESS OF LAW.

For a state to tax property of a foreign corporation which has never come within its borders would violate the due process clause of the Fourteenth Amendment.

2. COMMERCE 72—TAXATION—INTERSTATE COMMERCE.

So far as movables of a foreign corporation are regularly and habitually used and employed in a state, the state may tax them according to their fair value, along with other property subject to its jurisdiction, though devoted to interstate commerce.

3. TAXATION 397—FOREIGN CORPORATION—VALUATION OF CARS.

The just valuation of movables of a foreign corporation habitually used and employed in a state, according to which the state may tax them, need not be limited to mere worth of the articles considered separately, but may include, as well, the intangible value due to the organic relation of the property in the state to the corporation's whole system operating in many states.

4. COMMERCE 73—CONSTITUTIONAL LAW 283—DUE PROCESS—TAXATION—RAILROAD CARS.

A tax by the state, in accordance with Civ. Code Ga. 1910, § 990, on the cars run in the state belonging to a foreign corporation engaged in leasing tank cars to shippers, by taking as their assessed value a sum bearing the same ratio to the value of all its cars that the miles of railroad in Georgia over which the cars move bears to total mileage so traversed in all states, a plan arbitrary, and resulting in grossly excessive valuation, violates the Four-

teenth Amendment as to due process of law, and unduly burdens interstate commerce.

5. COURTS 92—PRECEDENTS—OBITER DICTUM.

The statement in opinion on appeal that the method of assessment adopted was proper was obiter dictum; the amount of assessment not having been challenged, but the contention having been right to complete exemption.

Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke dissenting.

In Error to the Supreme Court of the State of Georgia.

Suit for injunction by the Union Tank Line against William A. Wright, Comptroller General of Georgia. Judgment adverse to plaintiff was affirmed in part by the Supreme Court of Georgia (146 Ga. 489, 91 S. E. 680), and plaintiff brings error. Reversed and remanded.

*Mr. Douglas Campbell, of New York City, for plaintiff in error.

Mr. Clifford Walker, of Monroe, Ga., for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

This cause requires us to consider the power of a state to lay and collect taxes upon instrumentalities of interstate commerce which move both within and without its jurisdiction.

Union Tank Line—plaintiff in error—an equipment company incorporated in New Jersey which has never carried on business or had an office in Georgia, owns 12,000 tank cars suitable for transporting oil over railroads and rents them to shippers at agreed rates, based on size and capacity. The roads over which they move also pay therefor stipulated compensation. Under definite contract certain of these cars were furnished to the Standard Oil Company of Kentucky and all of those which came into Georgia were being operated by the Oil Company under such agreement. They were not permanently within that state but passed "in and out."

*March 16, 1914, the Tank Line made the following tax return to the comptroller general for 1913:

Name of company.....	Union Tank Line
Value of real estate owned by company in or out of Georgia..	None
Number of miles of railroad lines in Georgia over which * * * cars are run.....	6976.5
Total value of * * * cars and * * * other personal property [in Georgia and elsewhere].....	\$10,518,333.16
Value franchise [in Georgia].....	No franchise
Total number of miles railroad lines over which * * * cars are run [in Georgia and elsewhere]	251,999
Total value of property taxable in Georgia	\$47,310.00
Union Tank Line Company had an average of 57 tank cars in Georgia during 1913, which at a value of \$830 per car equals....	\$47,310.00

Defendant in error expressly admitted that the average number of cars in Georgia during 1913 was 57, the value of each being \$830—total \$47,310; that the owner had paid into the state treasury as taxes the full amount required on such valuation and during that year had no other property in the state. Acting upon information contained in return above quoted, the comptroller general assessed the Tank Line's property for 1913 at \$291,196, its franchise at \$27,685, and demanded payment. In explanation of this action he wrote to it as follows:

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 "As to the return filed, you have furnished the data desired, but have made an error in the application of same. After giving the mileage for the company everywhere *and for Georgia, you then go ahead and assign 57 tank cars for this state and value them at \$830 each, making the total for Georgia \$47,310. This is an incorrect method. If you were to be allowed to merely assign so many cars to the state for taxation there would be no need for the mileage figures to be furnished. The valuation to be assigned to Georgia must be in the same proportion to the valuation for the entire company as the mileage in Georgia bears to the entire mileage everywhere. * * * Or to work it out by percentage instead of proportion: 6,976.5 the Georgia mileage, is 2.76846 per cent. of 251,999, the entire mileage. Georgia is therefore entitled to 2.76846 per cent. of the entire valuation. This per cent. of \$10,518,333 is \$291,195.84, or the same sum arrived at by proportion, if we call the 84 cents an even dollar. * * * A franchise value should also be returned. And whatever the valuation you place on the franchise for the entire country, 2.76846 per cent. of same must be assigned to Georgia. Thus, if you should value your franchise at \$1,000,000, the franchise value to be assigned to Georgia would be \$27,685.

"The valuation for Georgia was determined by taking 2.76846 per cent. of the valuation you gave for the entire company, exclusive of franchise. The 2.76846 per cent. is the ratio the Georgia mileage bears to the entire mileage, as explained in a previous letter. The franchise value was obtained by placing your franchise for the entire country at an even million dollars and giving Georgia 2.76846 per cent. thereof."

Thereupon, plaintiff in error instituted this proceeding in Fulton county superior court alleging invalidity of the assessment, that to enforce the tax would violate the Fourteenth Amendment, and asked appropriate relief. The cause was tried upon pleadings and agreed statement of facts. Among other things, the parties stipulated:

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 "On April 7, 1914, when the defendant entered an assessment in his office of property and franchise of the plaintiff as shown hereinbefore, he had no other information for any of the years 1907 to 1914 inclusive than was contained in the said return filed by the plaintiff on March 16, 1914, and embraced in this statement and which was refused by the defendant, and did not know what cars defendant had had in Georgia during any of said named years nor did he ascertain the value of such cars, but his ac-

tion was taken on such information hereinbefore shown; and that the assessment so entered by the defendant in his office against the plaintiff's property during said period for each of said years embraces the valuation of about three hundred cars in excess of what the plaintiff actually had in the state of Georgia, during said years of the approximate value of \$250,000.00 each year; and that the true value of a tank car is about eight hundred and thirty (\$830.00) dollars per car.

"That for the year 1914 the assessment entered against plaintiff by defendant covered the value of at least three hundred and fifty cars in excess of the number of cars plaintiff actually had in the state of Georgia for the time said tax was assessed.

"That defendant in entering said assessment never undertook to ascertain the actual property of plaintiff's located in the state of Georgia during the said years or to assess its property at its real value for taxation, otherwise than by simply ascertaining the percentage of its entire property shown by the ratio of the railroad traversed by its equipment in Georgia and the railroad mileage traversed by its equipment everywhere as shown by its said return filed on March 16, 1914."

The trial court adjudged the assessment good as to both franchise and physical property. The Supreme Court held no taxable franchise existed, but that the physical property had been assessed as required by statutes not in conflict with either state or federal Constitution. 146 Ga. 489, 91 S. E. 680. It said (Wright v. Union Tank Line, 143 *Ga. 765, 769, 771, 773, 85 S. E. 994, 996, 997):

"The case relates to two matters, namely: a tax assessment against tangible property of the company; and second, a claim of right to assess a franchise tax. * * * The effort was to tax property in this state, and in doing so to apply the statute designed as a rule to ascertain the property so coming into the state and its proper valuation."

After quoting sections 989, 990, and 1031 Civil Code of Georgia, copied in the margin,¹ the opinion continues:

¹ Civil Code of Georgia.

Sec. 989. "Each nonresident person or company whose sleeping cars are run in this state shall be taxed as follows: Ascertain the whole number of miles of railroad over which such sleeping cars are run, and ascertain the entire value of all sleeping cars of such person or company, then tax such sleeping cars at the regular tax rate imposed upon the property of this state in the same proportion to the entire value of such sleeping cars that the length of lines in this state over which such cars are run bears to the length of lines of all railroads over which such sleeping cars run. The returns shall be made to the comptroller general by the president, general agent, or person in control of such cars in this state. The comptroller general shall frame such questions as will elicit the information sought, and answers thereto shall be made under oath. If the officers above referred to in the control of said sleeping cars shall fail or refuse to answer, under oath, the questions so propounded, the comptroller general shall obtain the information from such sources as he may, and he shall assess a double tax on such sleeping cars. If the taxes herein provided for are not paid, the

"The several Code sections embody the statutory scheme for taxing cars of equipment companies whose cars are handled over the railroads in this state. Owing to the nature of the business, it is difficult to ascertain the number of cars of equipment companies that come into this state and designate the identity of each car or its value. The purpose of the statute is to provide a reasonable method for determining the fact that cars come into this state and the values thereof, to the end that the equipment companies allowing their cars to come into this state may bear their just proportion of taxes leviable in this state. The scheme of the statute is what is sometimes called the track mileage basis of apportionment, or what in a more general way is termed the unit rule. The comptroller general followed the statute. The unit rule has been upheld by the Supreme Court of the United States, in regard to railroads, telegraph companies, and sleeping car companies. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613. And this principle of average has been approved in regard to refrigerator cars. *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 Sup. Ct. 631, 44 L. Ed. 708. It has even been held that the unit rule of valuation could properly be applied to the valuation of property of express companies within a certain state, though there was no physical connection with property beyond the state. * * * It seems to us, therefore, that the case falls within the rule laid down by the Supreme Court of the United States, as above mentioned, and that there are no such circumstances as to bring it within the ruling made in *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761."

comptroller general shall issue executions against the owners of such cars, which may be levied by the sheriff of any county of this state upon the sleeping car or cars of the owner who has failed to pay the taxes."

Sec. 990. "Any person or persons, copartnership, company or corporation wherever organized or incorporated, whose principal business is furnishing or leasing any kind of railroad cars except dining, buffet, chair, parlor, palace, or sleeping cars, or in whom the legal title in any such cars is vested, but which are operated, or leased, or hired to be operated on any railroads in this state, shall be deemed an equipment company. Every such company shall be required to make returns to the comptroller general under the same laws of force in reference to the rolling stock owned by the railroads making returns in this state, and the assessment of taxes thereon shall be levied and the taxes collected in the same manner as provided in the case of sleeping cars in section 989."

Sec. 1031. "Railroad companies operating railroads lying partly in this state and partly in other states shall be taxed as to the rolling stock thereof and other personal property appurtenant thereto, and which is not permanently located in any of the states through which said railroads pass, on so much of the whole value of rolling stock and personal property as is proportional to the length of the railroad in this state, without regard to the location of the head office of such railroad companies."

[1-4] A state may not tax property belonging to a foreign corporation which has never come within its borders—to do so under any formula would violate the due process clause of the Fourteenth Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well "the intangible value due to what we have called the organic relation of the property in the state to the whole system." How to appraise them fairly when the tangibles constitute part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is generally impossible. We have accordingly sustained methods of appraisal producing results approximately correct—for example, the mileage basis in case of a telegraph company (*W. U. Tel. Co. v. Massachusetts*) and the average amount of property habitually brought in and carried out by a car company (*American Refrigerator Transit Co. v. Hall*). But if the plan pursued is arbitrary and the consequent valuation grossly excessive it must be condemned because of conflict with the commerce clause of the Fourteenth Amendment or both. *W. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; *Marye v. B. & O. R. R.*, 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. Ed. 94; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 26, 11 Sup. Ct. 876 (35 L. Ed. 613); *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683; *Adams Express Co. v. Ohio*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 19 Sup. Ct. 599, 43 L. Ed. 899; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 20 Sup. Ct. 631, 44 L. Ed. 708; *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 453, 38 Sup. Ct. 373, 62 L. Ed. 827.

In the present case the comptroller general made no effort to assess according to real value or otherwise than upon the ratio which miles of railroad in Georgia over which the cars moved bore to total mileage so traversed in all states. Real values—the essential aim—of property within a state cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto. During a year two or three cars might pass over every mile of railroad in one state while hundreds constantly employed in another moved over lines of less total length. Fifty-seven was the average number of cars within Georgia dur-

ing 1913, and each had a "true" value of \$830. Thus the total there subject to taxation amounted to \$47,310—the challenged assessment specified \$291,196.

We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce.

[5] Pullman's Car Co. v. Pennsylvania, supra, relied on by defendant in error, contains the following passage which seems to uphold the Georgia rule:

*284 "The mode which the state of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles, in that and other states, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more."

But the point therein spoken of was unnecessary to determination of the cause; and so far as the quoted passage sanctions the specified rule for ascertaining values as generally appropriate, just, unobjectionable and productive of conclusive results it must be regarded as obiter dictum, and we cannot now approve or follow it.

Reference to the original record upon which that case came here will aid in understanding the exact issues presented. Pennsylvania demanded taxes of the Pullman Company, an Illinois corporation, for the years 1870 to 1880 upon such portion of its capital stock as total miles of railroad in Pennsylvania over which its cars moved bore to like total in all states. No statute prescribed the method of valuation; it had been adopted by executive officers. The court of common pleas declared:

"On the facts defendant claims that no part of its capital stock is invested in this state. The argument is that its cars are personal property, and, as they are not permanently located in this state, but pass into, through, and out of it, this personal property has no taxable situs in Pennsylvania, and could not be taxed specifically in any given locality, and therefore, it is contended, as the tax on capital stock is a tax on the property in which the capital is invested, the latter cannot be taxed. * * * We hold, therefore, that the proportion of the capital stock of the defendant invested and used in Pennsylvania is taxable under these acts, and that the amount of the tax may be properly ascertained by taking as a basis the proportion

which the number of miles operated by defendant in this state bears to the whole number of miles operated by it, without regard to the question where any particular car or cars were used. * * * The defendant is liable to tax on the proportion of its capital stock invested in this state, *as represented by the coaches and cars owned and used by it here. * * * Determining the amount of the tax on the principle above stated, it is as follows: Tax for years 1870 to 1880, inclusive, \$16,321.89."

The Supreme Court affirmed this view, saying:

"While the tax on the capital stock of the company 'is a tax on its property and assets,' yet the capital stock of a company and its property and assets are not identical. The coaches of the company are its property. They are operated within this state. They are daily passing from one end of the state to the other. They are used in performing the functions for which the corporation was created. The fact that they also are operated in other states cannot wholly exempt them from taxation here. It reduces the value of property in this state justly subject to taxation here. This was recognized in the court below, and we think the [proportion] preference was fixed according to a just and equitable rule."

In 1870 the Pullman Company's capital stock amounted to \$3,000,000; in 1880 it had grown to \$6,000,000. All cars actually owned by the company (leased ones not included) during 1871 numbered 241, and in 1880, 472, their total value being \$4,334,000 and \$8,588,000 respectively; 100 cars were operated within Pennsylvania during each of the 11 years; total miles of track everywhere passed over by the company cars during 1880 amounted to 57,099; within Pennsylvania, 5,127; and these figures adequately represent the proportion for other years; total tax held due for the 11 years amounted to \$16,321.89. While the record does not disclose the precise valuations upon which taxes were computed, enough does appear to show that they were far below (perhaps not one-third) the actual worth of 100 cars.

The company demanded complete exemption upon the ground that its cars were moving in interstate commerce *and had no tax- *sable situs in Pennsylvania. The appraisal was not challenged as excessive; if the property was taxable in Pennsylvania the rule adopted may have been decidedly favorable to the owner and the assessment a moderate one. Having failed to challenge amount of the assessment, the company could not well complain of the rule under which this was fixed. In such circumstances reasonableness of the rule was not really in question and what was said of it cannot control here where the very point is presented for decision. Cohens v. Virginia, 6 Wheat. 264, 399, 5 L. Ed. 257; McCormick Machine Co. v. Aultman, 169 U. S. 606, 611, 18 Sup.

Ct. 443, 42 L. Ed. 875. See, also, *Adams Express Co. v. Ohio*, supra.

In other opinions of this court cited below to support the conclusion there reached we upheld the power of a state to tax property actually within its jurisdiction upon a fair valuation considered as part of a going concern—they give no sanction to arbitrary and inflated valuations. Taxes must follow realities, not mere deductions from inadequate or irrelevant data.

In *Fargo v. Hart*, supra, we condemned an assessment ostensibly proportioned to mileage where property without the state and unnecessary to the express company's actual business had been included; and we pointed out that under no formula can a state tax things wholly beyond its jurisdiction.

The same considerations which establish invalidity of the assessment of plaintiff in error's property for 1913 apply to like ones made by the comptroller general for all other years in question.

Judgment of the court below must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice DAY, in view of the undisputed facts of this case, concurs in the result.

*Mr. Justice PITNEY, with whom concurred Mr. Justice BRANDEIS and Mr. Justice CLARKE, dissenting.

During the period in controversy the Union Tank Line, plaintiff in error, a New Jersey corporation, was the owner of many tank cars, aggregating in value more than \$10,000,000, and was engaged in the business of renting them out to be employed in transporting oil and similar fluids over railroads throughout the United States extending to more than 250,000 miles. In the course of its business it made a contract with the Standard Oil Company of Kentucky to furnish to that corporation cars for use in the transportation of oils and like fluids from depots at Savannah, Georgia, and Jacksonville, Florida. The oils were brought to those depots chiefly in vessels by sea, and were shipped thence in the Tank Line cars to various destinations within and without the state of Georgia; plaintiff in error being compensated in part by rentals paid by the Standard Oil Company, based on size and capacity of cars, and in part by payments received from the railroad companies over whose lines the cars were run; those companies, in lieu of providing their own tank cars, paying to plaintiff in error three-fourths of a cent per mile per car for the car movements.

Under the provisions of the Georgia statutes (Civil Code, §§ 989, 990, 1031), property taxes were imposed upon plaintiff in error by reason of the habitual use and employment

of its rolling stock within that state, based upon a valuation not limited to the value of the tank cars as separate chattels, but considering their value as a part of the entire system of cars owned and operated by plaintiff in error, and regarding these as a part of the equipment of the railroads over which they ran. Thus, it appearing from a return made by the Tank Line to the comptroller general for the year 1913 that the number of miles of railroad lines in Georgia over which its cars were run was 6,976.5, and the total number of miles of railroad lines over which its cars were run in Georgia and elsewhere was 251,999, and that the total value of its cars and other personal property in Georgia and elsewhere was \$10,518,333.16, the comptroller general assigned to the state of Georgia for taxation the same proportion of the property value of the system of cars that the Georgia rail mileage bore to the total mileage. This gave a valuation of \$291,195.84, whereas plaintiff in error had returned that during the same year it had an average of only 57 tank cars in Georgia, amounting, at a valuation of \$830 per car, to \$47,310.

The Supreme Court of Georgia sustained the tax on the authority of numerous decisions of this court, cited for the purpose. 143 Ga. 765, 85 S. E. 994, 146 Ga. 489, 91 S. E. 680. This court reverses the judgment, and holds the taxing law unconstitutional, upon reasoning to which I am unable to yield assent.

In my opinion the Georgia system of taxing movable property of this character when habitually employed in the state, and the decision of the state Supreme Court sustaining the particular taxes in question, are based upon a correct view of the powers of the state under the federal Constitution, and are in entire harmony with principles laid down in authoritative decisions of this court which have remained unchallenged for more than a quarter of a century. *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 552, 8 Sup. Ct. 961, 31 L. Ed. 790; *Marye v. Baltimore & Ohio R. R.*, 127 U. S. 117, 123, 8 Sup. Ct. 1037, 32 L. Ed. 94; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 26, et seq., 11 Sup. Ct. 876, 35 L. Ed. 613; *Cleveland, etc., Ry. Co. v. Backus*, 154 U. S. 439, 445, 14 Sup. Ct. 1122, 38 L. Ed. 1041; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 14, 16 Sup. Ct. 1054, 41 L. Ed. 49; *Adams Express Co. v. Ohio*, 165 U. S. 194, 221, 17 Sup. Ct. 305, 41 L. Ed. 683; *Adams Express Co. v. Ohio*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 75, et seq., 19 Sup. Ct. 599, 43 L. Ed. 899; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 152, 20 Sup. Ct. 631, 44 L. Ed. 708; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 453, 38 Sup. Ct. 373, 62 L. Ed. 827.

*The case presents no question of taxing

a foreign corporation with respect to personal property that never has come within the borders of the state. According to the agreed state of facts and the petition of the Union Tank Line which is to be read with it, any and all cars of the company were liable to be used indiscriminately, as occasion required, in the transportation of oil within the state of Georgia, and there is nothing to show how many were so used during either of the taxing years in question. Fifty-seven cars simply represent the average number within the state at one and the same time within the year, and is not representative of the number of cars used in the state during the year. This court has declared that a state may lay hold of the average habitual use of movable railroad equipment as a basis of taxation (*Marye v. Baltimore & Ohio R. R.*, 127 U. S. 117, 123, 8 Sup. Ct. 1037, 32 L. Ed. 94); but there is nothing in the Constitution of the United States to confine the state to that particular method. It is but a method of approximation. Nor is the state obliged to ignore the special value that rolling stock has because of its organic relation to, and its customary use in connection with, the railroad tracks upon which it runs. Although the equipment be held in separate ownership, it may be regarded in fact as an appurtenance of the railroad and valued in that relation. It is admitted that the revenue derived by plaintiff in error from the use of its cars is in part paid by the railroad companies and proportioned to the mileage covered by the run of the cars.

The opinion of this court recognizes that plaintiff in error, because its tank cars are regularly and habitually used and employed in the state of Georgia, is taxable according to their fair value along with other property subject to the jurisdiction of the state, although they are devoted to interstate commerce; that while the valuation must be just it need not be limited to the mere value of the cars considered separately, but may include also the *special value attributable to their organic relation to the entire system; that fair appraisal, in a case like this, where the cars constitute part of a system operating in many states, is a matter of serious difficulty, but that absolute accuracy usually is impossible and therefore is not required by the Constitution; and it seems to be intimated that a valuation based upon the aggregate car mileage within the state during the taxable year would be permissible. But, even assuming that such a basis could be adopted without in effect regulating interstate commerce by varying the burden of taxation in direct proportion to the volume of such commerce, it still is obvious that a valuation according to aggregate car mileage would virtually ignore the particular value due to the relation of the cars to the rail system, would in effect be equivalent to a valuation according to average use,

and would be open to the same objection, viz., that its ascertainment would lie wholly within the breast of the taxpayer. For, if the state authorities were required to keep a check either upon the average use or the aggregate mileage covered by the movements of rolling stock within the state, and to supplement this with observations in other states in order to arrive at the due proportion, the cost of administration easily might consume the tax.

It is because of difficulties such as these that so many of the states have resorted to track mileage—readily ascertained and little subject to change—as an equitable method of ascertaining the proportionate value taxable by a single state, out of the aggregate value of the movables of an equipment company that does business in several states.

This method was very clearly sustained by this court in *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18, 26, 11 Sup. Ct. 876, 35 L. Ed. 613, a case decided in the year 1891, followed repeatedly, and never questioned in the least until now. The tax laws of the state of Georgia, and doubtless of many other *states, have been based upon that decision, and I regard it as most unfortunate that at this late date its authority should be overthrown.

The Pullman Company was a corporation of the state of Illinois, having its principal office in Chicago, and its business was to furnish sleeping coaches and parlor and dining cars to various railroad companies for use as a part of the equipment of passenger trains running in interstate commerce; the railroad companies collecting the usual passenger fares and the Pullman Company separate charges for seats and berths. The company was subjected by the state of Pennsylvania to a tax upon a part of its capital stock bearing the same proportion to the whole as the number of miles of railroad over which its cars were run in Pennsylvania bore to the whole number of miles in that and other states over which they were run. The Pullman Company objected to the taxation of any part of its capital stock by the state of Pennsylvania by reason of its running its cars through that state in the course of their employment in interstate transportation of passengers; and it is obvious that unless the tax was sustainable as being in substance and effect a tax upon property of the company no greater than that which the state had a right to impose it was invalid because amounting in its effect to a burden upon interstate commerce. It was from this point of view that the court tested and sustained the tax, as the following excerpts from the opinion will show. After declaring that the legislative power of every state extends to all property within its borders; that for purposes of taxation personal property may be separated from its owner and the owner

taxed on account of it at the place where it is located, although he is not a citizen or resident of the state which imposes it; and that there is nothing in the Constitution or laws of the United States to prevent a state from taxing personal property employed in interstate or foreign commerce *like other personal property within its jurisdiction, the court, speaking by Mr. Justice Gray, proceeded to say (141 U. S. 25, 26, 11 Sup. Ct. 879, 35 L. Ed. 613):

"Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one state cannot be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. * * * The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the state to other states or countries. * * * The tax on the capital of the corporation, on account of its property within the state, is, in substance and effect, a tax on that property. * * * The cars of this company within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. * * * The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. * * * The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods *for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the state.

"The mode which the state of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that state, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles, in that and other states, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more. [Italics mine.] The validity of this mode of apportioning such a tax is sustained by several decisions of this court," etc.

It was upon this decision, among others, that the Supreme Court of Georgia relied as authority for its judgment. I cannot agree that any part of what I have quoted—least of all the italicized clause which relates to the apportionment of the tax according to track mileage—was obiter dictum or unnecessary for the decision. It was necessary—certainly so this court deemed it—that the disputed tax be vindicated as a property tax in order to relieve it from the criticism that it was an unwarranted interference with interstate commerce; and it could not be sustained as a property tax unless the method of apportionment was fair and equitable. The authority of the case cannot properly be overthrown by showing, even if it could be shown, that the court might have reached the same result upon some other ground than that which in truth it adopted as the basis of its decision. And it seems to me that a considered judgment of this court upon a constitutional question affecting the taxing powers of the states, long acted upon as a guide to state legislation upon this important and difficult matter, ought not to be *set aside without more cogent reasons than any that are here adduced. Certainly the fact that the established rule of taxation may operate with hardship or even with apparent injustice in a particular case is not sufficient to condemn it.

The decision referred to, Pullman's Car Co. v. Pennsylvania, supra, has always been regarded as a leading case, and cited with uniform approval in repeated decisions of this court, not only upon the point that property employed in interstate commerce, and in the ordinary use of it situate sometimes within and sometimes without a state, is subject to state taxation without regard to the place of the owner's domicile, but also and especially in support of the proposition that the mileage basis of apportionment as between the different states may be resorted to in order to determine what tax each state shall lay upon rolling stock used upon interstate railroads, just as it often is resorted to in apportioning the tax upon a railroad as between different taxing districts in the same state.

The reasoning of the case upon the point now in controversy has never heretofore been regarded as obiter dictum. On the contrary, it was cited in support of the mileage basis of apportionment for the taxation of a railroad in Pittsburgh, etc., Ry. Co. v. Backus, 154 U. S. 421, 431, 14 Sup. Ct. 1114, 38 L. Ed. 1031, and, in Adams Express Co. v. Ohio, 165 U. S. 194, 221, 17 Sup. Ct. 305, 41 L. Ed. 683, to sustain a mileage apportionment with respect to interstate express companies, notwithstanding the absence of physical unity. Adams Exp. Co. v. Ohio, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed.

965. It was quoted from extensively in *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 75, 76, 19 Sup. Ct. 599, 43 L. Ed. 899, as authority for the apportionment of taxes upon rolling stock according to the track mileage within and without the state; the very part of the opinion now held to be dictum being included in the quotation. See also *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 14, 21, 16 Sup. Ct. 1054, 41 L. Ed. 49; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 152, 20 Sup. Ct. 631, 44 L. Ed. 708; *Union Transit Co. v. Kentucky*, *199 U. S. 194, 206, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; *Galveston, Harrisburg, etc., Ry. Co. v. Texas*, 210 U. S. 217, 225, 28 Sup. Ct. 638, 52 L. Ed. 1031; *Pullman Co. v. Kansas*, 216 U. S. 56, 63, 64, 30 Sup. Ct. 232, 54 L. Ed. 378; *Louisville & Nashville R. R. Co. v. Greene*, 244 U. S. 522, 548, 37 Sup. Ct. 683, 61 L. Ed. 1291, Ann. Cas. 1917E, 97; *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 453, 38 Sup. Ct. 373, 62 L. Ed. 827. In *Fargo v. Hart*, 193 U. S. 490, 499, 24 Sup. Ct. 498, 48 L. Ed. 761, the court recognized the authority of *Pullman's Car Co. v. Pennsylvania* as supporting the acknowledged doctrine of organic unity and the reasonableness and constitutionality of the mileage proportion, but found in the particular case an exception to the rule.

I can see nothing arbitrary or unreasonable in the general rule of mileage apportionment adopted by the state of Georgia, upon the authority of these repeated decisions of this court, for the taxation of railroad cars and other equipment habitually operated on lines extending within and without the state, and hence am convinced that the statute is not repugnant to the federal Constitution. If, for any reason that does not appear, the rule operated unfairly in this particular case, and imposed an unjust and inequitable burden of taxation upon plaintiff in error, it was incumbent upon plaintiff in error to show this by calling for an arbitration upon the question of true value, as permitted by the Georgia statutes (Civil Code, §§ 1045-1046, 1050-1054), or by some appropriate proceeding for relief against the excessive part of the taxes. Having failed to do this although properly notified, it cannot in justice be heard to say that the valuation of its property, made according to a statutory rule that in its general application is just and reasonable, is in the particular case so excessive as to amount to a deprivation of property without due process of law, or an undue burden upon interstate commerce.

Mr. Justice BRANDEIS and Mr. Justice CLARKE concur in this dissent.

(249 U. S. 296)

UNITED STATES v. BROOKLYN EASTERN DISTRICT TERMINAL.

(Argued Jan. 20, 1919. Decided March 24, 1919.)

No. 155.

1. MASTER AND SERVANT ⇄ 13—HOURS OF SERVICE ACT—"RAILROAD."

Neither the character of the Brooklyn Eastern District Terminal's railroad, nor its independent ownership, excludes it from the operation of the federal Hours of Service Act (Comp. St. §§ 8677-8680); it being declared by section 1 that the term "railroad," as used therein, shall include bridges and ferries used or operated in connection with a railroad, and also all the road in use by a common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Railroad.]

2. MASTER AND SERVANT ⇄ 13—HOURS OF SERVICE ACT—COMMON CARRIER.

Whether the Brooklyn Eastern District Terminal is a common carrier within the Hours of Service Act (Comp. St. §§ 8677-8680) depends, not on whether its charter so declares it, nor on how the state of incorporation considers it, but on what it does.

3. MASTER AND SERVANT ⇄ 13—HOURS OF SERVICE ACT—"COMMON CARRIER"—TERMINAL COMPANY.

The Brooklyn Eastern District Terminal held a "common carrier," within the Hours of Service Act (Comp. St. §§ 8677-8680), though its service is performed under contracts with railroad companies as agents for them; the service actually performed by it for or in respect to shippers in no respect differing from that performed by the railroad companies at other stations, and it being immaterial that its carriage is in cars furnished by the railroad companies.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Carrier.]

4. MASTER AND SERVANT ⇄ 13—HOURS OF SERVICE ACT—"TRAIN."

Switching crews of the Brooklyn Eastern District Terminal, engaged in moving at one time a locomotive with seven or eight cars between its docks and warehouses or team tracks, a distance of nearly a mile, are engaged in moving a "train" within the Hours of Service Act (Comp. St. §§ 8677-8680).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Train.]

On writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Action by the United States against the Brooklyn Eastern District Terminal for penalties for violation of the Hours of Service Act. Judgment for plaintiff was reversed by the Circuit Court of Appeals (239 Fed. 287,

152 C. C. A. 275), and plaintiff appeals. Reversed.

Mr. Assistant Attorney General Frierson, for the United States.

Mr. Henry B. Closson, of New York City, for respondent.

*Mr. Justice BRANDEIS delivered the opinion of the Court.

The Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. §§ 8677, 8678])¹ prohibits any common carrier by railroad engaged in interstate commerce from requiring or permitting an employé to remain on duty for a longer period than 16 consecutive hours. For alleged violation of this provision, proceedings were brought against the Brooklyn Eastern District Terminal in the District Court of the United States for the Eastern District of New York. The defendant contended that it was not a common carrier; that it was not engaged in interstate commerce by railroad; and that its employés were not "connected with the movement of any train." Upon facts which were agreed the trial court entered judgment for the government. The Circuit Court of Appeals reversed the judgment on the ground that, while the Terminal was engaged in interstate commerce and the employment in question was connected with the movement of trains, it was not a common carrier. *Brooklyn Eastern District Terminal v. United States*, 239 Fed. 287, 152 C. C. A. 275. The case comes here on writ of certiorari (243 U. S. 647, 37 Sup. Ct. 475, 61 L. Ed. 945); and the substantial question before us is whether the Terminal is within the scope of the Hours of Service Act, as being a common carrier. The essential facts are these:

1. The Terminal is a navigation corporation with an authorized capital stock of one hundred thousand dollars (\$100,000), incorporated under section 10 of article 3 of the Transportation Corporations Law of the state of New York (Consol. Laws, c. 63) which reads as follows:

"Seven or more persons may become a corporation, for the purpose of building for their own use, equipping, furnishing, fitting, purchasing, chartering, navigating, or owning steam,

¹ Act of March 4, 1907, c. 2939, 34 Stat. 1415.

"That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employés, engaged in the transportation of passengers or property by railroad . . . from one state . . . to any other state. . . . The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'employés' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours. . . ."

sail, or other boats, ships, vessels or other property to be used in any lawful business, trade, commerce, or navigation upon the ocean, or any seas, sounds, lakes, rivers, canals, or other waterways, and for the carriage, transportation, or storing or lading, freight, mails, property, or passengers thereon."

In its certificate of incorporation, the corporate powers and purposes of the defendant are stated as follows:

"The purposes for which it is formed are to build for its own use, equip, furnish, fit, purchase, charter, navigate, and own steam, sail, and other boats, ships, vessels, and other property to be used in the business of carrying, transporting, storing, and lading merchandise in New York Harbor and the waters adjacent thereto and connected therewith and the territory bordering thereon."

2. The Terminal operates a union freight station at Brooklyn under individual contracts with ten interstate railroads and several steamship companies. From the railroads it receives both carload and less than carload freight and transports the same from their termini to its Brooklyn docks. There, the cars containing such freight are hauled from the car floats by its locomotives and placed for unloading either on its team tracks or at its freight houses. The Terminal receives likewise from shippers both carload and less than carload outgoing freight originating at Brooklyn and consigned to points upon the various railroads with which it has contracts. The cars carrying this outgoing freight are then switched and loaded by its locomotives upon its floats and transported by its tugs to the docks of the several railroads.

3. For its services in handling freight as above set forth the Terminal is paid not by the shipper or consignee, but by the railroad or steamship company upon whose account the transportation service is performed, at the rate of 3 cents per 100 pounds of freight moving to or from points east of the western terminus of said railroads, and 4½ cents *per 100 pounds on freight moving to or from points beyond such terminus. Upon prepaid shipments from shippers not on the credit lists of the railroads it collects from the shipper at Brooklyn the money and charges for the transportation of such freight from that point to its final destination; and also collects from the consignee at Brooklyn the charges for the transportation of such freight from its point of origin to that place, when such charges have not been prepaid. The freight moneys and charges so received by the defendant from shippers or consignees are accounted for and paid over by it without deduction to the railroads or steamship lines upon whose account they are collected.

4. The Terminal does not hold itself out as a common carrier; nor does it file with the Interstate Commerce Commission any tariffs or concurrences with tariffs, or copies of

the contracts with the common carriers by whom it is paid for the transportation of freight, as heretofore set forth. The terminal at Brooklyn is designated by such railroads and rail and water lines, in the tariffs filed by them with the Interstate Commerce Commission, as one of their receiving and delivering stations for freight in the port of New York; and through bills of lading to such terminal as such station are issued by them on freight to be delivered there. For all freight originating at Brooklyn bills of lading of the railroad or steamship line to which the freight is to be delivered are there issued to the shipper by one of the defendant's employes, who is duly authorized to issue such bills of lading by the railroad or steamship line by which the freight is to be transported to its final destination or destinations after the same is delivered to such railroad or steamship line by defendant.

5. The tracks of the Terminal which extend from its float bridges to several warehouses, coal pockets, platforms, and team tracks have an aggregate length of $8\frac{1}{2}$ miles. One track connecting its several dock and delivery *tracks which is kept clear for operating its switching engines is about one mile in length. The length of haul effected by its locomotives in moving cars between its float bridges and warehouses, platforms, pockets, and team tracks varies from a few yards to nearly a mile. The number of cars so hauled as part of a movement varies from a single car to eight cars. As an incident to such movement its locomotives hauling cars cross a public street in Brooklyn.

6. Defendant owns or hires no cars itself, and no cars, except the ones heretofore mentioned, are ever moved over its tracks. For the use of such cars defendant pays no charges; and except by the switching service heretofore described, it transports freight only by water. It handles interstate and intrastate freight indiscriminately, the larger part being interstate. It transports no passengers.

7. In connection with the movement of one or more cars between the floats and the loading tracks, warehouses, and team or delivery tracks, defendant employs four to eight switching crews during the day and two at night, each crew consisting of a conductor, engineer and two or more brakemen.

[1] The Hours of Service Act declares (in the first section) that:

"The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease."

Hence, neither the character of the Terminal's railroad nor its independent ownership excludes it from the scope of the act. But the Terminal contends that it is not subject

to the provisions of the statute, since it is not incorporated as a common carrier and does not hold itself out as such; does not file tariffs; and does not undertake to transport property for all who may apply to have their goods transported; but merely transports as agent such freight as is delivered to *it by or for those carriers, and those only, with whom it has elected to make special contracts; and that, under these contracts it performs for the railroads, and not for the public, a part of the whole carriage which they, as common carriers, have undertaken with the shipper to perform.

[2] We need not undertake a definition of the term "common carrier" for all purposes. Nor are we concerned with questions of corporate power or of duties to shippers, which frequently compel nice distinctions between public and private carriers. We have merely to determine whether Congress, in declaring the Hours of Service Act applicable "to any common carrier or carriers, their officers, agents, and employes, engaged in the transportation of passengers or property by railroad," made its prohibitions applicable to the Terminal and its employes engaged in the operations here involved. The answer to that question does not depend upon whether its charter declares it to be a common carrier, nor upon whether the state of incorporation considers it such; but upon what it does. *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252, 254, 36 Sup. Ct. 583, 60 L. Ed. 984, Ann. Cas. 1916D, 765.

[3] The relation of the Terminal to the several railroads is substantially the same as that of the terminal considered in *United States v. Baltimore & Ohio Railroad Co.*, 225 U. S. 306, 32 Sup. Ct. 817, 56 L. Ed. 1100; 231 U. S. 274, 288, 34 Sup. Ct. 75, 58 L. Ed. 218. The transportation performed by the railroads begins and ends at the Terminal. Its docks and warehouses are public freight stations of the railroads. These with its car floats, even if not under common ownership or management, are used as an integral part of each railroad line, like the stockyards in *United States v. Union Stockyard*, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226, and the wharfage facilities in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310. They are clearly unlike private plant facilities. Compare *Tap Line Cases*, 234 U. S. 1, 25, 34 Sup. Ct. 741, 58 L. Ed. 1185. The services rendered by the Terminal are public in their *nature; and of a kind ordinarily performed by a common carrier. If these terminal operations were conducted directly by any, or jointly by all, of the ten railroad companies with which the Terminal has contracts, the operations would clearly be within the scope of the Hours of Service Law. The evils sought to be remedied exist equally, whether the terminal operations are

conducted by the railroad companies themselves or by the Terminal as their agent; and whether the Terminal acts only as such agent for railroads or undertakes in addition to transport on its own account goods for shippers. The precise question presented is, therefore, whether the fact that the Terminal conducts these operations, not as an integral part of a single railroad system but wholly as an agent for one or several, exempts the railroad companies, because they are not the employer and exempts the Terminal, because it is not a common carrier; thus making inapplicable a provision regarding the physical operation of the property devised for the protection of employes and the public.

One who transports property from place to place over a definite route as agent for a common carrier may, under conceivable circumstances, be a private carrier. But what is there in the facts above recited to endow the Terminal with that character? The service which it performs is distinctly public in character; that is, conveying between Brooklyn and points on any of the ten interstate carriers and their connections all property that is offered. The fact that the railroad of the Terminal is short does not prevent it from being a common carrier; *United States v. Sioux City Stockyards Co.* (C. C.) 162 Fed. 556; nor does the fact that the thing which it undertakes to carry is contained only in cars furnished by the railroad companies with which it has contracts. Railroads, whose only service is hauling cars for other railroads, have been held liable as common carriers under the Safety Appliance Acts March 2, 1893, c. 196, 27 Stat. 531, Comp. St. §§ 8605-8612; Act March 2, 1903, c. 976, 32 Stat. 943, Comp. St. §§ 8613-8615; Act April 14, 1910, c. 160, 36 Stat. 298, Comp. St. §§ 8617-8623 **(Union Stockyards Co. of Omaha v. United States, 169 Fed. 404, 94 C. C. A. 626; Belt Railway Co. of Chicago v. United States, 168 Fed. 542, 93 C. C. A. 666, 22 L. R. A. [N. S.] 582);* and under the Twenty-Eight Hour Law Act June 29, 1906, c. 3594, 34 Stat. 607, Comp. St. §§ 8651-8654 (*United States v. Sioux City Stockyards Co., supra*).²

What the Terminal contracts to transport, however, is not primarily cars, but their contents. Its compensation is measured not by the weight, size, or character of the car, but by the weight and the origin or destination of the goods carried therein. These goods the Terminal must, under its contracts with the railroad companies, receive and carry at the rates specified for all who offer them, as fully as the railroad companies do at their

other stations. The incidental services performed by the Terminal in respect to these goods are also the same as those performed by the railroad companies at their other stations. For all freight originating at Brooklyn, it issues through bills of lading to destination. Upon prepaid shipments originating there, it collects from the shippers the charges for transportation from Brooklyn to final destination; except where shippers are on the credit lists of the railroad companies. Upon goods arriving over its line at Brooklyn, it collects from the consignees the charges from point of origin, unless these were prepaid. As the Terminal receives both from railroad companies and from shippers also less than carload freight, it doubtless performs the loading and unloading, as is done at other railroad stations; and for freight delivered at Brooklyn takes appropriate receipts. In no respects, therefore, does the service actually performed by the Terminal for or in respect to shippers differ from that performed by the railroad companies at their other stations. True, the service is performed by the Terminal under contracts with the railroad companies as agent for them and not on its own account. But a common carrier does not cease to be *such merely because the services which it renders to the public are performed as agent for another. The relation of connecting carriers with the initial carrier is frequently that of agent. See *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872. The relation of agency may preclude contractual obligations to the shippers, but it cannot change the obligations of the carrier concerning the physical operation of the railroad under the Hours of Service Act, which as this court has said, must be liberally construed to secure the safety of employes and the public. *Atchison, Topeka & Santa Fé Railway Co. v. United States*, 244 U. S. 336, 37 Sup. Ct. 635, 61 L. Ed. 1175, Ann. Cas. 1918C, 794.

[4] It is now admitted that the Terminal is engaged in interstate commerce; and it is clear that at least "switching crews" engaged in moving at one time a locomotive with seven or eight cars between the docks and the warehouses or team tracks, a distance of nearly a mile, are engaged in the movement of a "train." The decisions under the Safety Appliance Acts depend upon the particular context in which the word "train" there occurs, and are not here applicable. Compare *United States v. Erie Railroad Co.*, 237 U. S. 402, 407, 408, 35 Sup. Ct. 621, 59 L. Ed. 1019.

The judgment of the Circuit Court of Appeals is reversed, and that of the District Court affirmed.

Reversed.

² Compare also *McNamara v. Washington Terminal Co.*, 37 App. D. C. 384, 394 et seq.; *State v. Union Stockyards Co.*, 91 Neb. 67, 116 N. W. 527.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1918

(248 U. S. 582)

No. 522. OKLAHOMA CITY MILL & ELEVATOR COMPANY, petitioner, v. PAMPA GRAIN COMPANY. Dec. 23, 1918. For opinion below, see 248 Fed. 477, 160 C. C. A. 487. Mr. Joseph W. Bailey, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(248 U. S. 582)

No. 537. Henry A. WISE, Trustee, et al., petitioners, v. The COMMONWEALTH OF VIRGINIA et al. Dec. 23, 1918. For opinion below, see 122 Va. 693, 95 S. E. 632. Mr. Henry A. Wise, of New York City, for petitioners. Mr. J. D. Hank, Jr., of Richmond, Va., for the Commonwealth of Virginia. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia denied.

(248 U. S. 582)

No. 753. Sam Orr TRIBBLE, petitioner, v. SOUTHERN EXPRESS COMPANY. Dec. 23, 1918. For opinion below, see 96 S. E. 712. Mr. Ernest F. Cochran, of Anderson, S. C., for petitioners. Mr. Robert C. Alston, of Atlanta, Ga., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied.

(248 U. S. 547)

No. —, Original. Ex parte in the matter of Daniel O'CONNELL et al., petitioners. Jan. 7, 1919. Mr. Joseph L. Tepper, of Washington, D. C., for petitioners. Motion for leave to file a petition for a writ of mandamus herein denied.

No. —, Original. The STATE OF KANSAS, complainant, v. Albert S. BURLESON, Postmaster General, etc., et al. March 17, 1919. Motion for leave to file bill of complaint herein granted, and process ordered to issue returnable on the first day of the next term.

(249 U. S. 584)

No. —, Original. Ex parte in the matter of Wilfred TOMPKINS. March 17, 1919. Motion for leave to file petition for a writ of habeas corpus herein denied.

(249 U. S. 584)

No. 225. Mrs. M. E. SIMS et al., plaintiffs in error, v. W. H. STARK et al. March 17, 1919. In error to the District Court of the United States for the Eastern District of Texas. See, also, 230 Fed. 115, 144 C. C. A. 413; 236 Fed. 731, 150 C. C. A. 63. Mr. E. E. Townes, of Houston, Tex., for plaintiffs in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of Aspen Mining & Smelting Co. v. Billings, 150 U. S. 31, 37, 14 Sup. Ct. 4, 37 L. Ed. 986; Brown v. Alton Wa-

ter Co., 222 U. S. 325, 332-334, 32 Sup. Ct. 156, 56 L. Ed. 221. See Red Jacket, Jr., Coal Co. et al. v. United Thacker Coal Company, 248 U. S. 531, 39 Sup. Ct. 5, 63 L. Ed. —, point 3, decided October 21, 1918; Omaha Baum Iron Store Co. v. Moline Plow Co., 244 U. S. 650, 37 Sup. Ct. 743, 61 L. Ed. 1371.

(249 U. S. 583)

No. 226. The ANN ARBOR RAILROAD COMPANY, plaintiff in error, v. Stephen MANOLOFF. March 17, 1919. In error to the Court of Appeals, Sixth Appellate District of the State of Ohio. Mr. Alexander L. Smith, of Toledo, Ohio, for plaintiff in error. Messrs. A. Jay Miller, of Bellefontaine, Ohio, and Albert H. Miller, of Toledo, Ohio, for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, § 2, 39 Stats. L., 726 (Comp. St. § 1214).

(249 U. S. 584)

No. 239. The DENVER & RIO GRANDE RAILROAD COMPANY, plaintiff in error, v. Oresta DA VELLA, Royal Italian Consul, as administrator, etc. March 17, 1919. In error to the Supreme Court of the State of Colorado. For opinion below, see 165 Pac. 254. Mr. Elroy N. Clark, of Denver, Colo., for plaintiff in error. Mr. F. W. Sanborn, of Denver, Colo., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, § 2, 39 Stats. L., 726 (Comp. St. § 1214).

(249 U. S. 583, 604)

No. 373. SUPREME CONCLAVE, IMPROVED ORDER OF HEPTASOPHS, plaintiff in error, v. William Marshall WILSON. March 17, 1919. In error to and on petition for writ of certiorari to the Supreme Court of the State of North Carolina. For opinion below, see 174 N. C. 628, 94 S. E. 443. Mr. H. La Rue Brown, of Boston, Mass., and Mr. Olin Bryan, of Philadelphia, Pa., for plaintiff in error. Mr. Thaddeus A. Adams, of Charlotte, N. C., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, 39 Stats. L., 726 (Comp. St. § 1214). Petition for writ of certiorari denied.

(249 U. S. 582)

No. 418. CITY OF CHICAGO et al., plaintiffs in error, Thomas E. DEMPCY, as chairman, etc., et al. March 17, 1919. In error to

the Supreme Court of the State of Illinois. See, also, 281 Ill. 257, 117 N. E. 1010. Messrs. W. W. Gurley, Harry P. Weber, and George W. Miller, all of Chicago, Ill., for plaintiffs in error. Messrs. Edward J. Brundage, James H. Wilkerson, and George T. Buckingham, all of Chicago, Ill., for defendants in error.

PER CURIAM. The motion of the Chicago City Railway Company, Chicago Railways Company, Calumet & South Chicago Railway Company, and the Southern Street Railway Company, for leave "to withdraw as plaintiffs in error in said case and to discontinue the writ of error as to them" is granted upon the condition that the exercise of the permission to withdraw shall be a consent to a severance and without prejudice to the right of the city of Chicago to prosecute its writ of error to a final conclusion.

(249 U. S. 595)

No. 819. **CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY** and Wabash Railway Company, petitioners, v. **DES MOINES UNION RAILWAY COMPANY** et al. March 17, 1919. For opinion below, see 254 Fed. 927. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(249 U. S. 595)

No. 820. **DES MOINES UNION RAILWAY COMPANY** et al., petitioners, v. **CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY** and Wabash Railway Company. March 17, 1919. For opinion below, see 254 Fed. 927. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(249 U. S. 604)

No. 846. **IOWA CENTRAL RAILWAY COMPANY**, petitioner, v. **J. W. BREEN**. March 17, 1919. For opinion below, see 168 N. W. 901. Mr. C. H. E. Boardman, of Marshalltown, Iowa (Messrs. M. M. Joyce and R. B. Alberson, of Minneapolis, Minn., of counsel), for petitioner. Messrs. Dutcher, Davis & Hambrecht, of Iowa City, Iowa, for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Iowa denied.

(249 U. S. 604)

No. 862. **The NULOMOLINE COMPANY**, petitioner, v. **Julius STROMEYER**, trading as Julius Stromeier & Company. March 17, 1919. For opinion below, see 254 Fed. 296. Messrs. Leo Levy, of New York City, and Chester N. Farr, Jr., of Philadelphia, Pa., for petitioner. Mr. Michael J. Ryan, of Philadelphia, Pa., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(249 U. S. 605)

No. 866. **ZENITH CARBURETOR COMPANY**, petitioner, v. **STROMBERG MOTOR DEVICES COMPANY**. March 17, 1919. For opinion below, see 254 Fed. 68. Messrs. Clarence P. Byrnes, of Pittsburgh, Pa., and Mr. Melville Church, of Washington, D. C., for petitioner. Mr. Charles A. Brown, of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

No. 872. **H. M. LUCK**, executrix, etc., petitioner, v. **Abram P. STAPLES**, trustee, etc. March 17, 1919. For opinion below, see 255 Fed. 637. Mr. W. L. Welborn, of Roanoke, Va., for petitioner. Messrs. Horace M. Fox, and Abram P. Staples, both of Roanoke, Va., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(249 U. S. 605)

No. 880. **NEW YORK, PHILADELPHIA & NORFOLK RAILROAD COMPANY**, petitioner, v. **Lillie WILKINS**, administratrix, etc. March 17, 1919. For opinion below, see 257 Fed. 42. Messrs. Thomas H. Wilcox and Hughes, Vandeverter & Eggleston, all of Norfolk (Mr. Floyd Hughes, of Norfolk, Va., of counsel), for petitioner. Messrs. John W. Oast, Jr., and R. T. Thorp, both of Norfolk, Va. (Mr. John W. Oast, Jr., of Norfolk, Va., of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(249 U. S. 595)

No. 889. **Stephen H. P. PELL** et al., petitioners, v. **W. Gordon McCABE, Jr.**, and **William F. Gray**. March 17, 1919. For opinion below, see 256 Fed. 512. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(249 U. S. 605)

No. 891. **ST. LOUIS SOUTHWESTERN RAILWAY OF TEXAS**, petitioner, v. **Frank SMITH**. March 17, 1919. For opinion below, see 254 Fed. 581. Messrs. E. B. Perkins, of Dallas, Tex., and S. P. Ross and Sam R. Scott, both of Waco, Tex., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(249 U. S. 606)

No. 892. **The BISIGHT COMPANY** and **Benjamin Mayer**, petitioners, v. **ONEPIECE BIFOCAL LENS COMPANY**. March 17, 1919. For opinion below, see 259 Fed. 275, which modifies 246 Fed. 450. Mr. Cyrus N. Anderson, of Philadelphia, Pa., for petitioners. Messrs. Edward Rector, of Chicago, Ill., and Virgil H. Lockwood, of Indianapolis, Ind., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(249 U. S. 606)

No. 896. **Amey HANEY** et al., petitioners, v. **Albert ANDERSON** et al. March 17, 1919. For opinion below, see 178 Pac. 120. Mr. Malcolm E. Rosser, of Muskogee, Okl., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(249 U. S. 606)

No. 903. **Frederick H. CLARKE** and **Harry F. CLARKE**, petitioners, v. **The UNITED STATES of America**. March 17, 1919. For opinion below, see 255 Fed. 546. Mr. George Haldorn, of New York City, for petitioners. Mr. Claude R. Porter, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(249 U. S. 606)

Nos. 904. Oliver R. GILLESPIE and Martha Morgan, petitioners, v. E. D. SCOTT, trustee, etc. March 17, 1919. For opinion below, see 103 Kan. 745, 176 Pac. 132. Mr. Frans E. Lindquist, of Kansas City, Mo., for petitioners. Petition for a writ of certiorari to the Supreme Court of the State of Kansas denied.

(249 U. S. 619)

No. 572. NORTHERN PACIFIC RAILWAY COMPANY, plaintiff in error, v. J. R. THOMPSON, as County Treasurer of Flathead County, Mont. March 19, 1919. In error to the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 253 Fed. 178. Mr. Milton S. Gunn, of Helena, Mont., for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(249 U. S. 585)

No. 261. CHESAPEAKE & OHIO COAL & COKE COMPANY, plaintiff in error, v. The TOLEDO & OHIO CENTRAL RAILWAY COMPANY. March 24, 1919. In error to the United States Circuit Court of Appeals for the Fourth Circuit. For opinion below, see 245 Fed. 917, 158 C. C. A. 205, which affirmed 238 Fed. 629. Messrs. George E. Price and Buckner Clay, both of Charleston, W. Va., for plaintiff in error. Mr. E. W. Knight, of Charleston, W. Va., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 128 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. § 1120]); *Stevenson v. Fain*, 195 U. S. 165, 166, 25 Sup. Ct. 6, 49 L. Ed. 142; *Hull v. Burr*, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; *St. Anthony's Church v. Pennsylvania R. R. Co.*, 237 U. S. 575, 577, 35 Sup. Ct. 729, 59 L. Ed. 1119; *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397.

(249 U. S. 584)

No. 265. CRESCENT MILLING COMPANY, appellant, v. The H. N. STRAIT MANUFACTURING COMPANY et al. March 24, 1919. Appeal from the District Court of the United States for the District of Minnesota. Mr. Harris Richardson, of St. Paul, Minn., for appellant. Mr. John I. Dille, of Minneapolis, Minn., for appellees.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 6 of the act of September 6, 1916, chapter 448, 39 Stat., 726, 727 (Comp. St. § 1228a).

(249 U. S. 586)

Nos. 266 and 267. CRESCENT MILLING COMPANY, plaintiff in error, v. H. N. STRAIT MANUFACTURING COMPANY. March 24, 1919. In error to the District Court of the United States for the District of Minnesota. Mr. Harris Richardson, of St. Paul, Minn., for plaintiff in error. Mr. John I. Dille, of Minneapolis, Minn., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 6 of the act of September 6, 1916, chapter 448, 39 Stat., 726, 727 (Comp. St. § 1228a).

(249 U. S. 586)

Nos. 268 and 269. CRESCENT MILLING COMPANY, plaintiff in error, v. The H. N. STRAIT MANUFACTURING COMPANY. March 24, 1919. In error to the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 245 Fed. 984, 157 C. C. A. 665. Mr. Harris Richardson, of St. Paul, Minn., for plaintiff in error. Mr. John I. Dille, of Minneapolis, Minn., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 128 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. § 1120]); *Stevenson v. Fain*, 195 U. S. 165, 166, 25 Sup. Ct. 6, 49 L. Ed. 142; *Hull v. Burr*, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; *St. Anthony's Church v. Pennsylvania R. R. Co.*, 237 U. S. 575, 577, 35 Sup. Ct. 729, 59 L. Ed. 1119; *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397.

(249 U. S. 586)

No. 270. CRESCENT MILLING COMPANY, appellant, v. The H. N. STRAIT MANUFACTURING COMPANY. March 24, 1919. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. For opinion below, see 245 Fed. 984, 157 C. C. A. 665. Mr. Harris Richardson, of St. Paul, Minn., for appellant. Mr. John I. Dille, of Minneapolis, Minn., for appellee.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 128 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133 [Comp. St. § 1120]); *Stevenson v. Fain*, 195 U. S. 165, 166, 25 Sup. Ct. 6, 49 L. Ed. 142; *Hull v. Burr*, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; *St. Anthony's Church v. Pennsylvania R. R. Co.*, 237 U. S. 575, 577, 35 Sup. Ct. 729, 59 L. Ed. 1119; *Delaware, Lackawanna & Western R. R. Co. v. Yurkonis*, 238 U. S. 439, 444, 35 Sup. Ct. 902, 59 L. Ed. 1397.

(249 U. S. 585)

No. 272. Neely POWERS, Trustee, etc., plaintiff in error, v. SCOTT COUNTY MILLING COMPANY. March 24, 1919. In error to the Supreme Court of the State of Mississippi. For opinion below, see 112 Miss. 798, 73 South. 792. Mr. James N. Flowers, of Jackson, Miss., for plaintiff in error. Mr. Robert H. Thompson, of Jackson, Miss., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chapter 448, § 2, 39 Stat., 726 (Comp. St. § 1214).

(249 U. S. 596)

No. 849. C. C. CALHOUN, petitioner, v. Bland MASSIE. March 24, 1919. For opinion below, see 97 S. E. 576. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia granted.

(249 U. S. 607)

No. 852. SOUTHERN RAILWAY COMPANY, petitioner, v. Hugh PETIT et al. March 24, 1919. For opinion below, see 257 Fed. 663. Messrs. Ewing, King & King, of Memphis, Tenn., for appellant. Messrs. Julian C. Wilson and Walter P. Armstrong, both of Memphis, Tenn., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(249 U. S. 607)

No. 853. NORTH AMERICAN TELEGRAPH CO., petitioner, v. NORTHERN PACIFIC RAILWAY COMPANY. March 24, 1919. For opinion below, see 254 Fed. 417. Messrs. T. D. O'Brien, Edward T. Young, and Alexander E. Horn, all of St. Paul, Minn. (Mr. Royal A. Stone, of St. Paul, Minn., of counsel), for petitioner. Mr. Charles W. Bunn, of St. Paul, Minn., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(249 U. S. 607)

No. 854. DALY-WEST MINING COMPANY et al., petitioners, v. Catherine SAVAGE et al. March 24, 1919. For opinion below, see 253 Fed. 548. Messrs. William H. King and Hiram E. Booth, both of Salt Lake City, Utah, for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(249 U. S. 606)

No. 860. FIDELITY TITLE & TRUST COMPANY, Ancillary Administrator, etc., petitioner, v. The DUBOIS ELECTRIC COMPANY. March 24, 1919. For opinion below, see Du Bois Electric Co. v. Pancoast's Adm'r, 253 Fed. 987. Messrs. James R. Sterrett, M. W. Acheson, Jr., and Charles Alvin Jones, all of Pittsburgh, Pa., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied, with reservation of and without prejudice to the right to apply for a reinstatement of the petition at any time before the end of this term in case the judgment below should fail to award a new trial.

(249 U. S. 607)

No. 867. Troy DEASON, petitioner, v. The UNITED STATES of America. March 24, 1919. For opinion below, see 254 Fed. 259. Messrs. Levi Herring, of Glen Rose, Tex., and H. P. Brown, of Cleburne, Tex., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(249 U. S. 608)

No. 873. Edward E. GOLD et al., petitioners, v. James T. NEWTON, Commissioner of Patents. March 24, 1919. For opinion below, see 254 Fed. 824. Messrs. William A. Redding and Arthur C. Fraser, both of New York City, for petitioners. Mr. Otto R. Barnett, of Chicago, Ill. (Mr. Grafton L. McGill, of Washington, D. C., of counsel), for defendant. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(249 U. S. 608)

No. 875. Arthur L. BLUNT, petitioner, v. The UNITED STATES of America. March 24, 1919. For opinion below, see 255 Fed. 332. Mr. Hope Thompson, of Chicago, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(249 U. S. 608)

No. 883. J. B. GRAY, petitioner, v. BANK OF HARTFORD et al. March 24, 1919. For opinion below, see 203 S. W. 302. Messrs. Joseph M. Hill, Henry L. Fitzhugh, and Daniel Hon, all of Fort Smith, Ark., for petitioner. Messrs. George L. Grant and Webb Covington, both of Fort Smith, Ark., for respondents. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas denied.

(249 U. S. 608)

No. 887. Wilhelm KNAUTH et al., petitioners, v. John W. KNIGHT et al. March 24, 1919. For opinion below, see 255 Fed. 677. Messrs. Edward H. Cabaniss, of Birmingham, Ala., George T. Hogg, of New York City, Cabaniss & Bowie, of Birmingham, Ala., and Davies, Auerbach & Cornell, of New York City, for petitioner. Mr. Augustus Benners, of Birmingham, Ala. (Messrs. Percy, Benners & Burr, of Birmingham, Ala., of counsel), for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(249 U. S. 608)

No. 890. Henry A. HOUSE, petitioner, v. Laurence W. LUELLEN. March 24, 1919. Mr. C. P. Goepel, of New York City (Messrs. J. J. Darlington and Joseph D. Sullivan, both of Washington, D. C., of counsel), for petitioner. Mr. Joseph H. Milans, of Washington, D. C., for respondent. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(249 U. S. 609)

No. 897. James F. BISHOP, administrator, etc., petitioner, v. GREAT LAKES TOWING COMPANY. March 24, 1919. For opinion below, see Great Lakes Towing Co. v. St. Joseph-Chicago S. S. Co., 253 Fed. 635. Mr. Harry W. Standidge, of Chicago, Ill., for petitioner. Messrs. Harvey D. Goulder and Thomas H. Garry, both of Cleveland, Ohio, and Ralph F. Potter, of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(249 U. S. 609)

No. 898. NORTH BRITISH & MERCANTILE INSURANCE COMPANY, petitioner, v. H. BAARS & COMPANY. March 24, 1919. For opinion below, see 255 Fed. 625. Messrs. Blount & Blount & Carter, of Pensacola, Fla. (Messrs. D. Roger Englar and Oscar R. Houston, both of New York City, of counsel), for petitioner. Messrs. W. H. Watson and S. Pasco, Jr., both of Pensacola, Fla., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(249 U. S. 609)

No. 907. **OTTO HIGEL COMPANY, Inc.**, petitioner, v. **AUTOPIANO COMPANY**. March 24, 1919. For opinion below, see 256 Fed. 992. Mr. William F. Hall, of Washington, D. C., for petitioner. Mr. Louis W. Southgate, of Worcester, Mass., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(249 U. S. 587)

No. —. Original. *Ex parte* in the matter of Christoffer **HANNEVIG** and Vidkunn Johnsen, petitioners. March 31, 1919. Motion for leave to file petition for writs of prohibition, mandamus, and certiorari denied.

(249 U. S. 621)

No. 271. **CORN PRODUCTS REFINING COMPANY** et al., appellants, v. **The UNITED STATES** of America. March 31, 1919. For opinion below, see 234 Fed. 964. Messrs. Charles E. Hughes, Morgan J. O'Brien, and Preston Davie, all of New York City, James M. Sheean, of Chicago, Ill., and Junius Parker and Frank H. Hall, both of New York City, for appellants. Mr. Attorney General, for the United States. Appeal from the District Court of the United States for the Southern District of New York. Dismissed, on motion of counsel for the appellants, and mandate granted.

(249 U. S. 621)

No. 387. *The STATE* of Wisconsin *ex rel.* **SALLIE F. MOON COMPANY**, plaintiff in error, v. **WISCONSIN TAX COMMISSION**. March 31, 1919. In error to the Supreme Court of the State of Wisconsin. For opinions below, see 166 Wis. 287, 163 N. W. 639, 165 N. W. 470. Mr. C. T. Bundy, of Eau Claire, Wis., for plaintiff in error. Dismissed on motion of counsel for plaintiff in error.

(249 U. S. 609)

No. 809. **ARKANSAS CENTRAL RAILROAD COMPANY**, plaintiff in error, v. **W. L. GOAD**. March 31, 1919. For opinion below, see 206 S. W. 901. Messrs. Edward J. White, of St. Louis, Mo., and Thomas B. Pryor, of Fort Smith, Ark., for petitioner. Messrs. Jephtha H. Evans and Chas. I. Evans, both of Booneville, Ark., and Robert J. White and Sidney H. White, both of Paris, Ark., for respondent. Petition for a writ of certiorari herein denied.

(249 U. S. 596)

No. 901. **KWOCK JAN FAT**, petitioner, v. **Edward WHITE**, as Commissioner of Immigration, etc. March 31, 1919. For opinion below, see 255 Fed. 323. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(249 U. S. 610)

No. 910. **PULP WOOD COMPANY**, petitioner, v. **GREEN BAY PAPER & FIBRE COMPANY**. March 31, 1919. For opinion below, see 170 N. W. 230. Mr. Moses Hooper,

of Oshkosh, Wis., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Wisconsin denied.

(249 U. S. 610)

No. 916. **William A. HAMILTON**, petitioner, v. **The UNITED STATES** of America. March 31, 1919. For opinion below, see 255 Fed. 511. Messrs. Ralph F. Potter, James H. Wilkerson, Edwin H. Cassels, and George I. Haight, all of Chicago, Ill., for petitioner. Messrs. Claude R. Porter, Asst. Atty. Gen., and Raymond S. Norris, of Washington, D. C., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(249 U. S. 610)

No. 921. **U. S. G. HUGHES**, petitioner, v. **The UNITED STATES** of America. March 31, 1919. For opinion below, see 253 Fed. 545. Messrs. John T. Barker and B. F. Pursel, both of Kansas City, Mo., for petitioner. Mr. Claude R. Porter, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(249 U. S. 610)

No. 922. **J. H. HUGHES**, petitioner, v. **The UNITED STATES** of America. March 31, 1919. For opinion below, see 253 Fed. 543. Messrs. John T. Barker and B. F. Pursel, both of Kansas City, Mo., for petitioner. Mr. Claude R. Porter, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(249 U. S. 620)

No. 951. **L. R. GARRETT**, plaintiff in error, v. **The UNITED STATES** of America. March 31, 1919. In error to the District Court of the United States for the Northern District of California. Mr. Solicitor General King, for the United States. Docketed and dismissed, on motion of Mr. Solicitor General King for the defendant in error, and mandate granted.

(249 U. S. 620)

No. 952. **L. R. GARRETT**, appellant, v. **The UNITED STATES** of America. March 31, 1919. Appeal from the District Court of the United States for the Northern District of California. Mr. Solicitor General King, for the United States. Docketed and dismissed, on motion of Mr. Solicitor General King for the appellee, and mandate granted.

(249 U. S. 620)

No. 953. **L. R. GARRETT**, appellant, v. **The UNITED STATES** of America. March 31, 1919. Appeal from the District Court of the United States for the Northern District of California. Mr. Solicitor General King, for the United States. Docketed and dismissed, on motion of Mr. Solicitor General King for the appellee, and mandate granted.

(249 U. S. 334)

CAPITOL TRANSP. CO. v. CAMBRIA
STEEL CO.(Argued March 14 and 17, 1919. Decided
March 31, 1919.)

No. 231.

SHIPPING — 203—LIMITATION OF LIABILITY
—PERSONAL CONTRACT.

Act June 26, 1884, § 18 (Comp. St. § 8028), and section 30, limiting the liability of owners of vessels and repealing conflicting acts, did not repeal the provision of Rev. St. § 4283 (Comp. St. § 8021), restricting limitation of liability to loss occurring without the privity of the owners, and an owner who personally contracted to carry the cargo warranting seaworthiness, and knew that the vessel was unseaworthy because overloaded, cannot limit his liability.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Petition by the Capitol Transportation Company against the Cambria Steel Company to limit its liability for loss of cargo on the vessel Benjamin Noble. A decree of the District Court denying the petition (The Benjamin Noble, 232 Fed. 382), was affirmed by the Circuit Court of Appeals (244 Fed. 95, 156 C. C. A. 523), and petitioner brings certiorari. Affirmed.

*Messrs. J. Parker Kirlin, of New York City, and Frank S. Masten, of Cleveland, Ohio, for petitioner.

Messrs. Francis S. Laws, of Philadelphia, Pa., and Sherwin A. Hill, of Detroit, Mich., for respondent.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a petition to limit liability for the loss of cargo on the Benjamin Noble, brought by the present petitioner after libels in personam had been filed in different districts by the cargo owners, the Cambria Steel Company. The right was denied by the District Court on the ground that the vessel was unseaworthy with the privity and knowledge of the owner when she sailed and that the owner had made a personal contract by which it warranted seaworthiness. The Benjamin Noble, 232 Fed. 382. The findings, rulings and decree of the District Court were affirmed by the Circuit Court of Appeals. 244 Fed. 95, 156 C. C. A. 523, sub nom. The Benjamin Noble. A writ of certiorari was granted before Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U. S. 139, 39 Sup. Ct. 53, 63 L. Ed. 170, and Pendleton v. Benner Line, 246 U. S. 353, 38 Sup. Ct. 330, 62 L. Ed. 770, were decided but when they were before this Court. 245 U. S. 648, 38 Sup. Ct. 12, 62 L. Ed. 530. See Ewing v. United States ex rel.

Fowler Car Co., 242 U. S. 638, 37 Sup. Ct. 111, 61 L. Ed. 540; Pendleton v. Benner Line, 241 U. S. 677, 36 Sup. Ct. 726, 60 L. Ed. 1232. The findings of fact are contested here, and because of some expressions it is suggested that the Circuit Court of Appeals is to be taken not to have made findings of its own upon the facts. On the contrary it appears to us to have reconsidered the evidence, giving to the findings below only the weight usually accorded to those of the tribunal that see the witnesses and we see no sufficient reason for departing from the general rule where the two lower courts have concurred. Luckenbach v. McCahan Sugar Refining Co., 248 U. S. 139, 145, 39 Sup. Ct. 53, 63 L. Ed. 170.

*We are urged to reconsider the question whether the limitation of liability is not made independent of the "privity or knowledge" of the owner by the omission of those words from the Act of June 26, 1884, c. 121, § 18, 23 Stat. 53, 57 (Comp. St. § 8028), coupled with the repeal, in section 30, of all laws and parts of laws in conflict with the provisions of that act. It is argued that the effect of the omission and the repealing section is to do away with the former qualification in Rev. Stat. § 4283 (Comp. St. § 8021), and the argument is fortified by a reference to the history of the act, which shows that some of the Senators thought it important to make the limitation absolute. On the other hand in Butler v. Boston & Savannah Steamship Co., 130 U. S. 527, 553, 554, 9 Sup. Ct. 612, 616 (32 L. Ed. 1017), it was said by Mr. Justice Bradley that possibly the later act was intended to remove all doubt as to the application of the law to all cases of loss "caused without the privity or knowledge of the owner." We find no different expression in O'Brien v. Miller, 168 U. S. 287, 303, 18 Sup. Ct. 140, 42 L. Ed. 469. Mr. Justice Bradley's opinion was adopted after considerable discussion in Richardson v. Harmon, 222 U. S. 96, 106, 32 Sup. Ct. 27, 56 L. Ed. 110, and Richardson v. Harmon was accepted as establishing that the statute does not limit liability for the personal acts of the owners done with knowledge, in the late case of Pendleton v. Benner Line, 246 U. S. 353, 356, 38 Sup. Ct. 330, 62 L. Ed. 770. In that case the argument that the limitation of the exoneration to acts, etc., done or incurred without the privity or knowledge of the owner was repealed by the Act of 1884, was presented in the fullest way.

We very much appreciate the danger that the act should be cut down from its intended effect by too easy a finding of privity or knowledge on the part of owners, as also by too liberal an attribution to them of contracts as personally theirs. We are not disposed to press the law in those directions

further than the cases go. But in this case in addition to the finding of the owner's privity to the unseaworthiness was the further finding that the *contract was the personal contract of the petitioner—a finding that seems warranted if any contract by a corporation can fall within the class. That such contracts may impose a liability that cannot be transferred to what is left of the ship is decided. *Luckenbach v. W. J. McCahan Sugar Refining Co.*, 248 U. S. 139, 149, 39 Sup. Ct. 53, 63 L. Ed. 170. Upon the whole case we cannot escape from the conclusion that the decree must be affirmed.

Decree affirmed.

(249 U. S. 367)

UNITED STATES ex rel. ARANT v. LANE,
Secretary of the Interior.

(Argued March 6 and 7, 1919. Decided
March 31, 1919.)

No. 441.

1. MANDAMUS ☞143(1)—LIMITATIONS AND LACHES.

Since mandamus issues in the exercise of judicial discretion, and is recognized as different from ordinary actions by Code of Law, D. C. 1901, §§ 1273-1282, providing for the remedy, it is not embraced within the ordinary statutes of limitation, but is subject to the doctrine of laches.

2. MANDAMUS ☞143(2)—LACHES—RESTORATION TO PUBLIC OFFICE.

The unexplained delay of a national park superintendent, who claimed to be in the classified civil service, for nearly two years, in applying for mandamus to compel his restoration to office, is such laches as will bar his right to the relief.

In Error to the Court of Appeals of the District of Columbia.

Petition for mandamus by the United States, on the relation of William F. Arant, against Franklin K. Lane, Secretary of the Interior. Judgment denying the relief was affirmed by the Court of Appeals of the District of Columbia (47 App. D. C. 336), and relator brings error. Affirmed.

Messrs. H. Prescott Gatley and Samuel Maddox, both of Washington, D. C., for plaintiff in error.

Mr. Assistant Attorney General Brown, for defendant in error.

*Mr. Justice CLARKE delivered the opinion of the Court.

The relator, on April 30, 1915, filed his petition in the Supreme Court of the District of Columbia for a writ of mandamus against

Franklin K. Lane, as Secretary of the Interior.

He alleged: That when serving as the duly appointed superintendent of Crater Lake National Park on June 7, 1913, the defendant requested him to resign; that protesting against such removal from office, he demanded that he be furnished with a statement in writing of the reasons for his removal and that he be given a reasonable time in which to answer; that upon June 28th, he received a telegram from the defendant notifying him that he had been removed, and directing that he should transfer all government property to his successor, who was named; that he refused to relinquish his position or to transfer the property until convinced that the order for his removal was lawful; and that upon July 20, he was forcibly ejected from the government office building and the records and papers of his office were seized by government officials.

He further averred: That as such superintendent he was in the classified civil service of the government and that he could not lawfully be removed therefrom "except for such cause as would promote the efficiency" of the service and for reasons stated in writing, which he must *be given a reasonable opportunity to answer; that on July 1, 1913, he notified the defendant that he was able and willing to perform the duties of his office, that he had so continued to the time of the filing of his petition, and that he had made every reasonable effort to be restored to his position, but without avail.

His prayer was that the defendant be required to answer his petition and that upon hearing a writ of mandamus should issue requiring the defendant to vacate the order for his dismissal, and to restore him to his former office.

In response to a rule to show cause the defendant filed an answer, containing, among other things, this paragraph:

"10. He denies the allegations of paragraph 10 to the extent that the same attempt to show that he has made every reasonable effort to be restored to the office of superintendent as aforesaid, in this: That if relator were improperly or unlawfully removed from said office, under circumstances such as to justify the interference of the courts, such condition existed immediately upon relator's removal from office and upon the Secretary's refusal to continue him in said office, notwithstanding which and notwithstanding that since said time, to wit, July 1, 1913, another person has been appointed to and has discharged the duties of said office and has received the salary and allowance therefor appropriated from time to time by Congress, the relator did not seek recourse to the courts until the lapse of nearly two years, and therein has by his gross laches barred any right to the relief sought if any such right ever existed."

A demurrer to this answer or return was filed stating as a ground:

"Because no case is shown in said return why a writ of mandamus should not issue as prayed in the relator's petition."

This demurrer was overruled, and, the relator electing to stand on his demurrer, his petition was dismissed.

*It will be seen from this statement that although the relator was definitely removed from office as of June 30, 1913, and was forcibly ejected from the government office building on July 20, 1913, he did not file his petition until more than 20 months later, April 30, 1915. His only explanation for this delay is the allegation, which was denied, that he had made every reasonable effort to have his rights in the premises accorded him and to be restored to office, but without avail.

Without discussion of the authority of the Secretary of the Interior to remove the relator without filing charges against him and giving him an opportunity to answer, the Court of Appeals affirmed the judgment of the Supreme Court of the District of Columbia on the ground of laches, and the case is here on writ of error.

In this conclusion we fully concur.

[1] This court has lately said that while mandamus is classed as a legal remedy, it is a remedial process, which is awarded not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principles. *Duncan Town Site v. Lane*, Secretary, 245 U. S. 308, 38 Sup. Ct. 99, 62 L. Ed. 309. It is an extraordinary remedy which will not be allowed in cases of doubtful right (*In re Life & Fire Ins. Co. v. Wilson's Heirs*, 8 Pet. 291, 302, 8 L. Ed. 949), and it is generally regarded as not embraced within statutes of limitation applicable to ordinary actions, but as subject to the equitable doctrine of laches (*Chapman v. County of Douglas*, 107 U. S. 348, 355, 2 Sup. Ct. 62, 27 L. Ed. 378; *Duke v. Turner*, 204 U. S. 623, 628, 27 Sup. Ct. 316, 51 L. Ed. 652, 9 Ann. Cas. 842).

The remedy is provided for in a separate chapter (chapter 42) of the Code for the District of Columbia with detailed requirements which differ so greatly from the pleading and practice prescribed for ordinary actions that we cannot doubt that Congress intended to continue the special character which has been given the proceeding from our early judicial history (*United States v. Judge Lawrence*, 3 Dall. 42, 1 L. Ed. 502; 8 Pet. 291, 302, 8 L. Ed. 949, supra), *and we cannot discover any intention to include it within the general provisions for the limitation of actions (section 1265).

When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action

requisite to effectively assert his rights, to the end that if his contention be justified the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.

[2] Under circumstances which rendered his return to the service impossible, except under the order of a court, the relator did nothing to effectively assert his claim for reinstatement to office for almost two years. Such a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating him, renders the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.

In this conclusion we are in full agreement with many state courts in dealing with similar problems. *McCabe v. Police Board*, 107 La. 162, 31 South. 662; *Stone v. Board of Commissioners*, 164 Ky. 640, 176 S. W. 39; *Connolly v. Board of Education*, 114 App. Div. 1, 99 N. Y. Supp. 737, and cases cited; *Clark v. City of Chicago*, 233 Ill. 113, 84 N. E. 170.

We agree with the Court of Appeals that it is entirely unnecessary to consider whether the removal of the relator from office was technically justified or not, since by his own conduct he has forfeited the right to have the action of the Secretary of the Interior reviewed, and the judgment of that court is therefore

Affirmed

(249 U. S. 354)

UNITED STATES v. UNION PAC. R. CO.

(Argued Jan. 30, 1919. Decided March 31, 1919.)

No. 199.

PUBLIC LANDS  85—GRANTS TO RAILROADS
—CONDITIONS—"TROOPS."

"Troops," as used in the railroad land grant acts, requiring the railroads to transport free from toll or other charge troops of the United States, and in the land grant equalization agreements, whereby the railroads were to transport such troops at half rates, means soldiers collectively, a body of soldiers, and does not include discharged soldiers or military prisoners, rejected applicants for enlistment returning home from recruiting depots, accepted applicants for enlistment going to recruiting depots, retired soldiers or soldiers on furloughs, traveling as individuals and not as a body.

[Ed. Note.—For other definitions, see Words and Phrases, Troops.]

Appeal from the Court of Claims.

Claim by the Union Pacific Railroad Company against the United States. Judgment

for the claimant (52 Ct. Cl. 226), and the United States appeals. Affirmed.

Mr. Assistant Attorney General Brown, for the United States.

Messrs. William R. Harr and Charles H. Bates, both of Washington, D. C., for appellee.

Mr. Justice BRANDEIS delivered the opinion of the Court.

*355
Most of the acts of Congress which granted lands in aid of railroads provide that they shall be "free from toll or other charge upon the transportation of any property or troops of the United States."¹ This clause
*356
was construed in *Lake Superior & Mississippi Railroad Co. v. United States*, 93 U. S. 442, 23 L. Ed. 965, as conferring only the free use of the roadbed as a highway. Since then, under appropriate legislation, payment has come to be made by the government for the transportation of property and troops at rates equal to 50 per cent. of those charged private parties. The Union Pacific, having entered into an agreement to that effect, claimed payment at the full rate for certain persons carried as passengers upon the request of the government. The Auditor of the War Department refused to allow payment for these passengers at more than half fares, on the ground that they were within the provision for transporting "troops of the United States"; and his ruling was sustained by the Comptroller of the Treasury. 21 Decisions of the Comptroller, 651. Thereupon this suit was brought in the Court of Claims for the amount disallowed; and judgment was rendered for the railroad. 52 Ct. Cl. 226. The case is here on appeal. The questions presented are *whether any of the following classes of persons are to be deemed "troops of the United States" within the provision of the land grant acts:

¹ Circular No. 16, Quartermaster General's Office, 1912, entitled "Schedule of Land-Grant and Bond-Aided Railroads of the United States," p. 28 et seq. Act Sept. 20, 1850, c. 61, § 4, 9 Stat. 466, 467. A few of the acts granting lands in aid of railroads provided that the grant is "subject to such regulations as Congress may impose restricting the charges for . . . government transportation." Act July 27, 1866, c. 278, § 11, 14 Stat. 292, 297. The army appropriation acts make provision for payment under both classes of statutes, payment in neither case to exceed 50 per cent. of the rates charged private parties. See Act July 16, 1892, c. 195, 27 Stat. 174, 180; Act March 2, 1913, c. 93, 37 Stat. 704, 715. Fifty per cent. has been adopted by the War Department as the standard rate of payment. The Union Pacific on May 15, and June 3, 1911, became a party to the so-called "Land Grant Equalization Agreements" entered into by the Quartermaster General of the United States with most of the important roads of the United States in other than New England or Trunk Line territories. By these agreements, the several roads consented (with certain exceptions) to accept the same net rate on both passenger and freight traffic via their respective lines as are effective via land grant lines. "Freight and Passenger Land Grant Equalization Agreements and List of Carriers Participating," Circular No. 6, Office of Chief, Quartermaster Corps, 1913.

1. Discharged soldiers; that is, former enlisted men of the army en route to their homes after discharge.

2. Discharged military prisoners; that is, discharged enlisted men en route to their homes or elsewhere after serving sentence as military prisoners.

3. Rejected applicants for enlistment in the army; that is, men who having passed the required tests at the recruiting stations and having been forwarded to the recruiting depots for final examination and enlistment, were there rejected and were being returned to the recruiting stations from which they came.

4. Accepted applicants for enlistment in the army; that is, applicants examined at general recruiting stations, found mentally, morally, and physically fit for service, and being forwarded to recruiting depots for final examination and enlistment.

5. Retired soldiers; that is, enlisted men of the army en route to their homes after retirement.

6. Furloughed soldiers; that is, enlisted men of the army on furlough en route back to their proper stations.

None of these persons traveled as part of a moving army, troop, or body of soldiers; that is, they traveled separately as individuals, and (with few exceptions) each on a different day and to widely scattered destinations. Under recent acts of Congress and Army Regulations,² the transportation of persons of some of these classes is paid for by the government.

In defining the transportation rights secured to the United States, these land grant acts draw a broad distinction between freight and passengers. All "property" *of the government, whatever its character and intended use, is to be carried "free of toll or other charge"; but of the many persons in its service, only "troops." The history of the legislation shows that both the broad term, "any property," and the narrower one, "troops," was adopted deliberately. The earliest land grant act in which the provision appears is that of September 20, 1850 (9 Stat. 466, 467, c. 61, § 4), under which the Illinois Central was constructed. The bill as introduced³ provided for the free transportation of "troops and munitions of war." It was amended so as to read "any property or troops." There had been an earlier act granting land to the state of Illinois for the construction of a canal (Act March 30, 1822, c. 14, 3 Stat. 659), which was amended (Act March 2, 1833, c. 87, 4 Stat. 662) so as to permit, on the same terms, the use and disposition of the land

² See acts cited in note 4, *infra*. Army Regulations, 1913, §§ 145, 1235, 1379, 1115. Army Regulations, 1913, wherever cited herein, refers to the edition corrected to April 15, 1917.

³ Congressional Globe, 1850, 31st Congress, 1st Session, vol. 21, pt. 1, p. 844.

for railroads. That act provided for the free transportation of "any property of the United States or persons in their service."

In 1850 the word "troops" had (and it has ever since had) an established meaning, namely, "soldiers collectively—a body of soldiers." Thus the army appropriation act of that year (Act Sept. 28, 1850, c. 78, § 1, 9 Stat. 504, 506) provides for the "transportation of the army including the baggage of the troops when moving either by land or water" and for "mileage, or the allowance made to officers for the transportation of themselves and baggage when traveling on duty without troops." The contemporary legislation draws a clear distinction also between troops, that is, those then having the status of soldiers, and those who once had been in, or were seeking to enter, the military service. Thus the army appropriation act of March 2, 1847 (9 Stat. 149, 151, c. 35), which provides in substantially the same terms as that of 1850 for the transportation of troops, makes specific provision for "forwarding destitute soldiers to their homes," for the "comfort of discharged soldiers," and for "expenses of recruiting," which include the cost of transportation. See Army Regulations, 1857, § 1321. And the resolution of March 3, 1847, 9 Stat. 206 (No. 7), authorizes the refund of moneys expended by the states and individuals "in organizing, subsisting, and transporting volunteers previous to their being mustered and received into the service of the United States for the present war, and for subsisting troops in the service of the United States." In view of the established meaning of the term "troops" as used by Congress the duty of the court is merely to apply the provisions of the act to the several classes of persons described above.

First. The first three classes, namely, discharged military prisoners, discharged enlisted men, and rejected applicants for enlistment, are clearly not "troops of the United States." Their status is that of the civilian. They form no part of the military establishment. They may go where they please and do what they please, subject to no more interference by the military authorities of the government, than if they had never been, or had never sought to be, connected with the army. They were traveling for their own personal ends. Congress recognizes the distinction between those forming part of the army and those who do not, because they are recruits or have been discharged; and it makes special provision for their transportation.⁴ Such had formerly been also the opinion of the Comptroller of the Treasury. Compare Digest, Second Comptroller's Decisions, vol. 4, §§ 354 and 355.

⁴ E. g., Act March 2, 1913, c. 93, 37 Stat. 704, 715; Act April 27, 1914, c. 72, 38 Stat. 351, 364; Act March 4, 1915, c. 143, 38 Stat. 1062, 1076.

*Second. Applicants for enlistment who have been accepted provisionally, but have yet to be subjected to the final examination at the recruiting depots and to take the oath before they become a part of the soldiery of the nation, are not "troops of the United States." It is the actual enlistment, the oath of allegiance, that changes the status from a civilian to soldier. Compare *In re Grimley*, 137 U. S. 147, 156, 157, 11 Sup. Ct. 54, 34 L. Ed. 636; *Tyler v. Pomeroy*, 8 Allen (Mass.) 480; 19 Decisions of the Comptroller, 367; Army Regulations, 1913, § 847. The officers at the recruiting stations are expressly forbidden to administer this oath. Army Regulations, 1913, § 841. Such applicant is then not even a potential soldier; for he may be rejected on final examination.⁵ And it is the actual and not the potential status that must govern. Compare *Alabama Great Southern Railroad Co. v. United States*, 49 Ct. Cl. 522, 537. The fact that under the Army Regulations he receives the same rations as an enlisted man, and that he is subject to the same medical attention,⁶ does not effect a change of status. And the fact that the transportation is for the purposes of the government in connection with its military establishment is immaterial. Workmen in armor plants and civilian clerks in the War Department at Washington travel for purposes of the government, but are obviously not "troops of the United States" within the meaning of the land-grant legislation. The army appropriation acts make specific provision for the transportation of "troops" and of "recruits."⁷

*Third. Retired enlisted men en route to their homes after retirement are also not "troops of the United States." They travel for their own purposes. Congress has declared that such retired men shall for certain purposes be deemed a part of the army (Act Feb. 2, 1901, c. 192, § 1, 31 Stat. 748 [Comp. St. § 1717]); but they may be employed only after Congress has authorized the raising of volunteer forces, and not even then for field duty (Act April 25, 1914, c. 71, § 11, 38 Stat. 347, 350 [Comp. St. § 2026h]). The Army Regulations for 1913 make no provision requiring any service from retired enlisted men. Practically they have retired from, and not simply into a different branch of, the army. Compare *Murphy v. United States*, 38 Ct. Cl. 511, 522; Army Regulations, 1913, article 20. See also *United*

⁵ Of the 45,111 applicants in the several recruiting districts of the United States provisionally accepted in the year ending June 30, 1915, 5,866 were finally rejected at the recruiting depots; 3,993 provisionally accepted applicants are recorded as having "declined to enlist at depots or eloped en route." Report of the Adjutant General, War Department, Annual Reports, 1915, vol. 1, pp. 202, 203.

⁶ Army Regulations, 1913, §§ 1224, 1225, 1232, 1473, 1476.

⁷ See, for example, acts cited in note 4, *supra*.

States v. Tyler, 105 U. S. 244, 26 L. Ed. 985. The fact that they may thereafter be called into the army does not make them "troops of the United States." Any male citizen may at some time be called into the service. Compare Alabama Great Southern Railroad Co. v. United States, supra.

Fourth. The furloughed soldier is, of course, a part of the army or troops of the United States; but his transportation back to the proper station, is not "transportation of troops" within the meaning of the land grant acts. The furloughed soldier travels for his own purposes. The government merely advances to him the cost of transportation and subsistence while on furlough; and does this, only if the soldier lacks funds to bear the expense himself. The advance must be repaid. Army Regulations, 1913, § 110.

We have no occasion to consider whether persons not enlisted as soldiers, but forming a part of a moving army or detachment are to be deemed "troops of the United States" within the provision of the land grant acts; nor whether a soldier traveling for the purposes of the government, but not for any purpose connected with war or the preparation for war, falls within the provisions. 19 Opinions of the Attorney General, 572.

The judgment of the Court of Claims granting full compensation for carriage of persons within the six classes considered is Affirmed.

(249 U. S. 308)

MILLER et al. v. McCLAIN.

(Submitted Nov. 13, 1918. Decided March 31, 1919.)

No. 19.

1. INDIANS §16(1)—LEASE—POWER.

Act Feb. 8, 1887, § 5 (Comp. St. § 4201) declaring void conveyances and contracts regarding Indian allotted lands, does not prevent an allottee from leasing his land pursuant to Act June 25, 1910, § 4 (Comp. St. § 4221), and regulations of Secretary of the Interior adopted thereunder which authorize such leases under certain conditions.

2. INDIANS §16(7)—LEASES—CROP RENTAL.

Act Feb. 8, 1887, § 5 (Comp. St. § 4201), prohibiting conveyances and contracts regarding Indian allotted lands, does not prohibit an allottee from selling the crop rental reserved by him in a lease made pursuant to Act June 25, 1910, § 4 (Comp. St. § 4221), and the regulations of the Secretary of the Interior made thereunder.

In Error to the Supreme Court of the State of Kansas.

Action by B. O. McClain against Robert Miller and another. Judgment for defend-

ants was reversed with directions to enter judgment for plaintiff (95 Kan. 794, 149 Pac. 399), and the defendants bring error. Affirmed.

Messrs. A. E. Crane, of Topeka, Kan., and F. T. Woodburn, of Holton, Kan., for plaintiffs in error.

Messrs. Robert Stone, George T. McDermott, and H. O. Caster, all of Topeka, Kan., for defendant in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

Under the Act of February 8, 1887 (24 Stat. 388, 389, c. 119), Mish-no, a member of the Prairie Band of the Pottawatomies, was allotted land in Kansas, which was to be *held in trust by the United States and subject to the restrictions on the power of the allottee to deal with the land, provided by that act.

Mish-no leased the land for the year 1912 for a rental of one-half the corn and stalks to be produced. In May of that year he sold his right to his share of the prospective crop to McClain, and in the autumn when the crop was made again sold his share to Cooney, who sold and delivered it to Miller.

The writ of error before us is prosecuted by Miller and Cooney to reverse the judgment of the court below, sustaining the purchase by McClain, with a resulting liability in Miller and Cooney to McClain for the corn or its value. The case as made by the argument turns exclusively upon the correctness of the interpretation affixed by the court below to section 5 of the Act of 1887 (U. S. Comp. St. § 4201), to the effect that as by the law of Kansas a growing crop is a chattel, the sale to McClain was valid and not in conflict with the following provision of section 5:

"And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract touching the same, before the expiration of the time above mentioned [the trust period], such conveyance or contract shall be absolutely * * * void."

[1, 2] But we are of opinion that the solution of the case does not require a consideration of this question since it only exacts that we ascertain whether the particular contract in question was by law excepted from the operation of the prohibition of the Act of 1887, thus rendering an analysis and application of that prohibition negligible.

As we have seen, what was sold to McClain was not an undivided share of a growing crop of the allottee, but was that portion of the total crop of the tenant fixed by the lease as due for rent. The lease, therefore, and the power to make it, was the criterion by which to determine the application of the prohibition of the Act of 1887. If it *be that the lease was inconsistent with

that Act, it would follow that the stipulation as to the rent which it contained would perish with the contract. If on the contrary it be that the lease was valid, the authority to make it would include the right to stipulate for the rental. As it cannot be questioned that a contract leasing land is one touching the land, it is indisputable that the lease was void under the Act of 1887 unless its validity may be excepted by some other statutory provision.

By a course of legislation beginning in 1891 and extending to 1900 authority was conferred upon the Secretary of the Interior to sanction, when enumerated and exceptional conditions existed, leases of land allotted under the Act of 1887, and the power was given to the Secretary to adopt rules and regulations governing the exercise of the right (Acts of February 28, 1891, c. 383, 26 Stat. 794, 795; August 15, 1894, c. 290, 28 Stat. 286, 305; June 7, 1897, c. 3, 30 Stat. 62, 85; May 31, 1900, 31 Stat. 221, 229, c. 598). The general scope of the legislation is shown by the following provision of the Act of 1900, which does not materially differ from the prior acts:

"That whenever it shall be made to appear to the Secretary of the Interior that by reason of age, disability, or inability, any allottee of Indian lands cannot personally and with benefit to himself occupy or improve his allotment or any part thereof, the same may be leased upon such terms, regulations, and conditions as shall be prescribed by the Secretary for a term not exceeding five years for farming purposes only."

The regulations for the purpose of carrying out the power given prescribed a general form of lease to be used under the exceptional circumstances which the statute contemplated and subjected its execution and the subjects connected with it to the scrutiny of the Indian Bureau and to the express or implied approval of the Secretary. (See "Amended Rules and Regulations to be Observed in the Execution of Leases of Indian Allotments," approved by the Secretary of the Interior March 16, 1905).

The foregoing provisions were enlarged by the Act of June 25, 1910 (36 Stat. 855, 856, c. 431 [Comp. St. § 4221]), as follows:

"That any Indian allotment held under a trust patent may be leased by the allottee for a period not to exceed five years, subject to and in conformity with such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds of any such lease shall be paid to the allottee or his heirs, or expended for his or their benefit, in the discretion of the Secretary of the Interior."

And the regulations of the Secretary which were adopted under this grant of power in express terms modified the previous regulations on the subject "so far as to permit Indian allottees of land held under a trust

patent, or the heirs of such allottees who may be deemed by the superintendent in charge or any competency commission to have the requisite knowledge, experience, and business capacity to negotiate lease contracts, to make their own contracts for leasing their lands." The scope of such regulations is further made clear by the following provision dealing with the rental to result from the lease by the Indian of his allotted land under the power given:

"The question of consideration, whether a cash rental or share of the crops grown on the land, shall be left to the determination of the lessor." (Regulations, approved Sept. 19, 1910.)

The right of an allottee under stated conditions to lease and to stipulate for such rental as he deemed adequate, whether in money or crop, having been thus undoubtedly provided for by the statute and the regulations, the only question is, had the capacity of the allottee in this case been recognized conformably to the statute and regulations so as to justify his exercise of the right? That question would seem to be free from difficulty for the following reasons: (a) Because in the narrative statement of the testimony on behalf of the plaintiff it is said that, "Written permission had been given by the government to Mish-no to lease his own allotment and he had leased the same for the year 1912"; (b) because there is no denial or controversy as to the correctness of this statement; (c) because the court below in its opinion treated the matter as indisputable by stating, "Written permission was given him (Mish-no) by the government to lease his allotment"; and (d) because the fact thus stated clearly refers to the authority and capacity provided for by the Act of 1910 and the regulations thereunder, that is, not to the authority of the government to lease for the allottee, but to the right to give the allottee permission to lease his allotted land for himself as the result of a conclusion that he had capacity to do so.

As it results that Mish-no, the allottee, had by virtue of the statute of 1910 and resulting regulations the power to make the lease and to stipulate for the rental for which it provided, it follows, as the greater power includes the lesser, that the contract for the sale of the growing crop made with McClain was also within the statute and regulations and excluded from the prohibition of the Act of 1887.

For the reasons which we have stated we affirm the judgment of the court below which sustained a like conclusion, although we have not found it necessary to express any opinion as to the correctness of the reasoning by which the court below was controlled in its action.

Judgment affirmed.

(249 U. S. 331)

LANE, Secretary of Interior, v. DARLINGTON et al.

(Argued March 12, 1919. Decided March 31, 1919.)

No. 219.

1. PUBLIC LANDS ⚡28—RESURVEY—RIGHT OF GOVERNMENT.

The owner of a grant bordering on government land cannot restrain the Secretary of the Interior from setting aside a later resurvey and recognizing an earlier one, where both resurveys were merely attempts to locate the boundary of the grant previously established.

2. PUBLIC LANDS ⚡28—RESURVEY—POWER OF SECRETARY.

The power of the Secretary of the Interior to approve the resurvey of government lands is not exhausted by a single exercise thereof with reference to any survey, where the act is not directed to a third person.

Appeal from the Court of Appeals of the District of Columbia.

Bill for injunction by Joseph J. Darlington and others against Franklin K. Lane, Secretary of the Interior. Decree dismissing the bill was reversed, and injunction ordered by the Court of Appeals (46 App. D. C. 465), and defendant appeals. Reversed, with directions.

*Mr. Assistant Attorney General Kearful, for appellant.

Mr. Francis W. Clements, of Washington, D. C., for appellees.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the appellees to restrain the Secretary of the Interior from carrying out a resurvey of a part of the boundary of a Mexican grant. The plaintiffs hold the legal title to the grant and the adjoining land belongs to the United States. The boundary was surveyed by one Hancock and on June 22, 1872, the grant was patented. A bill to set aside the patent was dismissed in *United States v. Hancock*, 133 U. S. 193, 10 Sup. Ct. 264, 33 L. Ed. 601 (1890). Doubts having arisen as to where a portion of the Hancock line on the northern boundary ran, the Land Department employed one Perrin to make a resurvey. It found and reestablished the original monuments except between Hancock's stations 20 and 25, and attempted to fix the line between these also. In 1901 the resurvey was approved by the Commissioner of the General Land Office, but in 1902 on an appeal, the Secretary of the Interior reversed the approval and ordered a new survey of the line between stations 20 and 25. This was made by one Sickler and was approved by the Secretary of the Interior

on February 28, 1907. On September 5, 1913, the Secretary vacated the Sickler survey and ordered the reestablishment of the Perrin line. The present bill to restrain the carrying out of this order was dismissed on motion by the Supreme Court of the District of Columbia but the decree was reversed and an injunction ordered by the Court of Appeals.

[1] The bill, of course, is not a bill against the United States brought on the ground that it is claiming land *belonging to the plaintiffs. The bill does not seek to try the title. It is brought on the ground that the power of the Secretary is exhausted, and it may be doubted whether that is a matter with which the plaintiffs have anything to do. But however that may be, the whole proceeding on behalf of the United States is simply an effort to fix the boundaries of its own land. It is recognized, it was recognized when the Perrin survey was set aside, that the United States has no authority to change the Hancock line; but it has a right for its own purposes to try to find out where that line runs and the fact that its conclusions may differ from that of the owners of the Hancock grant does not diminish that right. So long as the United States has not conveyed its land it is entitled to survey and resurvey what it owns and to establish and reestablish boundaries, as well one boundary as another, the only limit being that what it thus does for its own information cannot affect the rights of owners on the other side of the line already existing in theory of law. If, as the result of the survey adopted, the United States should give patents for land thought by the plaintiffs to belong to them, "the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now, is to take from the officers of the Land Department the functions which the law confides to them and exercise them by the court." *Litchfield v. Register and Receiver*, 9 Wall. 575, 578 (19 L. Ed. 681); *Minnesota v. Lane*, 247 U. S. 243, 250, 38 Sup. Ct. 508, 62 L. Ed. 1098.

[2] We know of no warrant for the notion that the power is exhausted by a single exercise of it. Repeated retracement of lines, although, of course, exceptions, are well known, we believe, to the Land Department, as, with the limitation that we have expressed, there is no reason why they should not be. The case is different when the act of the Secretary is directed to a third person, as for instance, the approval of a map of the location of a railroad over public lands, where the approval operates as a *grant. *Noble v. Union River Logging R. R. Co.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123. See *New Orleans v. Paine*, 147 U. S. 261, 267, 13 Sup. Ct. 303, 37 L. Ed. 162. But this retracing of the Hancock line is not directed to the

plaintiffs, but, as we have said, is an investigation by the United States on its own account. The plaintiffs gained no rights by the approval of the Sickler line; they lose none by the substitution of the Perrin line. These acts were neither adjudications nor agreements. The plaintiffs' rights were fixed before. Even after land had been sold with reference to a survey and plat that had been approved, this Court refused to restrain the Secretary from making a new survey in *Kirwan v. Murphy*, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698. See *Lane v. United States ex rel. Mickadiet*, 241 U. S. 201, 208, 36 Sup. Ct. 599, 60 L. Ed. 956; *Northern Pacific Ry. Co. v. United States*, 227 U. S. 355, 33 Sup. Ct. 368, 57 L. Ed. 544.

We are of opinion that the decision of the Court of Appeals was wrong.

Decree of the Court of Appeals reversed, with directions to affirm the Decree of the Supreme Court dismissing the bill.

(249 U. S. 313)

UNITED STATES v. PURCELL ENVELOPE CO.

(Argued March 10, 1919. Decided March 31, 1919.)

No. 168.

1. UNITED STATES ⇨65—CONTRACTS—WHEN COMPLETE.

Where the Postmaster General accepted the lowest bid for furnishing stationery by a formal order, and the bidder signed a formal contract, with a surety whose responsibility was not questioned, the contract was complete, although the formal contract was not signed by the Postmaster General.

2. DAMAGES ⇨124(4)—CONTRACTS—PREVENTION OF PERFORMANCE.

Where the Postmaster General repudiated before performance his contract to buy stationery, the measure of damages is the difference between the contract price and cost of performance.

3. APPEAL AND ERROR ⇨932(1)—PRESUMPTIONS—DAMAGES.

Upon appeal from the Court of Claims, which had twice tried a breach of contract case against the Post Office Department, it will be assumed that the court, in fixing damages, gave proper consideration to elements affecting the cost of performance and to the fact that plaintiff did not actually manufacture the goods covered by the contract.

4. DAMAGES ⇨124(3)—CONTRACTS.

Under plaintiff's contract to furnish "in quantities as ordered" certain stationery "that it may be called upon by the Post Office Department to furnish during the four years," the damages for a breach by the Post Office Department are not restricted to the expense of preparing to perform the contract and the profits

plaintiff would have received from a sale of 15 days' stationery supply to the department, but include the estimated profits for the 4-year term.

Appeal from the Court of Claims.

Action by the Purcell Envelope Company against the United States. Judgment for plaintiff (51 Ct. Cl. 211), and the United States appeals. Affirmed.

Mr. Assistant Attorney General Frierson, for the United States.

Mr. Arthur Black, of Boston, Mass., for appellee.

*Mr. Justice McKENNA delivered the opinion of the Court.

Action brought by appellee, the Purcell Envelope Company, which we shall designate as the Envelope Company, against the United States for damages for breach of an express contract. The Court of Claims rendered judgment for the Envelope Company for the sum of \$185,331.76. The United States appeals.

The findings of the court are quite voluminous, but it is only necessary to quote from them to the following effect: The Post Office Department, through the Postmaster General, James A. Gary, invited by advertisement bids "for furnishing stamped envelopes and newspaper wrappers in such quantities as may be called for by the department during a period of four years, beginning on the first day of October, 1898." In pursuance of the invitation the Envelope Company submitted a bid in the manner and time specified in the advertisements of the department.

The bid of the Envelope Company was accepted, and the following order entered:

" * * * (2) That the contract for furnishing the envelopes called for by the advertisement and specifications referred to be awarded to the Purcell Envelope Co., of Holyoke, Mass., as the lowest bidder for the government standard of paper, at the following prices a thousand, namely: * * * "

The department, before issuing the order, investigated the financial responsibility of the Envelope Company and considered it satisfactory.

April 21, 1898, the department sent to the Envelope Company a "contract in quadruplicate," to be executed "at once" and returned to the department. It was promptly returned as requested, signed by the president of the Envelope Company, with the Fidelity & Deposit Company of Maryland as surety in the sum of \$200,000.

*April 27, 1898, the department, by the Third Assistant Postmaster General, wrote to the Envelope Company as follows:

"Your telegram of to-day is before me. As the Postmaster General has not yet signed the

contract awarded by the Department to your company for furnishing stamped envelopes during the coming four years, but is holding the matter in abeyance, I have to request that you suspend all action under my letter of the 21st instant until further orders."

The Envelope Company had, however, already made arrangements and contracts for the supplying to it of the necessary materials to fulfill the terms of the contract and was ready and willing at all times to fully perform it according to its terms. But neither the Postmaster General, nor any department or officer of the government made any call or request upon the Envelope Company to furnish or deliver the envelopes or wrappers which were the subject-matter of the contract and the company's plant was kept intact ready for the performance of the contract, remaining idle.

July 22, 1898, the department, through Postmaster General Smith, the immediate successor of Postmaster General Gary, the latter having gone out of office, revoked and canceled the contract and declared it to be null and void. Prior to doing so the Postmaster General instituted an investigation through one of his proper officers into the business and financial standing of the Envelope Company and the report thereunder was unfavorable to the company.

On or about July 22, 1898, the Envelope Company, having received information that the Postmaster General designed readvertising for proposals, sought by a bill filed in the Supreme Court of the District of Columbia to enjoin his action. The bill was dismissed August 15, 1898. The court, however, was of opinion that a contract had been executed but that the Envelope Company had an efficient remedy at law.

* An offer was subsequently made by two other companies to supply the Post Office Department, upon an emergency contract, stamped envelopes and wrappers of the kinds and qualities the government should need. The department declared that an emergency existed under section 3709, R. S. (Comp. St. § 6832), accepted the offer and entered into a contract in accordance therewith.

The total cost to the Envelope Company for materials and the manufacture and delivery of the envelopes and wrappers in accordance with the terms of its contract would have been \$2,275,224.46. Deducting that sum from the contract price leaves a difference of \$185,331.76, which represents the profit the company would have made if it had been allowed to perform its contract. For that sum judgment was entered.

It will be observed from the recitation of the above facts that the case presents the propositions: First, was there a completed contract between the Envelope Company and the United States through its Postmaster General; and, second, if there was such contract, what is the measure of damages?

[1] For an affirmative answer to the first proposition the Envelope Company relies on *Garfield v. United States*, 93 U. S. 242, 23 L. Ed. 779, and on that case the Court of Claims rested its decision and considered that the case was supported by other cases which were cited.

The case may be considered as the anticipation of this—its prototype. It passed upon a transaction of the Post Office Department and decided that a proposal in accordance with an advertisement by that department and the acceptance by it of the proposal "created a contract of the same force and effect as if a formal contract had been written out and signed by the parties." And for this, it was said, many authorities were cited but it was considered so sound as to make unnecessary review of or comment upon them.

* In resistance to the case as conclusive the government urges the qualification that "the court did not say, or assume to say, that the acceptance of the proposal in *all* [italics counsel's] cases constituted a contract, but held that it did in the present [that] case," and that "there was reason for the conclusion which does not obtain in the case at bar." We cannot agree, and in answer to the first qualification it is only necessary to say that the court expressed a principle, not, of course, applicable to all cases, but applicable to like cases; and the present is a like case, identical in all that makes the principle applicable. And in so determining we answer the other objection of the government that there were features in the law in the *Garfield Case* which do not obtain in the pending case, which constituted, if we understand counsel, the determination of the law against the act of the Postmaster General, his duty being merely ministerial. In the present case it is insisted his action is not so subordinate, that he has discretion, and when exercised it is paramount, his action being "quasi judicial," the contract not having been consummated, and that, therefore, it was within his power to review and set aside the decision of his predecessor. We are unable to concede the fact or the power asserted to be dependent upon it. There must be a point of time at which discretion is exhausted. The procedure for the advertising for bids for supplies or services to the government would else be a mockery—a procedure, we may say, that is not permissive but required (section 3709, R. S.). By it the government is given the benefit of the competition of the market and each bidder is given the chance for a bargain. It is a provision, therefore, in the interest of both government and bidder, necessarily giving rights to both and placing obligations on both. And it is not out of place to say that the government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own. *And,

we repeat, there must be some point at which discretion ceases and obligation takes its place. That point is defined in the Garfield Case, and that the definition is applicable to the case at bar is illustrated by the findings of the Court of Claims. Upon the invitation, in accordance with law, of Postmaster General Gary, the Envelope Company and 11 others submitted bids. The Envelope Company was the lowest bidder and after the company had been found upon investigation to be financially responsible its bid was accepted by entry of a formal order. The company was then directed by the department to execute the necessary contract in quadruplicate, which it did, and returned the contract to the department with a surety whose responsibility was not questioned at any time nor was other security demanded, as it might have been. Postmaster General Gary went out of office, and his successor, either by inducement or upon his own resolution, revoked the contract and entered into a contract with other companies.

The record furnishes no justification of such action. There is no charge of default against the Envelope Company, no charge of inability to perform its contract, except in a particular which we shall hereafter mention. There is, it is true, a finding that Postmaster General Smith caused an investigation to be made of the financial standing of the Envelope Company and that the report thereunder was unfavorable to it. This is made a great deal of, and the fact that the contract was not signed nor the bond of the Envelope Company approved.

It makes no difference that the contract was not formally signed or the bond formally approved, as counsel for the government contends they should have been, both by the terms of the contract and by a statute of the United States. Act Aug. 13, 1894, c. 282, 28 Stat. 279 (Comp. St. §§ 3293-3300). Their formal execution, as we have seen, was not essential to the consummation of the contract. That was accomplished, as was decided in the *Garfield Case*, by the acceptance of the bid of the Envelope Company and the entry of the order awarding the contract to it. Therefore, we do not follow with minute attention the argument of the government in asserting the power of Postmaster General Smith to review and annul his predecessor's decision and that directed against the financial standing of the Envelope Company or the deception the government asserts was practiced on Postmaster General Gary, which are made the subject of a request for findings. We may assume that the Court of Claims considered such charges and all other elements before concluding that the Envelope Company was entitled to recover. And we pass to the question of damages.

[2] The Court of Claims decided that the measure of damages was the difference be-

tween the cost to the Envelope Company of materials and the manufacture and delivery of the envelopes and wrappers in accordance with the terms of its contract and what it would have made if it had been allowed to perform the contract. For this the court cited and relied upon *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. It is there decided that the positive refusal to perform a contract is a breach of it, though the time for performance has not arrived, and that liability for the breach at once occurs. And it is further decided that the measure of damages is the difference between the contract price and the cost of performance. The case was replete in its review of prior cases. We may refer, however, to *United States v. Speed*, 8 Wall. 77, 85, 19 L. Ed. 449; *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967.

The government does not attack the ruling, but contends that it was not properly applied by the Court of Claims. The contention is rested on the following finding:

"Claimant, contemplating making the envelopes under its said contract on the Wickham envelope machines, entered into negotiations with Horace J. Wickham whereby he promised to furnish claimant with a sufficient number of said machines on which to perform said (envelope) contract, and to have some of them ready before the beginning of the contract term, October 1, 1898."

The government says of the Wickham machine that it made the envelope in one operation and that there is nothing to show that the Court of Claims, "as an incident to the cost of performance of the contract, considered the cost of the Wickham machine to appellee although evidence of the same was submitted to it." And further, "If the court did find this item and did consider it in arriving at the judgment, appellant is entitled to know this." Again, the government contends that "so far as the findings are concerned it does not appear that the court allowed a reasonable deduction from the amount of the judgment by reason of appellee's release from care, trouble, risk and responsibility attending the performance of the contract."

[3] To the contentions there may be off set the decision of the Court of Claims. The court in its opinion expressly declares that the findings showed that the Envelope Company had fulfilled all the requirements of the Postmaster General and was ready and willing to furnish the envelopes and wrappers and recognized, we may assume, as grounds to be considered the elements the government urges, so far as the court deemed them relevant or as having any probative strength, and its appreciation of them was obtained after protracted litigation involving two complete trials. We are not, therefore,

disposed, on assertions so elusive or disputable of estimation as those of the government, to reverse or modify the judgment.

There are other contentions of the government which we may pass without comment except one which it submits upon a supplemental brief. It is addressed to the rule of damages adopted by the Court of Claims and urges that it was erroneous, based on the theory, as it is asserted, that the Envelope Company "had a contract which entitled it to furnish all the stamped envelopes and wrappers of the sizes mentioned in the specification, which the Post Office Department *should need* [italics counsel's] during the four years contract." This is denied, and it is said, quoting the contract, that the Envelope Company was only to "furnish and deliver promptly and in quantities as ordered," the envelopes and wrappers "that it may be called upon by the Post Office Department to furnish during the four years." It is difficult to treat the contention seriously. There is something surprising in the declaration that a contract to supply a great department of the government with envelopes and newspaper wrappers which it might need for a period of four years at a cost of nearly two and one-half million dollars bore but scant obligation upon the part of the government, or, to be precise and in the language of counsel, that the Envelope Company "could not have forced the giving of orders [by the government] in excess of fifteen days' supply," and that this was the extent of the government's obligation. And the further contention is, that the obligation being thus limited the damages the Envelope Company was entitled to were, at most, "the expenses, incurred in getting ready to perform the contract, and the profits it would have derived from the manufacture and sale" of such fifteen days' supply—that all else was expectation and cannot be capitalized by the Envelope Company and made the basis of profits and the responsibility of the government. If the contention be more than dialectical we may express wonder that it was not given prominence in the Court of Claims and that in this court it was reserved for the afterthought of a supplemental brief. The further answer may be made that the contract of the Envelope Company was not so dependent as urged, and that its expectation was substantial is evidenced by the haste of the department, after the revocation of the contract *with the company, to declare an emergency in its need and enter into a contract with other companies.

On January 13th the government made a motion to remand the case to the Court of Claims for additional findings. It was denied, but the right reserved to make such order if we should be so advised. Our attention is directed to the motion, which it is

submitted should be considered on the merits. Again considering the motion and the case as it has been developed by argument of counsel, we think the motion should not be granted. The judgment of the Court of Claims is

Affirmed.

Mr. Justice McREYNOLDS took no part in the consideration and decision of this case.

(249 U. S. 361)

WISE v. UNITED STATES.

(Argued March 11, 1919. Decided March 31, 1919.)

No. 214.

1. DAMAGES ⇨77—LIQUIDATED—CONSTRUCTION OF PROVISION.

Relative to whether a provision of a contract is for liquidated damages or penalty, intention will be sought by construction precisely as in other respects.

2. DAMAGES ⇨85—LIQUIDATED—ENFORCEMENT OF PROVISION.

Intention to provide for liquidated damages appearing from writing, effect will be given the provision as freely as to any other, where damages are uncertain in nature or amount, or are difficult of ascertainment, or the amount stipulated is not so disproportionate as to show that compensation was not the object, or to imply fraud, mistake, circumvention, or oppression.

3. DAMAGES ⇨78(4) — LIQUIDATED — PROVISION OF BUILDING CONTRACT.

Provision of contract for erecting for \$1,200,000 two laboratory buildings for Department of Agriculture, that if buildings are not completed in 30 months government shall be entitled to \$200 as liquidated damages, "computed, estimated, and agreed on" for each day's delay, is not to be considered as one for penalty, because making no distinction whether delay be in completion of one or both buildings.

Appeal from the Court of Claims.

Suit by Henry A. Wise, trustee in bankruptcy of Ambrose B. Stannard, against the United States. Petition dismissed (52 Ct. Cl. 400), and claimant appeals. Affirmed.

Messrs. Wm. B. King and George A. King, both of Washington, D. C., for appellant.

Mr. Assistant Attorney General Brown, for the United States.

* Mr. Justice CLARKE delivered the opinion of the Court.

In December, 1904, Stannard, represented in this case by his trustee in bankruptcy, contracted with the United States to erect two laboratory buildings for the Department of Agriculture, in the city of Washington, D. C.,

for \$1,171,000. The buildings were both to be completed in 30 months and for a delay of 101 days beyond the contract period the government deducted from the contract price \$200 a day, the amount stipulated in the contract as liquidated damages, a total of \$20,200, and the claim made in this court is for the recovery of that amount.

The Court of Claims dismissed the petition and the case is here on appeal.

The contract was in writing and the specifications, which the contractor had before him when bidding, were made a part of it. These specifications contain the following:

*364 "11. Each bidder must submit his proposal with the distinct understanding that, in case of its acceptance, time for the completion of the work shall be considered as *of the essence of the contract, and that for the cost of all extra inspection and for all amounts paid for rents, salaries and other expenses entailed upon the United States by delay in completing the contract, the United States shall be entitled to the fixed sum of \$200, as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States."

The provision of the contract upon the subject is:

"3. To complete the said work in all its parts within 30 months from the date of the receipt of the notice referred to in subdivision 2 hereof. Time is to be considered as of the essence of the contract, and in case the completion of said work shall be delayed beyond said period, the party of the second part may, in view of the difficulty of estimating with exactness the damages which will result, deduct as liquidated damages, and not as a penalty, the sum of two hundred dollars (\$200.00) for each and every day during the continuance of such delay and until such work shall be completed, and such deductions may be made from time to time from any payments due hereunder."

[1-3] There is no dispute as to the extent of the delay and the sole contention of the appellant is that, because a single sum in damages is stipulated for, without regard to whether the completion of one or both buildings should be delayed, and because the damage to the government would probably be less in amount if one were completed on time and the other not, than if the completion of both were delayed, the provision of the contract with respect to liquidated damages cannot be considered the result of a genuine pre-estimate of the loss which would be caused by the delay but must be regarded as a penalty which requires proof of damage in any amount to be deducted.

*365 If it were not for the earnestness with which this claim *is presented we should content ourselves with the observation that as there was delay in the completion of both buildings, the case falls literally within the terms of the contract of the parties and that a court will refuse to imagine a different

state of facts than that before it for the purpose of obtaining a basis for modifying a written agreement, which evidently was entered into with great deliberation.

The subject of the interpretation of provisions for liquidated damages in contracts, as contradistinguished from such as provide for penalties, was elaborately and comprehensively considered by this court in *Sun Printing & Publishing Association v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, applied in *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731, and the result of the modern decisions was determined to be that in such cases courts will endeavor, by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment, of a designated sum or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, where the damages are uncertain in nature or amount or are difficult of ascertainment or where the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression. There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced.

*366 There are, no doubt, decided cases which tend to support *the contention advanced by appellant, but these decisions were, for the most part, rendered at a time when courts were disposed to look upon such provisions in contracts with disfavor and to construe them strictly, if not astutely, in order that damages, even though termed liquidated, might be treated as penalties, so that only such loss as could be definitely proved could be recovered. The later rule, however, is to look with candor, if not with favor, upon such provisions in contracts when deliberately entered into between parties who have equality of opportunity for understanding and insisting upon their rights, as promoting prompt performance of contracts and because adjusting in advance, and amicably, matters the settlement of which through courts would often involve difficulty, uncertainty, delay and expense.

The result of the application of the doctrine thus stated to the case before us cannot be doubtful. The character of the contract and the amount involved assures experience and large capacity in the contractor and the parties specifically state that the

amount agreed upon as liquidated damages had been "computed, estimated and agreed upon" between them. It is obvious that the extent of the loss which would result to the government from delay in performance must be uncertain and difficult to determine and it is clear that the amount stipulated for is not excessive, having regard, to the amount of money which the government would have invested in the buildings at the time when such delay would occur, to the expense of securing or continuing in other buildings during such delay, and to the confusion which must necessarily result in the important and extensive laboratory operations of the Department of Agriculture.

1367 The parties to the contract, with full understanding of the results of delay and before differences or interested views had arisen between them, were much more competent to justly determine what the amount of damage would be, an amount necessarily largely conjectural and resting in estimate, than a court or jury would be, directed to a conclusion, as either must be, after the event, by views and testimony derived from witnesses who would be unusual to a degree if their conclusions were not, in a measure, colored and partisan.

There is nothing in the contract or in the record to indicate that the parties did not take into consideration, when estimating the amount of damage which would be caused by delay, the prospect of one building being delayed and the other not, and the amount of the damages stipulated, having regard to the circumstances of the case, may well have been adopted with reference to the probability of such a result.

The judgment of the Court of Claims must be

Affirmed.

(249 U. S. 323)

O'PRY et al. v. UNITED STATES.

(Argued March 12, 1919. Decided March 31, 1919.)

No. 216.

UNITED STATES — 103 — CLAIMS FOR ABANDONED PROPERTY—STATUTE—"ADDITION"—"AMENDMENT."

Act July 2, 1864, providing for the purchase by common agents of property in the insurrectionary districts at three-fourths of the market value, was in "addition" to the Abandoned Property Act of March 3, 1863, not an "amendment," since its provisions are independent of the original act, whereas in an amendment there is a change; and Judicial Code, § 162 (Comp. St. § 1153), giving the Court of Claims jurisdiction to determine claims for the proceeds of property seized under act of 1863 and acts amendatory thereof does not authorize recovery of one-fourth of the value of the property tak-

en by a government agent under the act of 1864.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Addition; Amendment.]

Appeal from the Court of Claims.

Claim by Isabel Kouns O'Pry, as sole descendant and heir of John Kouns, surviving partner of George L. Kouns and John Kouns, and another, against the United States. Judgment against the claimants (51 Ct. Cl. 111), and claimants appeal. Affirmed.

*Messrs. George A. King and William B. King, both of Washington, D. C., and Alexander M. Garber, of Birmingham, Ala., for appellants.

Mr. Assistant Attorney General Brown, for the United States.

Mr. Justice McKENNA delivered the opinion of the Court.

Section 162 of the Judicial Code, enacted March 3, 1911 (36 Stat. 1139, c. 231 [Comp. St. § 1153]), provides as follows:

"The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June 1, 1865, under the provisions of the act of Congress approved March 12, 1863, entitled 'An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,' and acts amendatory thereof, where the property so taken was sold and the net proceeds thereof were placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding."

To avail herself of that section Isabel Kouns O'Pry alleged herself to be the sole surviving descendant and sole heir of John Kouns and brought this suit in the Court of Claims and for grounds thereof set forth the following facts:

June 6, 1865, George L. Kouns and John Kouns were owners of 900 bales of cotton in two lots, of which 350 bales had been raised in Texas and 550 bales raised in Louisiana, and after the cessation of *hostilities were brought to New Orleans, June 6, 1865. The cotton was worth the sum of \$123,110.

On that date—June 6, 1865—the act of Congress of July 2, 1864 (13 Stat. 375, c. 225), was in force, section 8 of which made it lawful for the Secretary of the Treasury, with the approval of the President, to authorize agents to purchase for the United States products of states declared in insurrection at designated places at such prices as might be agreed on with the seller, not exceeding

three-fourths of the market value at the latest quotation in the city of New York.

(The other provisions of the statute are not necessary to quote.)

The act of July 2, 1864, was an amendment of the act of March 3, 1863, entitled "An act to provide for the collection of abandoned property and the prevention of frauds in insurrectionary districts within the United States." 12 Stat. 820, c. 120.

In pursuance of the authority thus conferred the Secretary of the Treasury designated, among other cities, the city of New Orleans as a place of purchase and by a subsequent regulation directed that the agents appointed should receive all the cotton brought to the places designated as places of purchase and forthwith return to the seller three-fourths of the cotton or sell the same and retain out of the price thereof the difference between three-fourths of the market price and the full price thereof in the city of New York.

The agent appointed at New Orleans was Otis N. Cutler, and, on the arrival of the Kouns cotton, Cutler, as such agent, took possession of it and refused to release the same or to allow the owners to have any custody of it until they paid him one-fourth of its market value, being the sum of \$30,777.50. They paid the same under protest and it was placed in the Treasury of the United States, where it remains.

June 13, 1865, the President removed by proclamation **all restrictions upon intercourse and trade in products of states theretofore in insurrection and theretofore imposed in the territory east (italics ours) of the Mississippi river.*

Thereafter the Kouns brought suit in a New York court against Cutler, which was removed to the Circuit Court of the United States for the Southern District of New York. The ground of Cutler's liability was alleged to be that his retention of the cotton and the exaction of money from them was unwarranted in law. They recovered judgment, but it was reversed by the Supreme Court of the United States (Cutler v. Kouns, 110 U. S. 720, 4 Sup. Ct. 274, 28 L. Ed. 305) and a new trial ordered. The suit was then dismissed.

The loyalty of the appellants is alleged. The Court of Claims dismissed the suit upon the demurrer of the government. The court expressed the opinion that the claim did not come either "within the letter or the spirit of section 162 and the correlative statutes" and said:

"At the time of this transaction the Kouns firm could not have made any disposal of the cotton in question had it not been for the provision of said section 8, it being insurrectionary territory. That section prescribed the method and the conditions upon which it might be sold to the government. The firm complied with those conditions and were doubtless glad to do

so. We do not think where one complies with the law in his transaction with the government in the sale of cotton and receives all that the law allows him he has any valid claim under section 162 of the Judicial Code."

To fulfill the conditions of necessary parties on account of a doubt expressed by the court, there was an intervening petition by Charles Schneidau, assignee in bankruptcy of George L. Kouns. He adopted the petition of Isabel Kouns O'Pry "and jointly with her claims as therein prayed."

By order of the court the petition was amended and **Schneidau made a party claimant.* The government's demurrer to the petition as amended was sustained.

The case is not in broad compass, involving as it does only the relation and construction of statutes, but it is not easy to state it briefly. The petition recites, as we have seen, that the Kouns in their lifetime brought suit against the agent of the government, Cutler, who had seized the cotton in New Orleans and exacted payment from them of one-fourth of its value, granting them, however, the indulgence of paying it in three installments, respectively, June 12, June 15, and June 20, 1865. They charged Cutler with an unlawful seizure of the cotton and an unlawful exaction of the money. They obtained judgment in the Circuit Court, but the judgment was reversed by this court (110 U. S. 720, 4 Sup. Ct. 274, 28 L. Ed. 305), and the following is, so far as material, a summary of the decision in the case:

In consequence of the act of July 13, 1861 (12 Stat. 255, c. 3), it was lawful for the President to declare that the inhabitants of all states in rebellion against the United States were in a state of insurrection and that all commercial intercourse between them should cease and be unlawful so long as such condition of hostilities should continue. And August 16, 1861 (12 Stat. 1262) the states of Texas and Louisiana were declared to be in like condition and intercourse was forbidden between them and other states and parts of the United States. On April 12, 1862, the city of New Orleans, however, was occupied by the national forces and from that date was excepted from the operation of the Non-Intercourse Act.

In this state of affairs Congress passed the act of July 2, 1864, referred to in the petition, section 8 of which authorized the purchase of products of states declared in insurrection, which included the cotton in suit, and it was seized by virtue of such authority and the payments mentioned **exact*ed. It was contended that the cotton was exempt from such action by proclamation of the President of June 13, 1865. The contention was rejected, the cotton not being, as it was said, the product of territory *east* of the Mississippi river. It was, however, further urged that the President's proclamation of June 24,

1865, removed all restrictions as well from products of territory *west* of the Mississippi river. To this it was replied that upon the arrival of the cotton in New Orleans the rights of the government to it became fixed and that at such time "one-fourth its value was as much the property of the government as the other three-fourths were the property of the defendants in error [the Kounsels]. No proclamation of the President could transfer the property of the government to them." It was hence decided that Cutler "had authority under the law and regulations of the Treasury Department to exact the money" which the suit was brought to recover. The defense of the statute of limitations was also sustained.

It is now asserted that notwithstanding such decision a claim has accrued to appellants by virtue of section 162 of the Judicial Code upon which they are entitled to recover. It will be observed by reference to that section that the Court of Claims is given jurisdiction of claims of those whose property was taken subsequent to June 1, 1865, under the provisions of the act of March 3, 1863, "and acts amendatory thereof," where the property was sold and its net proceeds were placed in the Treasury of the United States, and they are directed to be returned upon judgment rendered for the claimant. Appellants invoke the relief of these provisions by the contention that the cotton was taken under the provisions of the act of March 3, 1863, because the act of July 2, 1864, was an amendment to it, and that therefore the provision of section 162 of the Judicial Code is completely satisfied; in other words, that the money exacted was taken under the **act of March 3, 1863 "and acts amendatory thereof."* It is further contended that the conditions of section 162 being thus satisfied it is no answer to say that the seizure of the cotton was legal, it being the intention of Congress to declare that even in such case "the proceeds should be returned to the owners." And this contention counsel offers as an answer to Cutler v. Kouns, *supra*, and that Congress having by section 162 opened the doors of the Court of Claims "to claimants whose property was seized after June 1, 1865, they can no longer be met with the defense that because the seizure was lawful when made, there can be no recovery on account of it. To sustain such a defense would be 'to keep the word of promise to the ear and break it to the hope.'" The government opposes the contentions.

The act of March 3, 1863 (12 Stat. 820), is entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States." Its first section empowers the Secretary of the Treasury to appoint a special agent or special agents to collect and receive all abandoned or

captured property in any state or territory in insurrection, with an exception not material. Section 2 provides that the property so received or collected may be put to public use or sold at public auction and the proceeds thereof put into the Treasury of the United States. By section 3 a bond may be required of the agent or agents, who may be required to keep a book or books of accounts showing those from whom the property was received, the cost of transportation and proceeds of sale. It is further provided that the owner of the property may at any time within two years prefer a claim for the proceeds thereof and upon proof of loyalty receive the residue of the proceeds.

It will be observed that the act had a special purpose and was directed to the receipt and collection of property **in a particular condition, either abandoned or captured, recognizing however, that there might be a just claim to it, but limiting the assertion of the claim to two years after the suppression of the rebellion.*

The act of July 2, 1864 (13 Stat. 375), describes itself to be "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary states, and to provide for the collection of captured and abandoned property, and the prevention of frauds in states declared in insurrection." The act, therefore, is declared to be an "addition" to preceding legislation, not an amendment to it. Is an addition the same as an amendment? We are informed by the dictionaries that in addition the added parts remain independent and by amendment there is change and, it may be improvement. The words and the processes they respectively describe may, however, be regarded as roughly or even accurately interchangeable and in investigating the meaning of legislation we must regard that possibility and resolve a doubt in the words by the purpose of the legislation. In other words, whatever the relation of the statutes, their purpose must be looked to to determine the application to them of section 162. So looked to, we agree with the government that the purpose of the act of July 2, 1864, demonstrates the contrary of the contention of appellants, and that the act was strictly in addition to prior acts and not an amendment of the act of March 3, 1863 in the sense asserted. The latter act applied to a different situation. The cotton collected under it and to which its provisions applied might be the property of those innocent of disloyalty, but victims of the disorder and violence of the times, and the government constituted itself a trustee for them and gave them the opportunity, at any time within two years after the suppression of the rebellion, to establish their right to the proceeds, requiring of them nothing but proof of loyalty and ownership. United States **v. Anderson*, 9 Wall. 56, 65, 19 L. Ed.

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615; *United States v. Padelford*, 9 Wall. 531, 19 L. Ed. 788; *United States v. Klein*, 13 Wall. 128, 20 L. Ed. 519.

The cotton in the present case, unlike that to which the act of March 3 applied, was the subject of a business enterprise and taken to a market opened by the United States forces upon the conditions expressed in the act of July 2, 1864—that is, that its owners should turn over to the government one-fourth of the cotton, or its money equivalent, which would immediately become the property of the United States. *Cutler v. Kouns*, supra. The conditions in the two situations, therefore, are in broad contrast and it could not have been the intention of section 162 to confound the conditions. The section did no more than remove the bar of limitation of time to sue that was given by the act of March 3, 1863. It did not intend to transfer property that had become that of the United States.

Judgment affirmed.

(249 U. S. 337)

UNION OIL CO. OF CALIFORNIA v. SMITH.

(Submitted Nov. 13, 1918. Decided March 31, 1919.)

No. 8.

1. MINES AND MINERALS — 29(6) — PUBLIC MINERAL LANDS — RIGHTS BEFORE DISCOVERY.

One exploring public lands for minerals under the permission given by Rev. St. § 2319 (Comp. St. § 4614), but before making the discovery necessary to locate a claim under section 2320 (section 4615) has a right of possession good against forcible, fraudulent, or clandestine intrusions, but which continues only during actual occupation and persistent and diligent prospecting.

2. MINES AND MINERALS — 29(3) — PUBLIC MINERAL LANDS — LOCATION — RIGHTS ACQUIRED.

One who, after discovery of mineral on a claim as required by Rev. St. § 2320 (Comp. St. § 4615), locates the claim in accordance with section 2324 (section 4620), has, under section 2322 (section 4618), a possessory right, capable of transfer and independent of continuous possession, which can be forfeited only by failure to do the annual work required by section 2324.

3. MINES AND MINERALS — 36 — OIL LANDS — "ASSESSMENT LABOR."

The term "assessment labor," in Act Feb. 12, 1903 (Comp. St. § 4636), providing that such labor on oil claims may be done on one of a group of contiguous claims refers to the annual labor required of the locator of a mineral claim after discovery by Rev. St. § 2324 (Comp. St. § 4620), and not to work before discovery.

4. MINES AND MINERALS — 36 — OIL LANDS — ASSESSMENT LABOR — STATUTE.

The proviso of Act Feb. 12, 1903 (Comp. St. § 4636), that annual assessment labor for a group of contiguous claims done on one of them must tend to the development or determination of the oil-bearing character of the several claims, does not enlarge the effect of the statute, so as to permit, before discovery, a location which can be maintained by performing work on the contiguous claim.

In Error to the Supreme Court of the State of California.

Action by S. R. Smith against the Union Oil Company of California to determine adverse claims to an oil claim. Judgment for plaintiff was affirmed by the Supreme Court of California (166 Cal. 217, 135 Pac. 966), and defendant brings error. Affirmed.

Messrs. Lewis W. Andrews and Thomas O. Toland, both of Los Angeles, Cal., for plaintiff in error.

* Mr. Justice PITNEY delivered the opinion of the Court.

This case presents, for the first time in this court, the question of the meaning and effect of an act of Congress approved February 12, 1903 (32 Stat. 825, c. 548 [Comp. St. § 4636]), which reads as follows:

"An act defining what shall constitute and providing for assessments on oil mining claims.

"Be it enacted, etc., that where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all: Provided, that said labor will tend to the development or to determine the oil bearing character of such contiguous claims."

Smith, now defendant in error, being in possession of a placer mining claim known as the "Schley claim," comprising a tract of 160 acres of land in the state of California, part of the public domain of the United States, under a location notice posted and recorded by himself and seven other qualified persons who afterwards conveyed their interests to him, and being engaged in the diligent prosecution of work for the purpose of finding oil upon the claim, brought an action in a California state court to determine adverse claims, making the Union Oil Company of California defendant.

Defendant asserted a superior right of possession under a mineral land location of the same ground under the name of the "Rawley claim," made by eight qualified associates in the year 1883, many years before plaintiff's location. No discovery of oil or other minerals had ever been made upon the ground

by either of the claimants or by any other person. But at the time plaintiff and his associates located it defendant, although not then *actually occupying this ground, was in actual occupation of a contiguous claim of 160 acres known as the "Sampson claim," upon which it then was drilling and afterwards continued to drill a well for the discovery of oil, the well being 1,000 feet distant from the boundary line of the disputed claim. Defendant claimed the right of possession of five contiguous claims, including the "Rawley-Schley" and the "Sampson," under locations regularly made in all respects save discovery. Defendant pleaded and proved these facts, and also introduced evidence warranting a finding that its boring work on the "Sampson claim" tended to determine the oil-bearing character of the "Rawley-Schley claim."

It was and is defendant's contention that by virtue of the act of 1903 one who has acquired the possessory rights of locators before discovery in five contiguous claims taken up as oil-bearing lands may preserve and maintain an inchoate right to all of them by means of a continuous actual occupation of one, coupled with diligent prosecution in good faith of a sufficient amount of discovery work thereon, provided such work tends also to determine the oil-bearing character of the other claims.

The superior court of the county, and, on appeal, the Supreme Court of the state, overruled this contention and gave judgment in favor of the plaintiff (Smith v. Union Oil Co., 166 Cal. 217, 135 Pac. 966), and the case was brought here by writ of error under section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), prior to the amendment of September 6, 1916 (39 Stat. 726, c. 448 [Comp. St. § 1214]).

It will be observed that both parties are in the position of prospectors or explorers upon the public domain—locators without discovery; and, in order to appreciate correctly what effect, if any, the act of 1903 has upon their rights, it is important to have in mind what is meant by "annual assessment labor," and the part it plays in the operations of miners under the mining laws of the United States.

* By section 2319, Rev. Stat. U. S. (Comp. St. § 4614), all valuable mineral deposits in lands belonging to the United States are declared to be—

"free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

By section 2320 (section 4615 it is declared:

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

By section 2322 (sec. 4618) locators of mining locations on the public domain—

"so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins," etc.

By section 2324 (section 4620):

"The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. * * * On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year *thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Section 2325 (section 4622) and sections following permit a patent to be obtained for a mineral claim, and regulate the procedure. By section 2325 the applicant for patent is required (among other things) to file "a certificate of the United States surveyor general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors," and, upon his compliance with this and other requirements, if after publication of notice for 60 days no adverse claim is filed, or (section 2326 [section 4623]) such claim, having been filed, has proceeded to adjudication in a court of competent jurisdiction with result favorable to the applicant, upon a payment of \$5 per acre and proper fees a patent is issued for the claim or such portion thereof as has been decided to be in the rightful possession of the applicant. By section 2329 (section 4628) placer claims are made subject to entry and patent under like circumstances and con-

ditions and upon similar proceedings as are provided for vein or lode claims; the purchase price of placer claims being fixed by section 2333 (section 4632) at \$2.50 per acre.

Under this legislation petroleum for many years was regarded as a mineral, although not specially mentioned as such, and claims to oil lands were disposed of by the Land Department under the provisions of law relating to placer claims, with a single exception afterwards overruled. *Union Oil Co.*, 23 L. D. 222, decided August 27, *1896; *Union Oil Co.* (on review) 25 L. D. 351, decided November 6, 1897. It was in order to obviate the effect of the former of these two decisions that Congress passed the act of February 11, 1897 (29 Stat. 526, c. 216 [Comp. St. § 4635]), which declared:

"That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims"

—with a proviso saving petroleum land therefore filed upon, claimed or improved as mineral but not yet patented. See House Rep. No. 2655, 54th Cong. 2d Sess.; 29 Cong. Rec. pt. 2, p. 1409; *Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669, 678, 34 Sup. Ct. 907, 58 L. Ed. 1527.

[1] Aside from the suggested effect of the act of 1903, it is clear that in order to create valid rights or initiate a title as against the United States a discovery of mineral is essential. Section 2320, Rev. Stat.; *Waskey v. Hammer*, 223 U. S. 85, 90, 32 Sup. Ct. 187, 56 L. Ed. 359. Nevertheless, section 2319 extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits, and this and the following sections hold out to one who succeeds in making discovery the promise of a full reward. Those who, being qualified, proceed in good faith to make such explorations and enter peaceably upon vacant lands of the United States for that purpose are not treated as mere trespassers, but as licensees or tenants at will. For since, as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the *pedis possessio* of a bona fide and qualified prospector is universally regarded as a necessity. It is held that upon the public domain a miner may hold the place in which he may be working against all others having no better right, and while he remains in possession, diligently working towards discovery, is entitled—at least for a reasonable time—to be protected against forcible, fraudulent, and clandestine intrusions upon his possession. *Zollars v. Evans* (C. C.) 5 Fed. 172, 173; *Crossman v. Pendery* (C. C.) 8 Fed. 693, 694; *Johanson v. White*, 160 Fed.

901, 88 C. C. A. 83; *Hanson v. Craig*, 161 Fed. 861, 863, 89 C. C. A. 55; s. c., 170 Fed. 62, 65, 95 C. C. A. 338; *Gemmell v. Swain*, 28 Mont. 331, 335, 72 Pac. 662, 98 Am. St. Rep. 570; *New England, etc., Oil Co. v. Congdon*, 152 Cal. 211, 92 Pac. 180; *Whiting v. Straup*, 17 Wyo. 1, 19, 23, 95 Pac. 849, 129 Am. St. Rep. 1093; *Phillips v. Brill*, 17 Wyo. 26, 38, 95 Pac. 856.¹

And it has come to be generally recognized that while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential to the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after location and give validity to the claim as of the time of discovery, provided no rights of third parties have intervened. *Mining Co. v. Tunnel Co.*, 196 U. S. 337, 345, 348-352, 25 Sup. Ct. 266, 49 L. Ed. 501; *Weed v. Snook*, 144 Cal. 439, 443, 77 Pac. 1023.

In the California courts the right of a locator before discovery while in possession of his claim and prosecuting exploration work is recognized as a substantial interest, extending not only as far as the *pedis possessio* but to the limits of the claim as located; so that if a duly qualified person peaceably and in good faith enters upon vacant lands of the United States prior to discovery but for the purpose of discovering oil or other valuable mineral deposits, there being no valid mineral location upon it, such person has the right to maintain possession as against *violent, fraudulent, and surreptitious intrusions so long as he continues to occupy the land to the exclusion of others and diligently and in good faith prosecutes the work of endeavoring to discover mineral thereon. *Miller v. Chrisman*, 140 Cal. 440, 447, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63 (case affirmed 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770; *Weed v. Snook*, *ubi supra*; *Merced Oil Mining Co. v. Patterson*, 153 Cal. 624, 625, 96 Pac. 90; s. c., 162 Cal. 358, 361, 122 Pac. 950; *McLemore v. Express Oil Co.*, 158 Cal. 559, 562, 112 Pac. 59, 139 Am. St. Rep. 147.

To what extent the possessory right of an explorer before discovery is to be deduced from the invitation extended in section 2319, to what extent it is to be regarded as a local regulation of the kind recognized by that section and the following ones, and to what extent it derives force from the authority of the mining states to regulate the possession of the public lands in the interest of peace

¹ Two recent acts of Congress contain recognition of the status of a bona fide occupant of oil-bearing lands in the public domain prior to discovery. Act June 25, 1910 (36 Stat. 847, c. 421, § 2 [Comp. St. § 4524], first proviso); Act March 2, 1911 (36 Stat. 1015, c. 201 [Comp. St. §§ 4637, 4637a]). See *Consolidated Mutual Oil Co. v. United States*, 245 Fed. 521, 524, 527, 529, 157 C. C. A. 633.

and good order, are questions with which we are not now concerned. Nor need we stop to inquire whether the right is limited to the ground actually occupied in the process of exploration, or extends to the limits of the claim. These questions and others that suggest themselves are not raised by the present record, which concerns itself solely with the rights asserted by the defendant under the act of 1903. Whatever the nature and extent of a possessory right before discovery, all authorities agree that such possession may be maintained only by continued actual occupancy by a qualified locator or his representatives engaged in persistent and diligent prosecution of work looking to the discovery of mineral.

[2] But, by the provisions of the Revised Statutes above cited, a discovery of mineral by a qualified locator upon unappropriated public land initiates rights much more substantial as against the United States and all the world. If he locates, marks, and records his claim in accordance with section 2324 and the pertinent local laws and regulations, he has, by the terms of section 2322, an exclusive right of possession to the extent of his claim as located, with the right to extract the minerals, even to exhaustion, without paying any royalty to the United States as owner, and without ever applying for a patent or seeking to obtain title to the fee; subject, however, to the performance of the annual labor specified in section 2324, for upon his failure to do this the claim is open to relocation by others at any time before resumption of work upon it by the original locator.

If not content to rest upon the right conferred by section 2322, the qualified locator may obtain a patent for his claim by complying with the conditions prescribed by sections 2325 and 2326.

But, even without patent, the possessory right of a qualified locator after discovery of minerals upon the claim is a property right in the full sense, unaffected by the fact that the paramount title to the land is in the United States (Rev. Stat. § 910 [Comp. St. § 1533]), and it is capable of transfer by conveyance, inheritance, or devise (*Forbes v. Gracey*, 94 U. S. 762, 763, 767, 24 L. Ed. 313; *Belk v. Meagher*, 104 U. S. 279, 283, 285, 26 L. Ed. 735; *Del Monte Mining Co. v. Last Chance Mining Co.*, 171 U. S. 55, 78, 18 Sup. Ct. 895, 43 L. Ed. 72; *Elder v. Wood*, 208 U. S. 226, 232, 28 Sup. Ct. 263, 52 L. Ed. 464).

Actual and continuous occupation of a valid mining location based upon discovery is not essential to the preservation of the possessory right. The right is lost only by abandonment, as by nonperformance of the annual labor required by section 2324. *Belk v. Meagher*, 104 U. S. 279, 283, 284, 26 L. Ed. 735; *Black v. Elkhorn Mining Co.*, 163 U. S. 445, 450, 16 Sup. Ct. 1101, 41 L. Ed. 221; *Far-*

rell v. Lockhart, 210 U. S. 142, 147, 28 Sup. Ct. 681, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162; *Bradford v. Morrison*, 212 U. S. 389, 394, 29 Sup. Ct. 349, 53 L. Ed. 564.

[3] After this brief review of the mining laws there is little danger of mistaking the true intent and meaning of the act of Congress of February 12, 1903. Title 32, chapter 6, Revised Statutes, therein referred to, embraces the sections we have cited. And *it is not to be doubted that the terms "assessments" and "annual assessment labor" refer to the annual labor required by section 2324, that being commonly called by miners the "annual assessment" or the "assessment work," and so described in many judicial opinions and in at least two acts of Congress, passed respectively November 3, 1893 (28 Stat. 6, c. 12), and July 2, 1898 (30 Stat. 651, c. 563). See *El Paso Brick Co. v. McKnight*, 233 U. S. 250, 255, 256, 258, 34 Sup. Ct. 498, 58 L. Ed. 943, L. R. A. 1915A, 1113.

And it is important to observe that in these acts of Congress, as in the practice of miners, "assessment work" had nothing to do with locating or holding a claim before discovery. On the contrary it was the condition subsequent prescribed by Congress to be performed in order to preserve the exclusive right to the possession of a valid mineral land location upon which discovery had been made. *McLemore v. Express Oil Co.*, 158 Cal. 559, 563, 112 Pac. 59, 139 Am. St. Rep. 147. Hence the declaration in the act of 1903 that where oil lands are located as placer mining claims "the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person," indicates simply the legislative purpose that the necessary assessment work if done upon one of the group should have the same effect as if properly distributed among the several claims; that is to say, the effect of preserving the exclusive right of possession and enjoyment conferred by section 2322 with respect to unpatented claims based upon a previous discovery of oil.

"Group assessment work" did not originate with the act of 1903. From an early period the economy of operating contiguous mines or claims by a single system was recognized. In section 5 of the act of May 10, 1872, (17 Stat. 92, c. 152), now section 2324, Rev. Stat., it was provided with respect to the annual labor that "where such claims are held in common, such expenditure may be made upon any one claim." Questions as to the precise meaning of *this naturally arose, and it was determined that it applied only to contiguous claims, and that the work must be done for the common benefit or for the purpose of developing all the claims. *Smeeting Co. v. Kemp*, 104 U. S. 636, 655, 28 L. Ed. 875; *Jackson v. Roby*, 109 U. S. 449, 444, 3 Sup. Ct. 301, 27 L. Ed. 990; *Chambers*

v. Harrington, 111 U. S. 350, 353, 4 Sup. Ct. 428, 28 L. Ed. 452; Anvil Hydraulic Co. v. Code, 182 Fed. 205, 206, 105 C. C. A. 45.

It is plain that the draftsman of the act of 1903 had this settled rule in mind, for the bill as introduced, with enacting clause in the same form as finally passed, had this proviso:

"Provided, that said labor will benefit or tend to the development of such contiguous claims."

By committee amendment in the House the words "benefit or" were struck out, and after the word "development" the following were inserted, "or to determine the oil bearing character," presumably regarded as peculiarly appropriate to oil lands. House Rep. No. 2657, 57th Cong. 1st Sess.; Senate Rep. No. 2756, 57th Cong. 2d Sess.; 36 Cong. Record, pt. 1, p. 83; pt. 2, pp. 1561, 1682. The committee report contains this explanation of the object of the bill:

"The law now requires that upon each mining claim there shall be performed each and every year at least \$100 worth of work. The courts have held with reference to lode-mining claims that this annual labor may be done upon any one of a group of mining claims, provided the said work tends to benefit the entire group, but the Land Department of the government seems to be of opinion that the annual labor upon placer-mining claims must be done upon each of said claims. There is good reason for this holding when applied to the ordinary placer claim containing deposits of gold, because in such case the gold lies upon the surface or near the surface, and general development work being upon and near the surface does not tend to benefit other claims than the one upon which the work is actually done, but in the case of oil-mining claims the situation is different. It is necessary to bore wells for great depths in order to determine whether or not oil exists in paying quantities. These wells are expensive, and it is the opinion of the committee that the industry itself will be more benefited by permitting the owner to spend his means in sinking a single well in order to demonstrate the possibilities of the property than it would to require him to distribute his means among several claims. In other words, it is better that \$500 should be spent in one place until the character of the oil deposit has been demonstrated than it is to require the same amount of money to be spent in five different places."

[4] The argument for plaintiff in error, while conceding the general rule to have been established that assessment work could avail nothing except when performed upon or for the benefit of a claim in which a discovery of mineral already had been made, insists that the difficulty and great expense attendant upon the sinking of wells to make discovery of oil made it evident that the ap-

plication of the doctrine was a great burden upon the oil miner; and that this, having been brought to the attention of Congress was the moving cause of the enactment of the act of February 12, 1903. This contention finds no support in the enacting clause, and but little in the proviso. It gives to the somewhat indefinite language of the proviso an effect that would greatly enlarge instead of confining the meaning of what precedes, and would render the statute a radical departure from the previous policy of the mining laws. The legislative history of the act, as well as its phraseology, fails to support the contention.

Nor is there great force in the suggestion that with respect to oil claims upon which discovery already had been made there was no need to encourage the doing of work tending to determine their oil-bearing character, because this would already have been established by the antecedent discovery. It hardly is necessary to say that *the discovery of oil upon several contiguous claims does not render it wholly unimportant that assessment work thereafter done by the common owner upon one of the claims, in order to be credited to him as if it had been distributed among the several claims, shall be of general benefit to the group. This is the object of the act, and except as the proviso specifically declares "determination of oil-bearing character" to be of benefit to the contiguous claims, little is added to the effect of section 2324, Rev. Stat., respecting group assessment work. But we cannot declare a determination of the "oil-bearing character" of a claim upon which oil already has been discovered to be a matter so idle as to require us to seek a strained construction of the statute.

In our opinion the act shows no purpose to dispense with discovery as an essential of a valid oil location or to break down in any wise the recognized distinction between the *pedis possessio* of a prospector doing work for the purpose of discovering oil and the more substantial right of possession of one who has made a discovery and performs annual development work to maintain his right to the mineral until patent is obtained. Hence the Supreme Court of California did not err in overruling the contention that by force the act discovery work upon the "Sampson claim" having a tendency to determine the oil-bearing character of the contiguous "Rawley-Schley claim" conferred upon plaintiff in error inchoate rights in the latter claim, of which it was not in possession and upon which it had made no discovery.

Judgment affirmed.

(249 U. S. 472)

SOUTHERN PAC. CO. v. STATE OF ARIZONA.

(Submitted March 13, 1919. Decided April 14, 1919.)

No. 238.

1. COMMERCE — 33 — POWER TO REGULATE "INTERSTATE COMMERCE" — TRANSPORTATION OF SHOW WITHIN STATE.

The transportation of a traveling show between two points within a state is not "interstate commerce," though the show had come into the state over the lines of another carrier and expected later to leave the state; no contract for transportation out of the state having as yet been entered into.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

2. COURTS — 396(3) — ERROR TO STATE COURT — FEDERAL QUESTION — HOW RAISED.

A federal question, not asserted in the answer filed in the state court, or even in the assignment of error in the Supreme Court, cannot be considered.

3. CARRIERS — 2 — CONSTITUTIONAL LAW — 242 — EQUAL PROTECTION OF THE LAWS — DECISION OF STATE COMMISSION — CONTRACT BY CARRIERS.

An order of the state Corporation Commission, requiring a railroad to transport a show at a special rate and providing that the company might enter into a contract for the transportation on terms similar to existing contracts with other shows, does not deprive the carrier of its right to contract as private carrier for the transportation of traveling shows, and thereby deprive it of equal protection of the laws.

In Error to the Supreme Court of the State of Arizona.

Suit by the State of Arizona against the Southern Pacific Company to recover a fine for violation of an order of the Arizona Corporation Commission. Judgment for plaintiff was affirmed by the state Supreme Court, and defendant brings error. Affirmed.

See same case below, 165 Pac. 303.

Messrs. C. W. Durbrow, Henley C. Booth, and William F. Herron, all of San Francisco, Cal., for plaintiff in error.

Mr. Wiley E. Jones, of Phoenix, Ariz., for the State of Arizona.

* Mr. Justice CLARKE, delivered the opinion of the Court.

An agent for Campbell's United Shows applied to the Southern Pacific Company to transport 18 cars, carrying a carnival show equipment, including employes and animals, from Tucson, via Maricopa, to Phoenix, Arizona.

In reply to this application the company

gave two reasons for refusing the request. The first of these was that the company had contracted for the transportation of another show, under an agreement not to carry a second one within 30 days, which had not expired; and the second, that the company was not a common carrier of shows and would not make the customary contract with Campbell, but would serve him only at certain published interstate rates, which it regarded as applicable. These were many times greater than had been charged for the same show and than had been the customary charge by the Southern Pacific and other companies for similar service.

Upon receiving this refusal, an application by the owner of the shows to the Arizona Corporation Commission for relief, resulted in an order to the Southern Pacific Company and the Arizona Eastern Railroad Company, operating a connecting line, to show cause why they should not publish, on one day's notice a special rate, designated in the order of the Commission, for the transportation of the shows between the points named. The reasonableness of the required rate is not contested, and the order permitted the Southern Pacific Company to make the special terms for transportation of the shows which had been customary with it in like cases.

* The company refused to obey the order and the Commission issued to it a second rule to show cause why it should not be punished for contempt for such disobedience. On this second rule a hearing was had, and the company was adjudged in contempt and fined \$1,500, which it refused to pay.

Thereupon the state of Arizona instituted this suit in a Superior Court of that state to recover the amount of the fine.

In its answer to the complaint of the state, the Southern Pacific Company alleged:

That the proposed movement of the shows was "interstate in character" because they were engaged in a tour, beginning at the city of El Paso, Texas, and designed to extend through the states of Arizona and New Mexico into the state of California, of which tour the movement from Tucson to Phoenix was a part; that in its necessary operation the order would require the company to accept a rate lower than its published interstate rate would be a direct burden upon interstate commerce; and that, for these reasons, the order for the transportation was in contravention of the provisions of article 1, section 8, of the Constitution of the United States, and the fine for contempt was unlawfully imposed and void.

The judgment of the superior court was in favor of the state, the company appealed to the Supreme Court of Arizona, which affirmed the judgment, and the case is here on writ of error.

[1] The only claim of error argued in this

court which is properly presented by the record is: Whether the persons and property which the Commission ordered the railroad company to carry were in interstate transportation when the order was made for the service between two stations in Arizona. If the shipment was then in interstate commerce the order was void, and if *it was not the order was valid and the judgment of the Supreme Court of Arizona must be affirmed.

The evidence which was before the courts and the Commission was as follows:

Early in February, 1914, an agent for the shows applied to the Southern Pacific Company for their transportation from El Paso, Texas, to various towns in Arizona where it was desired to exhibit, and ultimately to Cochise, Arizona, from which point another line would be taken into Tucson. Nothing came of this application and an arrangement was made for carriage to Tucson by another road. Before the shows arrived at Tucson the application out of which this suit arose was made. The agent for the shows testified that the tentative purpose of the management was to go from Tucson to Prescott, to Clarkdale, to Kingman, all in Arizona, and then to Needles, California, exhibiting in each town, but when testifying on March 23d, when his show was exhibiting in Tucson, he said that although he had made application to the Santa Fé Railroad Company for a contract for transportation beyond Phoenix, he had not at that time received a reply.

The agent for the Santa Fé Company at Phoenix testified that about March 20th an application was made to him for a rate and contract for the transportation of the shows over his line from Phoenix to Prescott, "possibly to Clarkdale and to Needles, California."

Two contracts with the Santa Fé Company were introduced in evidence, one dated April 3d, providing for the transportation of the shows from Phoenix to Prescott, to Kingman and to Needles, and the other dated April 16th, providing for transportation from Prescott direct to Bakersfield, California.

The shows were actually carried by the Southern Pacific Company on March 29th or 30th from Tucson to Phoenix, but at an interstate rate insisted upon in *defiance of the Commission's order. At Phoenix the transportation ended so far as the Southern Pacific Company was concerned, and the contract with the Santa Fé Company to carry the shows beyond that city was not concluded, as we have seen, until April 3d—in its modified form not until April 16th.

This statement of the case decides it. Whether a shipment was at a given time in interstate commerce is a question of fact, Railroad Commission of Ohio v. Worthington, 225 U. S. 101, 108, 32 Sup. Ct. 653, 56 L. Ed. 1004; and it is plainly impossible to say that the property and persons con-

stituting the shipment of the shows here involved were in progress of interstate transportation when the Arizona Commission entered its order on March 25th that the company should accept the intrastate shipment from Tucson to Phoenix. For at that time the shows were in the exclusive possession and control of the owner, exhibiting for six days at Tucson, and the application to the Southern Pacific Company, which was refused shows, incontrovertibly, that the transportation to Tucson had terminated, and that no other transportation had then been contracted for. The company itself proved that interstate transportation was not subsequently arranged for until April 3d certainly—and probably not until April 16th—and then was via another line from Phoenix, after two weeks for exhibition in that city.

The mere intention of the shipper to ultimately continue his tour beyond the state of Arizona did not convert the contemplated intrastate movement into one that was interstate. The case is ruled by *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; *Chicago, Milwaukee & St. Paul Ry. Co. v. State of Iowa*, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. Ed. 988; *Gulf, Colorado & Santa Fé R. R. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540; *Arkadelphia Milling Co. v. St. Louis Southwestern Railway Co.*, decided March 3d last, 249 U. S. 134, 39 Sup. Ct. 237, 63 L. Ed. 517.

It is further argued by the plaintiff in error that the *order of the State Commission deprived it of its right to make or refuse to make a contract as a private carrier for the transportation of traveling shows, and thereby deprived it of the equal protection of the laws and of its property without due process of law.

[2.3] It would be enough to say of this contention that no such claim was asserted in the answer of the company in the state court, or even in the assignments of error in this court, and that, therefore, it cannot be considered here. But this omission is not an oversight, for the record shows that it had been in prior practice of the plaintiff in error to transport such shows on application under special contract—a short time before it had transported another show and the year before it had accepted these same shows for transportation—and that the order of the Commission was:

"It is understood * * * that the * * * company may enter into a contract covering this transportation, the terms of which shall not be in substantial variance with the contract now existing between the Arizona & Eastern Railroad Company and the Sells-Floto Shows Company, with respect to details, as to the responsibility, service, conditions and equipment"

—which contract was on file with the Commission, and was dated March 4, 1914. This

form of contract was one also used by the Southern Pacific Company.

Thus this second claim, obviously an afterthought, is so clearly without merit that it cannot be considered and the judgment of the Supreme Court of Arizona is

Affirmed.

(249 U. S. 375)

MATTERS v. RYAN.

(Submitted Jan. 16, 1919. Decided April 14, 1919.)

No. 141.

1. HABEAS CORPUS §45(1) — FEDERAL COURTS—JURISDICTION IN HABEAS CORPUS —FEDERAL QUESTION.

The controlling question on the face of the petition for habeas corpus being maternity, and consequent right of custody, of a child, averment that the case is governed by the immigration laws of the United States, the only basis therefor being an allegation that defendant, pretending to be the child's mother, brought her from Canada without complying with the administrative requirements of the immigration laws, does not make the case involve a federal question adequate to sustain the jurisdiction of a federal court, especially in the absence of power of petitioner to champion the enforcement of the immigration laws.

2. HABEAS CORPUS §45(1) — FEDERAL COURTS—JURISDICTION IN HABEAS CORPUS —AMOUNT IN CONTROVERSY.

The question whether a federal court can take jurisdiction in habeas corpus on averments of diversity of citizenship and pecuniary interest, without assertion of a federal right, does not arise, where the suit is brought exclusively on the assumption of necessity of a federal question to give jurisdiction, and there is no averment of jurisdictional amount.

Appeal from the District Court of the United States for the Northern District of Illinois.

Habeas corpus by Margaret Ryan against Anna D. Matters. Decree for petitioner, and defendant appeals. Reversed and remanded, with directions.

* Messrs. Horace Kent Tenney, Roger Sherman, and Harry A. Parkin, all of Chicago, Ill., for appellant.

Mr. Chief Justice WHITE delivered the opinion of the Court.

On the 20th of May, 1916, Margaret Ryan, the appellee, alleging herself to be a subject of the King of Great Britain residing in Ottawa, Canada, applied for a writ of habeas corpus to obtain the possession of her alleged minor child, Irean, by taking her from the asserted illegal custody of An-

na D. Matters, the appellant, alleged to be a resident of the state of Illinois.

The petition for habeas corpus charged that the said child was born to petitioner ten months before in a hospital in Ottawa, but shortly after the birth of the child she was kidnapped by the respondent, who secreted her until August, when she brought the child by railroad journey to Chicago from Ottawa and there illegally detained her. It was charged that the cause of action arose under the law of the United States, in that the immigration laws of the United States forbade the bringing of an alien child under 16 years of age from Canada into the United States without being accompanied by its father or mother, in the absence of permission by the immigration authorities of the United States. An order was entered allowing the prosecution of the habeas corpus proceedings in forma pauperis, and the writ issued.

The respondent denied the averments of possession and kidnapping. She alleged that she had a child of her own about 10 months of age, and that if such child was the one referred to in the petition for habeas corpus, the *petitioner had no right to the custody of the same. The existence of any right in the petitioner to champion the enforcement of the immigration laws of the United States was denied, and the jurisdiction of the court to entertain the controversy was expressly challenged.

On the return, after hearing, jurisdiction was maintained, the return was held insufficient, and the petitioner was decreed to be entitled to the custody of the child and the appellant was commanded to deliver her. This direct appeal on the question of jurisdiction alone was then taken.

[1] It is settled that "the jurisdiction of courts of the United States to issue writs of habeas corpus is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations." *Carfer v. Caldwell*, 200 U. S. 293, 296, 26 Sup. Ct. 264, 265, 50 L. Ed. 488; *In re Burrus*, 136 U. S. 586, 591, 10 Sup. Ct. 850, 34 L. Ed. 1500; *Andrews v. Swartz*, 156 U. S. 272, 275, 15 Sup. Ct. 359, 39 L. Ed. 422; *Storti v. Massachusetts*, 183 U. S. 138, 142, 22 Sup. Ct. 72, 46 L. Ed. 120. It is obvious that on the face of the petition the sole question at issue was the maternity and custody of the child, and as that question was in its nature local and nonfederal there was nothing to sustain the jurisdiction unless the averment that the case was governed by the immigration laws of the United States had that effect. But when it is observed that the only basis for that assertion rested upon the allegation that the defendant, pre-

tending to be the mother of the infant child, had brought her from Canada into the United States without complying with the administrative requirements of the immigration laws, we are of opinion that the case made involved no federal question adequate to sustain the jurisdiction, because of the unsubstantial and frivolous character of the contention made in that respect.

We are constrained to this conclusion since we are unable to perceive the possible basis upon which it can be *assumed that the local question of maternity, and consequent right to custody, which dominated and controlled the whole issue could be transformed and made federal in character by the assertion concerning the immigration laws. And this becomes all the more cogent when the absence of power on the part of the petitioner to champion the enforcement of the immigration laws is borne in mind.

[2] Whether a case might arise where a court of the United States could take jurisdiction of a petition for habeas corpus upon averment of diversity of citizenship and pecuniary interest, without the assertion of a federal right, does not here arise (a) because the suit was brought exclusively under the assumption that it was governed by the law of the United States which requires a federal question to give jurisdiction, and (b) because, in any event, there is here no averment of jurisdictional amount.

It follows that the decree below must be and it is

Reversed and the case remanded with directions to dismiss the writ of habeas corpus.

(249 U. S. 454)

BARBOUR v. STATE OF GEORGIA.

(Submitted Jan. 24, 1919. Decided April 14, 1919.)

No. 191.

1. CONSTITUTIONAL LAW — 274—INTOXICATING LIQUORS — 15—DUE PROCESS OF LAW — POSSESSION OF INTOXICATING LIQUORS.

The application of Laws Ga. (Ex. Sess.) 1915, pt. 1, tit. 2, §§ 16 and 30, making it illegal to have in possession more than one gallon of vinous liquor, to the possession of liquor acquired after the law was enacted, but before it became effective, does not render that act invalid as depriving of property without due process of law.

2. COURTS — 396(3)—ERROR TO STATE COURT — FEDERAL QUESTION—HOW RAISED.

A federal question, first raised by defendant in an amended motion for new trial, which could not be considered by the state court under the state practice, does not present the question to the Supreme Court on writ of error.

In Error to the Supreme Court of the State of Georgia.

Andrew D. Barbour was convicted of violation of the liquor law of Georgia, and judgment was affirmed by the Supreme Court of that state (146 Ga. 667, 92 S. E. 70), and to review the decision defendant brings error. Affirmed.

Messrs. A. A. Lawrence and W. W. Osborne, both of Savannah, Ga., for plaintiff in error.

Mr. Clifford Walker, of Monroe, Ga., for the State of Georgia.

* Mr. Justice BRANDEIS delivered the opinion of the Court.

The Georgia prohibitory liquor law was approved November 18, 1915, but, by its terms, did not become effective until May 1, 1916. Under it Barbour was convicted for having in his possession on June 10, 1916, more than one gallon of vinous liquor. Georgia Laws, Extraordinary Session 1915, part 1, title 2, No. 4, §§ 16 and 30, pp. 90, 99, 105. He asserted that the liquor had been acquired by him before May 1st, and contended that the statute, if construed to apply to liquor so acquired, was void under the Fourteenth Amendment. The Supreme Court of the state overruled this contention and affirmed the sentence. 146 Ga. 667, 92 S. E. 70. The case comes here on writ of error under section 237 of the Judicial Code.

That a state which has enacted a prohibitory law may forbid the mere possession of liquor within its borders was decided in *Crane v. Campbell*, 245 U. S. 304, 38 Sup. Ct. 98, 62 L. Ed. 304; but it did not appear there when the liquor had been acquired. Whether the prohibition of sale may be constitutionally applied to liquor acquired before the enactment of the statute was raised in *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. Ed. 929, and *Beer Co. v. Massachusetts*, 97 U. S. 25, 32, 33, 24 L. Ed. 989, but was not decided. The question presented here, however, is simpler. For the exact date when Barbour acquired the liquor is not shown; and we must assume, as the Supreme Court of Georgia did, that it was acquired during the period of five months and twelve days between the enactment of the law and the date when it became effective. Does the Fourteenth Amendment, by its guaranty to property, prevent a state from protecting its citizens from liquor so acquired?

[1] A state, having the power to forbid the manufacture, sale, and possession of liquor within its borders, may, if it concludes to exercise the power, obviously postpone the date when the prohibition shall become effective, in order that those engaged in the business and others may adjust themselves to the new conditions. Whoever acquires, after the en-

*460 actment of the statute, property thus declared noxious, takes it with full notice of its infirmity and that *after a day certain its possession will, by mere lapse of time, become a crime. It is well settled that the federal Constitution does not enable one to stay the exercise of a state's police power by entering into a contract under such circumstances. *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 615, 23 Sup. Ct. 206, 47 L. Ed. 328. Compare *Calder v. Michigan*, 218 U. S. 591, 599, 31 Sup. Ct. 122, 54 L. Ed. 1163. Nor can he do so by acquiring property.

[2] The defendant raised, in his amended motion for a new trial, the further objection that the law was unconstitutional as applied to him, because the liquor had been acquired before the statute was enacted; but the trial judge denied the motion and declined to approve any of the grounds on which it was based. In accordance with the state practice its Supreme Court therefore refused to consider the point. *Dickens v. State*, 137 Ga. 523, 73 S. E. 826; *Harris v. State*, 120 Ga. 196, 197, 47 S. E. 573. Consequently the question is not before us (*Louisville & Nashville Railroad Co. v. Woodford*, 234 U. S. 46, 51, 34 Sup. Ct. 739, 58 L. Ed. 1202), and on it we express no opinion.

The judgment of the Supreme Court of Georgia is
Affirmed.

(249 U. S. 465)

Ex parte WAGNER et al.

(Argued March 17, 1919. Decided April 14, 1919.)

No. 29, Original.

1. MANDAMUS ⇐16(1) — STAY OF PROCEEDINGS—PENDENCY OF CASE.

It is a conclusive answer to petition for mandamus to a court to enter stay of proceedings in a case that the case was not, when the court refused stay, and is not now, pending in that court.

2. MANDAMUS ⇐45—STAY OF INTERLOCUTORY PROCEEDING.

The Supreme Court will not issue mandamus to a District Court to stay accounting in a case remanded from Circuit Court of Appeals till determination by the Supreme Court of a case pending there from the Circuit Court of Appeals for another circuit, on the claim of the same issue being involved and being decided differently in the two circuits, as mandamus is to be resorted to for securing judicial action, not for determining in advance what that action will be, and not for controlling minor orders, though the result of the litigation may be such that interlocutory proceedings taken may be valueless, even though the cost of them cannot be recovered from the opposite party, or though

the order sought to be stayed cannot be reversed on appeal or error.

Petition by F. A. Wagner (trading as the American Mechanical Toy Company), the Strobel & Wilken Company, and the American Mechanical Toy Company, for mandamus to two federal courts. Rule discharged, and petition dismissed.

Messrs. H. A. Toulmin and H. A. Toulmin, Jr., both of Dayton, Ohio, for petitioners.

Mr. Reeve Lewis, of Washington, D. C., for respondents.

Mr. Justice CLARKE delivered the opinion of the Court.

The petitioners pray that a writ of mandamus shall issue out of this court requiring the Circuit Court of Ap*peals for the Sixth Circuit and the judges thereof and the United States District Court for the Southern District of Ohio, Western Division, and the judge thereof, to stay further proceedings in a suit pending in the District Court, and the execution of a judgment against petitioners rendered therein by that court (*Meccano v. Wagner*, 234 Fed. 912) and affirmed by the Circuit Court of Appeals (*Wagner v. Meccano, Limited*, 246 Fed. 603, 158 C. C. A. 573). The answers of the courts and judges to the usual rule to show cause are before us.

The facts upon which the prayer for this extraordinary remedy is based are as follows: The Meccano, Limited, a corporation, brought a suit, which we shall designate as the Ohio case, in the District Court for the Southern District of Ohio against F. A. Wagner, trading as the American Mechanical Toy Company, and the Strobel & Wilken Company, a corporation, charging: (1) The infringement of letters patent, which the plaintiff claimed to own, covering certain parts of a model builder or mechanical toy, known by the trade-name of "Meccano"; (2) the infringement of two copyrights which the plaintiff claimed to own upon the manual or book of instructions, which was sold with the toy and which was essential to the use of it; and (3) unfair competition. An accounting and permanent injunction were prayed for. The defendants denied the allegations of the bill and asserted a counterclaim.

Upon the trial on the merits the District Court found for the plaintiff on all of the issues, dismissed the counterclaim of defendants, and, granting an injunction, ordered an accounting.

On appeal the Circuit Court of Appeals for the Sixth Circuit affirmed the decree of the District Court except as to the infringement of the patent, which was held to be invalid for want of invention, and remanded

the case for a decree not inconsistent with its opinion.

Pursuant to this affirmance the District Court entered a decree, and appointed a master to take an account of *gains, profits, and damages and to report his conclusions to that court.

Thus was the Ohio case ripe for an accounting, which had been ordered, when the petition which we are considering was filed.

After the decision by the District Court in the Ohio case, but before it was affirmed by the Circuit Court of Appeals, the Meccano, Limited, instituted a suit which we shall designate as the New York case, in the United States District Court for the Southern District of New York against John Wanamaker, a corporation, charging that the defendant, a customer of the defendants in the Ohio case and a retail dealer engaged in selling the toy manufactured by Wagner, was guilty of the same violations of complainant's rights as were alleged in the Ohio case. Upon "affidavits and exhibits" a motion for an injunction pendente lite was filed, which, upon hearing, was granted. From this order allowing a temporary injunction an appeal was taken to the Circuit Court of Appeals for the Second Circuit, and after the appeal was argued, but before it was decided, the decree of the District Court in the Ohio case was affirmed by the Circuit Court of Appeals for the Sixth Circuit. Thereupon the Meccano Company filed a "motion for a decision on the merits" in the New York case, then pending on appeal in the Circuit Court of Appeals for the Second Circuit, and in support of this motion were filed copies of the opinion of the Circuit Court of Appeals for the Sixth Circuit and of the decree entered by the District Court pursuant thereto.

This motion for a judgment on the merits was bottomed on the claim that the two cases involved the same issues, that Wagner had assumed the defense in the New York case, and that the decree rendered by the Circuit Court of Appeals for the Sixth Circuit constituted an estoppel by judgment when pleaded in the case in the Second circuit, but the motion was denied.

* Later on the appeal from the order granting a preliminary injunction, which was argued before the motion for judgment on the merits was filed, was decided, and the District Court was reversed, the Circuit Court of Appeals for the Second Circuit holding with the Circuit Court of Appeals for the Sixth Circuit that the patent declared on was invalid for want of invention, but the court also held that a very clear case was necessary to justify a preliminary injunction for a claimed infringement of copyright or for unfair competition, the only remaining claims in the bill, and that the

affidavits and exhibits before the District Court were not sufficient to warrant its conclusion. For these reasons the order of the District Court allowing a temporary injunction was reversed.

Following this decision by the Circuit Court of Appeals for the Second Circuit the Meccano, Limited, filed a petition in this court for a writ of certiorari, giving as the reasons relied upon to secure the writ that there was a conflict of opinion between the Courts of Appeals of the Second and Sixth Circuits upon the questions involved in the case, and that the cause should be brought before this court for review to determine:

(1) The legal effect to be given to a prior decree in the Sixth circuit against the manufacturer as against a customer in the Second circuit.

(2) Whether the preliminary injunction could be legally denied by the Circuit Court of Appeals for the Second Circuit after the prior adjudication of the same issues by the Circuit Court of Appeals for the Sixth Circuit.

(3) Whether or not the prior decree of the Circuit Court of Appeals for the Sixth Circuit entitled the petitioner to a decision in its favor on the "motion for a decision on the merits" filed in the later case in the Second circuit.

(4) Whether or not an unsuccessful defendant in a suit in one circuit, in which his product has been adjudged *unlawful, is to be permitted to relitigate the same issues with respect to the same product by assuming the defense of a subsequent suit in another circuit against one of his customers.

Upon this petition a writ of certiorari was allowed and the case was brought to this court for review.

Promptly upon the granting of the writ of certiorari by this court the petitioners herein moved the Circuit Court of Appeals for the Sixth Circuit to stay the accounting proceeding in the Ohio case pending a decision by this court in the New York case.

The Circuit Court of Appeals for the Sixth Circuit denied this motion, and, in the answer of that court and of the judges thereof to the rule of this court to show cause, they give as their reason for so deciding that the court was of the opinion that, as the case had theretofore been remanded to the District Court, it had no jurisdiction to order such a stay or to make an order directing the District Judge to do so, certainly not until a like application had been made to that court and had been refused. In its journal entry the court sufficiently advised the unsuccessful parties of the reason for its action. It reads as follows:

"That the motion * * * to stay all proceedings herein * * * presents a question which at this stage of the case, No. 2977, must be determined by the court below."

And the court and judges add that no application had been made in any way to review the action taken by the District Judge on the motion to stay.

[1] Obviously it is a conclusive answer to the prayer of the petitioners for a writ of mandamus to the Circuit Court of Appeals and to the judges thereof directing the entry of a stay of proceedings that the case was not, when the stay was refused, and is not now, pending in that court.

* After this overruling of their motion for a stay by the Circuit Court of Appeals for the Sixth Circuit, the petitioners herein made a similar application to the District Court for the Southern District of Ohio for a stay of proceedings until the New York case should be decided by this court, which motion was also denied.

The District Court and the judge thereof in the return to the rule issued herein give as reasons for such denial:

(1) That the defendants had permitted the time to expire in which to apply to this court for a review of the decree of the Circuit Court of Appeals for the Sixth Circuit on certiorari without making any application for such review, and therefore the court concluded that the rights of the parties as to unfair competition and copyright infringement, which remained after the holding that the patent was invalid, had become settled.

(2) That the case before the Circuit Court of Appeals for the Second Circuit was an appeal from an order granting a preliminary injunction, and that to the court, not having the record in that suit before it, the New York case seemed to involve only the question as to the effect of the decree of the Circuit Court of Appeals for the Sixth Circuit upon the case in the Second circuit, and could not, therefore, be determinative of the rights of the parties in the Ohio case.

(3) That there did not seem to the court to be any conflict between the decisions by the Sixth and Second Circuit Courts of Appeals because the facts of the two cases, as the court was advised, were so different that the decisions could not be the same upon their merits.

(4) That from the statement of counsel for Wagner that a fire had occurred on the floor of the building in which the Wagner outfits, manuals, etc., and books had been stored, resulting in great injury to them, the court concluded it to be the part of prudence that the marshal should take possession of such property and *books as soon as possible, and that there seemed to it no good reason for further delay in the accounting.

[2] This answer of the District Court and judge is also clearly sufficient and conclusive. It shows that the court was called upon to judicially determine the scope of the decision of the Circuit Court of Appeals for the Second Circuit, reversing the action of the District Court granting a temporary injunction, and whether or not that decision was in conflict with the decision by the Circuit Court of Appeals for the Sixth Circuit; to forecast, as best it might, what the scope and effect of the decision of this court in the New York case would be upon the rights of the parties as determined in the Ohio case, and, having regard to the rights of the plaintiff and the conduct of the defendants, whether, after four years of obviously very strenuous litigation, the accounting should be further delayed by the prospect that the decision of this court might render the results of it valueless.

Mandamus is an extraordinary remedy, to be resorted to for the purpose of securing judicial action, not for determining in advance what that action shall be. In *re Rice*, 155 U. S. 396, 15 Sup. Ct. 149, 39 L. Ed. 198. It may not be resorted to, as the petitioners seek to resort to it here, for the purpose of controlling minor orders made in the conduct of judicial proceedings, and the fact that the result of litigation may possibly be such that interlocutory proceedings taken may not prove of value is not a sufficient reason for calling the writ into use for the purpose of forbidding such proceedings, even though the cost of them cannot be recovered from the opposing party or even though the order cannot be reversed on error or appeal. *Ex parte Newman*, 14 Wall. 152, 165, 168, 20 L. Ed. 877. This from *American Construction Co. v. Jacksonville, Tampa & Key West Railway Co.*, 148 U. S. 372, 379, 13 Sup. Ct. 758, 761 (37 L. Ed. 486), is sharply pertinent to the application before us:

*"Least of all can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause; for, as observed by Chief Justice Marshall, to do this 'would be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for re-examination'; would 'introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it'; would allow an appeal or writ of error upon the same question to be 'repeated, to the great oppression of the parties'; and 'would subvert our whole system of jurisprudence.'"

The petitioners have misconceived the scope and applicability of the remedy of mandamus, and the rule is

Discharged and the petition dismissed.

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(249 U. S. 339)

STANDARD OIL CO. v. GRAVES.

(Argued Jan. 23, 1919. Decided April 14, 1919.)

No. 177.

1. COURTS ⇨366(1)—FEDERAL COURTS—DECISIONS OF STATE COURT—CONSTRUCTION OF STATUTE.

While the national Supreme Court follows the decision of the state's highest court as to meaning of a state Oil Inspection Law, the name given the statute is not conclusive, but it must be judged by its necessary effect, and, if that is to violate the national Constitution, the law must be declared void.

2. COMMERCE ⇨51—STATE OIL INSPECTION LAW—BURDEN OF INTERSTATE COMMERCE.

The Oil Inspection Law of Washington is violative of the commerce clause of the federal Constitution as imposing a direct burden on interstate commerce, in case of oils brought in from another state; the inspection fees which must be paid before the importer can sell being, as shown by the revenue yielded, grossly in excess of cost of inspection.

In Error to the Supreme Court of the State of Washington.

Action by the Standard Oil Company against H. T. Graves, individually and as Commissioner of Agriculture of the State of Washington. Judgment for plaintiff was reversed by the Supreme Court of Washington (94 Wash. 291, 162 Pac. 558), and plaintiff brings error. Reversed.

Messrs. Oscar Sutro, of San Francisco, Cal., Richard A. Ballinger, of Seattle, Wash., E. S. Pillsbury, of San Francisco, Cal., Alfred Battle and Bruce C. Shorts, both of Seattle, Wash., and F. D. Madison and Alfred Sutro, both of San Francisco, Cal., for plaintiff in error.

Messrs. L. L. Thompson, W. V. Tanner, and Glenn J. Fairbrook, all of Olympia, Wash., for defendant in error.

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*Mr. Justice DAY delivered the opinion of the Court.

Plaintiff in error filed a complaint and an amended complaint in the superior court of Thurston county, Washington, to enjoin the collection of fees prescribed by the Oil Inspection Act of that state upon the ground that the statute was in contravention of the Constitution of the United States. The superior court held the law to be unconstitutional. Upon appeal the Supreme Court of Washington reversed the judgment. 94 Wash. 291, 162 Pac. 558.

The statute is the "State Oil Inspection Law" (Laws 1907, p. 412) of the state of Washington. Its provisions are thus summarized in the opinion of the Supreme Court of the state:

"The inspection law referred to in the complaint was first passed during the legislative session for the year 1905 (Laws 1905, p. 310). That act was amended in 1907, and will be found in chapter 192 of the Laws of 1907, p. 413 (Rem. Code, § 6051 et seq.). Section 3 (Id., § 6052) of this act provides that all gasoline, benzine, distillate or *other volatile product of petroleum intended for use or consumption in this state for illuminating, manufacturing, domestic or power purposes, 'before being sold or offered for sale,' shall be inspected by the state oil inspector or his deputies. When the inspection is made, a certificate is to be issued, and the barrel or receptacle which contains the oil must be labeled or branded. Section 4 (Id., § 6053) of the act contains a schedule of the fees which shall be paid for the inspection. Section 6 (Id., § 6055) provides that if any person or persons, whether manufacturer, vender or dealer, or as agent or representative of any manufacturer, vender or dealer, 'shall sell or attempt to sell' to any person, firm or corporation in this state, any illuminating oil, gasoline, benzine, distillate or any volatile product of petroleum, intended for use or consumption within this state, that has not been inspected and branded according to the provisions of the act, 'shall be guilty of a misdemeanor.' By the Laws of 1913, chapter 60, p. 196 (Rem. Code, § 3000—1 et seq.), it was made the duty of the commissioner of agriculture to exercise all the powers and perform all the duties which, by the law of 1907, were vested in, and required to be performed by, the state oil inspector."

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The case was heard upon demurrer to the amended complaint.

Among other things, the amended complaint set out:

"Plaintiff is engaged in the state of California in the business of producing and buying crude petroleum oil, and of manufacturing and refining the same, and of shipping products of such manufacture, to wit, illuminating oils, gasoline, distillate and other volatile products of petroleum from its refineries in California into the state of Washington, where the same are sold by this plaintiff in large quantities for use and consumption in the state of Washington, for illuminating, manufacturing, domestic and power purposes. None of the products hereinbefore *referred to are manufactured by plaintiff in the state of Washington, but all of said products are shipped into said state from the state of California."

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"The plaintiff maintains in the state of Washington wharves and docks, tanks, warehouses, buildings, machinery, horses and wagons, and other equipment for receiving, shipping, handling, selling and otherwise distributing said products shipped as aforesaid from the state of California into the state of Washington."

The fees collected under the inspection acts are set out in the amended bill of complaint:

The total receipts from the fees collected under said statute, chapter 192 of the Laws of 1907, and chapter 161, Laws of 1905, of the state of Washington, for the inspection therein provided for of said products mentioned in said

laws intended for sale or consumption in this state, and the total disbursements in connection with the collection thereof, and in connection with the administration of said laws, and the net revenue from such receipts during the following years have respectively been the following:

Date.	Receipts.	Disbursements.	Revenue.
June 30 to Dec. 31, 1905.	\$5,693.19	\$4,947.70	\$745.49
Jan. 1 to Dec. 31, 1906..	\$9,539.86	\$6,610.80	\$2,929.06
Jan. 1 to Dec. 31, 1907..	\$19,084.29	\$7,551.70	\$11,532.59
Jan. 1 to Dec. 31, 1908..	\$23,493.93	\$8,684.87	\$14,809.06
Jan. 1 to Dec. 31, 1909..	\$24,799.67	\$8,802.90	\$15,996.77
Jan. 1 to Dec. 31, 1910..	\$35,174.64	\$8,469.00	\$26,705.64
Jan. 1 to Dec. 31, 1911..	\$38,344.42	\$8,762.85	\$29,581.57
Jan. 1 to Dec. 31, 1912..	\$48,489.73	\$8,860.80	\$39,628.93
Jan. 1 to Dec. 31, 1913..	\$51,816.91	\$8,859.00	\$42,957.91
Jan. 1 to Dec. 31, 1914..	\$79,339.66	\$8,553.75	\$70,785.91
	\$335,776.30	\$80,103.37	\$255,672.93

It thus appears that the expense of administration of the statutes from 1905 to 1914 was \$80,103.37. The total receipts for the same time \$335,776.30, a difference of \$255,672.93.

It is contended by the plaintiff in error that this inspection law violates the commerce clause, article 1, § 8, of the Constitution of the United States, in that it directly burdens such commerce by imposing inspection taxes far in excess of the cost of inspection. The Supreme Court of the state held that the tax was not upon property, but could be sustained as an excise or occupation tax upon the business of selling oil within the state. The reason given by the court for holding that the tax could not be upheld as a property tax rested upon provisions of the state Constitution.

[1] While this court follows the decisions of the highest court of a state, as to the meaning of statutes in cases of this character, the name given to the statute is not conclusive. It must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void. *Minnesota v. Barber*, 136 U. S. 313, 319, 10 Sup. Ct. 862, 34 L. Ed. 455; *Crew Levick v. Pennsylvania*, 245 U. S. 292, 294, 38 Sup. Ct. 126, 62 L. Ed. 295, and cases cited.

[2] That the state may pass proper inspection laws for oils brought into its borders in interstate commerce, there can be no question. But, taking the allegations of the complaint to be true, as we must for present purposes, the cost of the inspection was greatly less than the tax imposed. The general principle that a state may not impose burdens upon interstate commerce is so well settled, and has been so often declared in the opinions of this court, that a repetition of the reasons which have induced these decisions would be superfluous. In this case the amended complaint alleges that the oils were shipped into Washington from California. They are brought there for sale. This right of sale as to such importations is protected to the importer by the federal Consti-

tution, certainly while the same are in the original receptacles or containers in which they are brought into this state. Under this law the oils cannot be lawfully sold at all until the importer has paid the inspection fees provided in the statute, after inspection. That inspection fees, so grossly in excess of the cost of inspection imposed upon articles brought into the state in interstate commerce are unconstitutional, was held in *Foote v. Maryland*, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. 698. In that case the plaintiffs were engaged in the business of packing oysters in the city of Baltimore, and brought large quantities in from the state of Maryland and also from the waters of the states of Virginia and New Jersey. These oysters were inspected in Baltimore, where they were unloaded from vessels, by officials appointed under the provisions of the Maryland act which fixed an inspection fee of one cent per bushel to be paid one-half by the seller and one-half by the buyer. The case was brought to this court upon the ground that the inspection fee was excessive, and a burden upon interstate commerce, and levied an unlawful tax upon goods shipped into Maryland from other states. It was held that in view of the excessive nature of the inspection fees the requirement of the payment thereof necessarily imposed a burden upon interstate commerce in excess of the expenses of inspection, and that the act was therefore void. The subject was fully considered in an opinion by the late Mr. Justice Lamar, speaking for this court, and after recognizing the power of the state to impose reasonable inspection fees, and that such legislation will not be declared void unless the fees are obviously and largely beyond what is needed for the cost of inspection, he said:

"If, therefore, it is shown that the fees are disproportionate to the service rendered, or that they include the cost of something beyond legitimate inspection to determine quality and condition, the tax must be declared void because such costs, by necessary operation, obstruct the freedom of commerce among the states. *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 38 [27 Sup. Ct. 1, 51 L. Ed. 78]; *Brimmer v. Rebman*, 138 U. S. 78, 83 [11 Sup. Ct. 213, 35 L. Ed. 861]; *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64 [24 Sup. Ct. 208, 48 L. Ed. 342]; *Patapsco Co. v. North Carolina*, 171 U. S. 345, 354 [18 Sup. Ct. 862, 43 L. Ed. 191]; *Red 'C' Oil Co. v. North Carolina*, 222 U. S. 380, 394 [32 Sup. Ct. 152, 56 L. Ed. 240]; *Savage v. Jones*, 225 U. S. 501, 504 [32 Sup. Ct. 715, 56 L. Ed. 1182]."

The principles stated in *Foote v. Maryland* were recognized in *Pure Oil Co. v. Minnesota*, decided by this court at this term, 248 U. S. 158, 39 Sup. Ct. 35, 63 L. Ed. 180. The inspection fees there in question were held not excessive, and we said (248 U. S. page 162, 39 Sup. Ct. page 37, 63 L. Ed. 180):

"But, if such inspection charge should be obviously and largely in excess of the cost of inspection, the act will be declared void, because constituting, in its operation, an obstruction to and burden upon that commerce among the states the exclusive regulation of which is committed to Congress by the Constitution."

It is said that the Foote Case did not overrule the previous case of *General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754, and that the principles of that case should be controlling here. In the *Crain* Case this court sustained a tax upon oil which had been removed from the tank cars in which it was transported into Tennessee, and which, although destined for points beyond Tennessee, was then in storage in that state. The distinction between that case and the one now under consideration is obvious. *Bacon v. Illinois*, 227 U. S. 504, 33 Sup. Ct. 299, 57 L. Ed. 615, is also relied upon. In that case this court sustained a property tax upon grain brought from another state, but taken from the carrier and held by the owner in Illinois with full power of disposition in that state, and although intended to be ultimately forwarded to a point beyond the state; the property tax, after a review of the previous decisions of this court, was sustained.

*397 We reach the conclusion that the statute imposing these excessive inspection fees, in the manner stated, upon all sales of oils brought into the state in interstate *commerce necessarily imposes a direct burden upon such commerce, and is therefore violative of the commerce clause of the federal Constitution. We may remark that the conclusion at which we have arrived has been reached by the Supreme Courts of North Dakota and Ohio. *Bartels Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576; *Castle v. Mason*, 91 Ohio St. 296, 110 N. E. 463, Ann. Cas. 1917A, 164.

It follows that the judgment of the Supreme Court of Washington must be Reversed.

(249 U. S. 487)

MOORE v. UNITED STATES.

(Argued March 21, 1919. Decided April 14, 1919.)

No. 278.

UNITED STATES ☞97—CLAIM AGAINST—USE OF PATENT—FEDERAL EMPLOYÉ—DISCOVERY "DURING TIME OF EMPLOYMENT OR SERVICE."

The exception by Act June 25, 1910 (Comp. St. § 9465), from right to recover from United States for use by it without license of patented invention, of a case where the device was discovered or invented by a government employé "during the time of his employment or service,"

applies where he completed his invention during such time, though his work thereon was outside hours of duty.

Appeal from the Court of Claims.

Suit by David F. Moore against the United States. From judgment for defendant (52 Ct. Cl. 532), plaintiff appeals. Affirmed.

*Messrs. Samuel Herrick and Rufus S. Day, both of Washington, D. C., for appellant. *493

Mr. Assistant Attorney General Frierson, for the United States.

Mr. Justice Clarke delivered the opinion of the Court.

The appellant sued the United States in the Court of Claims to recover compensation for the use, without license or lawful right, of a tool, which was covered by United States letters patent, of which he was the owner. In his amended petition he alleged that during the years 1903 to 1914, inclusive, he invented the tool in question, which was adapted to be used "as a reefing iron on the decks, sides and bottoms of vessels where wood caulking is done"; that he entered the employment of the government as a wood caulker in a navy yard on March 26, 1913, and continued therein until July 16, 1914; "that during the month of May, 1914, your petitioner, after expending a great deal of time, labor and study, completed his invention" of the tool afterwards patented; and that during the hours of his employment by the government he did not do any work upon his invention, but that such work as was performed upon it subsequent to March 26, 1913, when he entered the government employ, was performed at his home during his absence from duty in the navy yard. For the extensive use which the government had made of the tool he prayed for compensation, which had been demanded and refused.

The appellant can maintain such a suit, if at all, only by warrant of the act of Congress, approved June 25, 1910 (36 Stat. 851, c. 423 [Comp. St. § 9465]). This act provides that whenever any invention described in and covered by a patent from the United States shall hereafter be used by the United States without the license of the owner thereof or lawful *right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims. *500

Of the three provisos in the act the third one is applicable to this case and reads:

"And provided further, (3) that the benefits of this act shall not inure to any patentee, who, when he makes such claim is in the employment or service of the government of the United States; or the assignee of any such patentee; nor shall this act apply to any device discovered or invented by such employé during the time of his employment or service."

The appellant was not actually in the employ of the government when he made his claim by bringing suit, but the Court of Claims dismissed his petition for want of jurisdiction on the ground that it showed on its face that the device was discovered during the time he was in the employment or service of the government, and that therefore the case fell within the third proviso of the act.

This decision is so obviously right that discussion of it would be superfluous. The act of Congress must be read "according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation." *United States v. Temple*, 105 U. S. 97, 99 (26 L. Ed. 967). No matter what the appellant may have done prior to May, 1914, it was in that month, he avers, that he completed his invention, and during the whole of that month he was in the employment or service of the government. To give the effect contended for to the allegation that the appellant confined his work on his invention to the hours when he was not actually on duty, but while he was in the government employ, would be to amend the statute, not to construe or interpret it.

The judgment of the Court of Claims is Affirmed.

(249 U. S. 373)

UNITED STATES v. GUDGER.

(Argued Dec. 11, 1918. Decided April 14, 1919.)

No. 408.

INTOXICATING LIQUORS —TRANSPORTATION "INTO" STATE—REED AMENDMENT.

The Reed Amendment (provision of Act March 3, 1917, § 5 [Comp. St. 1918, § 8739a]), prohibiting transportation of liquor in interstate commerce "into" any state which prohibits the manufacture, etc., does not include the movement through such state into another.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Into.]

In Error to the District Court of the United States for the Western District of Virginia.

Indictment against Homer Gudger for violation of the Reed Amendment was quashed, and the United States brings error. Affirmed.

Mr. Assistant Attorney General Frierson, for the United States.

Mr. Joseph S. Graydon, of Cincinnati, Ohio, for defendant in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

Virginia being a state which prohibits the manufacture or sale therein of intoxicating liquors for beverage purposes, the defendant in error was indicted for having transported into that state an enumerated quantity of whisky in violation of the provision in section 5 of the Post Office Appropriation Act of March 3, 1917, known as the Reed Amendment. 39 Stat. 1058, 1069, c. 162 (Comp. St. 1918, § 8739a). For the purposes of a motion to quash, the United States attorney furnished a bill of particulars of the evidence which the government intended to offer to sustain the indictment, and the defendant also made admissions which were recited in such bill. The motion to quash, as elucidated *by the bill of particulars, was granted on the ground that the statute, when rightly construed, did not embrace the acts charged. The United States prosecutes error.

The case stated by the court below is this:

"That the defendant was a passenger on a railroad train from Baltimore, Md., to Asheville, N. C., and that while the train was temporarily stopped at the station at Lynchburg, Va., he was arrested, his baggage examined, and it was found that he had in his valise some seven quarts or more of whisky. The particulars show clearly that the evidence will be that he had no intention of leaving the train at Lynchburg or at any other point in Virginia, and that his sole intention was to carry the liquor with him into the state of North Carolina to be there used as a beverage."

In addition to these facts we observe that the bill of particulars contained this recital:

"The charge in the indictment that the defendant caused to be transported liquor to Lynchburg, in the state of Virginia, has no other foundation than the fact that he was arrested while the train was stopped at the railroad station at Lynchburg, Va., and while he was en route to Asheville, N. C."

The bill stated besides, that the accused was traveling on a through ticket from Baltimore to Asheville and return.

Under this state of facts we think the court was clearly right in quashing the indictment, as we are of opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce "into any state or territory the laws of which state or territory prohibit the manufacture," etc., includes the movement in interstate commerce through such a state to another. No elucidation of the text is needed to add cogency to this plain meaning, which would, however, be reinforced by the context if there were need *to resort to it. *since the context makes clear that the word "into," as used in the statute, refers to the state of destination, and not to the means by which that end is reached, the movement through one state as a mere incident of trans-

portation to the state into which it is shipped.

The suggestion made in argument that, although the personal carriage of liquor through one state as a means of carrying it beyond into another state violates the statute, it does not necessarily follow that transportation by common carrier through a state for a like purpose would be such violation, because of the more facile opportunity in the one case than in the other for violating the law of the state through which the liquor is carried, is without merit. In last analysis it but invites, not a construction of the statute as enacted, but an enactment by construction of a new and different statute.

Affirmed.

(249 U. S. 397)

McKINLEY et al. v. UNITED STATES.

(Submitted March 3, 1919. Decided April 14, 1919.)

No. 417.

1. ARMY AND NAVY —REGULATIONS FOR HEALTH.

Congress has authority to make rules and regulations for protection of the health and welfare of those composing the armies raised by it.

2. CONSTITUTIONAL LAW —DELEGATION OF POWER.

Congress may leave details to the regulation of the head of a department, as in Act May 18, 1917, § 13 (Comp. St. 1918, § 2019b), authorizing and directing the Secretary of War to do everything by him deemed necessary to prevent brothels within such distances as he deems needful of a military camp, and declaring a punishment for any one violating any regulation issued to carry out the object and purpose of the section.

In Error to the District Court of the United States for the Southern District of Georgia.

D. G. McKinley and J. L. Bray were convicted for violation of a regulation of the Secretary of War, and bring error. Affirmed.

Mr. Robert Douglas Feagin, of Macon, Ga., for plaintiffs in error.

Mr. Assistant Attorney General Porter and Mr. W. C. Herron, of Washington, D. C., for the United States.

*Memorandum opinion by direction of the Court, by Mr. Justice DAY.

Plaintiffs in error were indicted, convicted, and sentenced upon an indictment in the District Court of the United States for the Southern District of Georgia for violation of a

regulation of the Secretary of War made under the authority of the Act of Congress of May 18, 1917, c. 15, § 13, 40 Stat. 83 (Comp. St. 1918, § 2019b). This statute provides:

"The Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdy houses, within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training or mobilization place and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section, shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000, or imprisonment for not more than twelve months, or both."

[1] Plaintiffs in error contend that Congress has no constitutional authority to pass this act. The indictment charged that the plaintiffs in error did unlawfully keep and set up a house of ill fame within the distance designated by the Secretary of War, under the authority of the act of Congress, to wit, within five miles of a certain military station of the United States.

*That Congress has the authority to raise and support armies and to make rules and regulations for the protection of the health and welfare of those composing them, is too well settled to require more than the statement of the proposition. *Arver v. United States*, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856.

[2] Congress having adopted restrictions designed to guard and promote the health and efficiency of the men composing the army, in a matter so obvious as that embodied in the statute under consideration, may leave details to the regulation of the head of an executive department, and punish those who violate the restrictions. This is also well settled by the repeated decisions of this court. *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563.

The judgment of the District Court is Affirmed.

(249 U. S. 451)

UNITED STATES v. ATCHISON, T. & S.
F. RY. CO.(Argued March 11 and 12, 1919. Decided
April 14, 1919.)

No. 201.

POST OFFICE 21(4)—CONTRACTS FOR CARRY-
ING MAIL—EXTRA COMPENSATION—STATUTE.

Act March 4, 1913 (Comp. St. § 7494), authorizing the Postmaster General to add to compensation for carrying of mails not exceeding 5 per cent. of the contract terms, on account of the increased weight of the parcel post, vested in the Postmaster General a discretion in awarding compensation, and did not require an award of 5 per cent. on all contracts.

Appeal from the Court of Claims.

From a judgment of the Court of Claims, sustaining the claim of the Atchison, Topeka & Santa Fé Railway Company against the United States, the United States appeals. Reversed and remanded.

See same case below, 52 Ct. Cl. 338.

Mr. Assistant Attorney General Brown, for the United States.

Mr. Alexander Britton, of Washington, D. C., for appellee.

*Memorandum opinion by Mr. Justice McREYNOLDS.

During 1910 and 1911 the appellee railway company entered into customary arrangements with the Post Office Department to carry mail over a number of routes for quadrennial terms ending June 30, 1914, and 1915, compensation to be based upon ascertained weights. While these were in force, by Act of August 24, 1912, c. 389 (37 Stat. 557), Congress directed establishment of the parcel post service without providing for any additional compensation on account of the large increase in weights which would surely follow.

The Postmaster General called attention to the matter January 20, 1913; and after much consideration the following clause was incorporated in the Act of March 4, 1913, c. 143 (37 Stat. 791, 797 [Comp. St. § 7494]):

"That on account of the increased weight of mails resulting from the enactment of section eight of the act of August twenty-fourth, nineteen hundred and twelve, * * * the Postmaster General is authorized to add to the compensation paid for transportation on railroad routes on and after July first, nineteen hundred and thirteen, for the remainder of the contract terms, not exceeding five per centum thereof per annum, excepting upon routes weighed since January first, nineteen hundred and thirteen, and to be readjusted from July first, nineteen hundred and thirteen, until otherwise provided by law."

Acting under this provision, the Postmaster General refused to allow increased compensation of 5 per centum upon all routes, but apportioned payments among them—never in excess of 5 per centum—according to a carefully worked out formula which he deemed appropriate. Appellee sued for the difference between amount actually received and what it would have received if five per centum had been added. Considering history of the legislation and intent of Congress supposed to be indicated thereby the Court of Claims held that the act—

"required the Postmaster General to add 5 per cent. to the compensation being paid on all of said routes, and he having failed to do so that the plaintiff is entitled to recover the difference sued for." Atchison, Topeka & Santa Fé Ry. Co. v. United States, 52 Ct. Cl. 338, 361.

*We are unable to agree with this conclusion. The language of the enactment is clear and we think it vested in the Postmaster General a discretion which, so far as shown by the record, has not been abused. We are not unmindful of the burden imposed upon appellee nor of the circumstances which lend color to a different conclusion; but these are not sufficient to justify a disregard of the plain import of the words which Congress deliberately adopted.

The judgment below must be reversed and the cause remanded with direction to dismiss the petition.

Reversed and remanded.

(249 U. S. 427)

CORN PRODUCTS REFINING CO. v.
EDDY et al.(Argued Jan. 14, 1919. Decided April 14,
1919.)

No. 119.

1. CONSTITUTIONAL LAW 240(1) — FOOD
1—EQUAL PROTECTION OF LAW—LABEL-
ING PROPRIETARY SYRUPS—REGULATION OF
STATE BOARD.

Regulation of state board, pursuant to Gen. St. Kan. 1915, §§ 4095–4134, as to labeling proprietary foods and syrups, stating percentage of each ingredient, held not to deny a manufacturer of syrup the equal protection of the law; there being no discrimination against it or its products, or against syrups as a class.

2. CONSTITUTIONAL LAW 278(4) — DUE
PROCESS OF LAW—LABELING PROPRIETARY
SYRUPS.

Regulation of state board, pursuant to Gen. St. Kan. 1915, §§ 4095–4134, requiring label of proprietary foods to state percentage of each ingredient, does not, in case of syrup made under secret formula and sold under its own distinctive name, amount to taking of property without due process of law, as right of manu-

facturer to maintain secrecy as to his compounds and processes is subject to right of state, in the exercise of police power and in promotion of fair dealing, to require nature of product to be fairly set forth.

3. COURTS ⇨366(1) — NATIONAL SUPREME COURT — REVIEWING STATE COURT — STATE LAW.

The national Supreme Court, in reviewing a general judgment of state Supreme Court for defendants in action to enjoin state officers from enforcing a state law, and regulations thereunder, for labeling of proprietary food, attacked as violative of the commerce clause and other provisions of the national Constitution, is concerned, not with the characterization or construction of the law by the state court, nor even with whether it was in terms construed, but solely with the effect and operation of it as put in force by the state.

4. COMMERCE ⇨60(3) — STATE REGULATION — LABELING PROPRIETARY FOODS.

Aside from federal legislation, Gen. St. Kan. 1915, §§ 4095-4134, and regulation thereunder requiring label of proprietary foods to state percentage of each ingredient, does not contravene commerce clause of national Constitution.

5. COURTS ⇨394(1) — NATIONAL SUPREME COURT — REVIEW OF STATE COURT — AUTHORITY OF BOARD UNDER STATE LAW.

The national Supreme Court must assume that a regulation adopted by a state board, and in effect sustained by the decision of the state Supreme Court, was within the authority of the board under a state act authorizing it to adopt regulations not inconsistent with the state's law to carry out the act.

6. COURTS ⇨394(1) — NATIONAL SUPREME COURT — REVIEW OF STATE COURT — REGULATION OF STATE BOARD.

A regulation adopted by a state board under authority of a state statute, as in effect decided by state Supreme Court, must be treated as an enactment proceeding from the legislative power of the state.

7. COMMERCE ⇨8(10) — CONFLICTING STATE AND FEDERAL REGULATIONS — LABELING PROPRIETARY FOODS.

Regulation of state board, pursuant to Food and Drugs Law Kan. (Gen. St. 1915, §§ 4095-4134), requiring label of proprietary foods to state percentage of each ingredient, is not as to such foods while still in interstate commerce, precluded by Food and Drugs Act June 30, 1906 (Comp. St. §§ 8717-8728), for prevention of misbranding of foods when the subject of interstate commerce, but silent as to stating percentage of ingredients.

In Error to the Supreme Court of the State of Kansas.

Action by the Corn Products Refining Company against V. C. Eddy and others. Judgment for plaintiff was reversed by the Supreme Court of Kansas (99 Kan. 63, 163 Pac. 615), and plaintiff brings error. Affirmed.

*Messrs. T. M. Lillard, of Topeka, Kan., and C. A. Magaw, of Omaha, Neb., for plaintiff in error.

Mr. J. L. Hunt, of Topeka, Kan., for defendants in error.

Mr. Justice PITNEY delivered the opinion of the Court.

Plaintiff in error (plaintiff in the original action) is a corporation which manufactures in the state of Illinois a proprietary table syrup composed of 85 per cent. corn syrup or glucose, 10 per cent. molasses, and 5 per cent. sorghum, and sells it under the name of "Mary Jane" in cans labeled as follows:

"5 Pounds Net Weight.

"Mary Jane.

"Reg. U. S. Pat. Off.

*"Mary Jane is guaranteed by Corn Products Refining Co. to comply with the Food and Drugs Act, June 30, 1906. Registered under serial number 2317.

"Mary Jane. A Table Syrup Prepared from Corn Syrup, Molasses and Pure Country Sorghum. Contains Sulphur Dioxide.

"M'd by Corn Products Refining Co.

"General Offices—New York, U. S. A."

Prior to the beginning of the action plaintiff had agents and representatives employed in soliciting orders for this syrup from wholesale merchants in the state of Kansas; the orders being filled by shipping the required quantity of the syrup in interstate commerce in the original sealed cans with original labels attached. Defendants, who are the members of the state board of health of Kansas, deeming "Mary Jane" to be misbranded in several particulars within the meaning of the Food and Drugs Law of that state (chapter 266, Sess. Laws, Kan. 1907, as amended by chapter 184, Laws 1909, embodied in chapter 35, Gen. Stat. Kan. 1909; chapter 32, Gen. Stat. Kan. 1915), and regulations adopted by the board under authority of that law, notified plaintiff's agents and representatives and other persons selling and dealing in "Mary Jane" syrup that, unless plaintiff complied with regulation 6 of the state board by attaching in a conspicuous place on the outside of each can sold or offered for sale within the state a label with the word "compound" printed upon it, and stating definitely the percentage of each ingredient of which the syrup was composed, they would be arrested and prosecuted. Similar warnings were communicated to wholesale and retail dealers who were and long had been selling this syrup in Kansas under the original brand and label.

Plaintiff brought an equitable action against the members of the board of health in one of the district courts of the state, setting up the pertinent facts alleging that defendants were acting under the authority of the state law and certain regulations

adopted by them pursuant to it, and among others regulation 6, requiring that in the case of syrups the principal label should state definitely the percentage of each ingredient, in the case of compounds, mixtures, imitations, or blends; plaintiff further averring that the state law and the regulations referred to, particularly regulation 6, were void because in conflict with the interstate commerce clause (article I, § 8) of the Constitution of the United States and the act of Congress of June 30, 1906 (chapter 3915, 34 Stat. 768 [Comp. St. §§ 8717-8728]), and also in conflict with the provisions of section 1 of the Fourteenth Amendment, and that defendants were interfering with plaintiff's interstate commerce and with its lawful business in the state of Kansas, thereby threatening plaintiff with great and irreparable damage, and praying for an injunction.

Their general demurrer having been overruled, defendants answered and the case came on for hearing, with the result that the district court made a finding "that all of the allegations of plaintiff's petition are true," and adjudged that there should be a perpetual injunction restraining defendants from interfering with the sale of "Mary Jane" in the state of Kansas upon the ground that it was misbranded when sold under the label above referred to, and in particular from interfering, because of regulation 6, with persons dealing in or selling the syrup, so branded, within the state.

Upon appeal the Supreme Court of Kansas reversed the judgment with direction that the district court enter judgment for the defendants (99 Kan. 63, 163 Pac. 615); and the case comes here on writ of error under section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156 [Comp. St. § 1214]), as amended September 6, 1916 (chapter 448, 39 Stat. 726), upon the contention that the Kansas statute and the regulations adopted by the state board pursuant to it, as interpreted and applied by the state court of last resort, are repugnant to the interstate commerce clause of the Constitution of the United States (article I, § 8) and to the due process *and equal protection provisions of the Fourteenth Amendment, and especially are in conflict with the federal Food and Drugs Act.

Upon the argument here, the attack was centered upon the effect of regulation 6, which, so far as pertinent, reads as follows:

"Manufacturers of proprietary foods are required to state upon the label the names and percentages of the materials used, so far as is necessary to secure freedom from adulteration and misbranding: (1) In the case of syrups, the principal label shall state definitely, in conspicuous letters, the percentage of each ingredient, in the case of compounds, mixtures, imitations, or blends. When the name of the syrup includes

the name of one or more of the ingredients, the preponderating ingredient shall be named first."

[1] It will be convenient to deal first with the contention made under the Fourteenth Amendment. It is not seriously insisted that there is a denial of the equal protection of the laws, and we see no ground for such a contention. There is no discrimination against plaintiff in error or its product, or against syrups as a class.

[2] It is, however, urged that since plaintiff's syrup is a proprietary food, made under a secret formula and sold under its own distinctive name, and since it contains no deleterious or injurious ingredients, the effect of the regulation in requiring plaintiff to disclose upon the label the ingredients and their proportions amounts to a taking of its property without due process of law. Evidently the purpose of the requirement is to secure freedom from adulteration and misbranding; the mischief of misbranding being that purchasers may be misled with respect to the wholesomeness or food value of the compound. And it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain *secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth. *Heath & Milligan Co. v. Worst*, 207 U. S. 338, 353, 28 Sup. Ct. 114, 52 L. Ed. 236; *Savage v. Jones*, 225 U. S. 501, 524, 32 Sup. Ct. 715, 56 L. Ed. 1182; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 548, 549, 32 Sup. Ct. 784, 56 L. Ed. 1197; *Schmidinger v. Chicago*, 226 U. S. 578, 588, 33 Sup. Ct. 182, 57 L. Ed. 364, Ann. Cas. 1914B, 284; *Armour & Co. v. North Dakota*, 240 U. S. 510, 514, 515, 36 Sup. Ct. 440, 60 L. Ed. 771, Ann. Cas. 1916D, 548; *Hutchinson Ice Cream Co. v. Iowa*, 242 U. S. 153, 159, 37 Sup. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917B, 643; *Hebe Co. v. Shaw*, 248 U. S. 297, 303, 39 Sup. Ct. 125.

We turn to the questions raised under the commerce clause and the act of Congress.

[3] Although the Supreme Court in its opinion said nothing about interstate commerce, it cannot be doubted, in the state of the record, that defendants' activities against which relief was sought included incidental interference with plaintiff's interstate commerce in the "Mary Jane" syrup, and that the general judgment in favor of defendants amounts to an adjudication that the state law and regulations are to be enforced with respect to plaintiff's product indiscriminately, not only when sold and offered for sale in domestic commerce, but also while in the hands of the importing dealers for sale in the original packages, and hence, in con-

temptation of law, still in the course of commerce from state to state. The silence of the Supreme Court upon the subject cannot change the result in this regard. In cases of this kind, we are concerned, not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state. *St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350, 362, 35 Sup. Ct. 99, 59 L. Ed. 265; *Kansas City Ry. v. Kansas*, 240 U. S. 227, 231, 36 Sup. Ct. 261, 60 L. Ed. 617; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294, 38 Sup. Ct. 126, 62 L. Ed. 295.

[4-7] *The question of repugnancy to the commerce clause may be treated (a) aside from federal legislation; and (b) in view of Food and Drugs Act of Congress June 30, 1906, c. 3915, 34 Stat. 768.

Upon this question, in both aspects, the judgment under review is clearly sustained by the decision of this court in *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182, which is precisely in point. That case raised a question whether a statute of Indiana relating to concentrated commercial feeding stuffs for animals (Acts 1907, c. 206), which required the packages, when sold or offered for sale, to bear in a conspicuous place a tag or label having plainly printed on it in the English language (among other things) a guaranteed analysis stating the minimum of crude fat and crude protein, determined by a prescribed method, and the ingredients from which the concentrated commercial feeding stuff was compounded, as applied to sales of complainant's products in original packages by importing purchasers, constituted an unwarranted interference with interstate commerce, either independently of or in the light of the Food and Drugs Act of Congress. The court, finding (225 U. S. 524, 32 Sup. Ct. 715, 56 L. Ed. 1182) that the evident purpose of the Indiana statute was to prevent fraud and imposition in the sale of food for domestic animals, that its requirements were directed to that end and were not unreasonable, and that it was not aimed at interstate commerce, but without discrimination sought to promote fair dealing in the described articles of food, held (225 U. S. 528, 32 Sup. Ct. 715, 56 L. Ed. 1182) that the statute was a lawful exercise of the police power of the state, including the required disclosure of the ingredients contained in feeding stuffs offered for sale in that state and the provision for their inspection and analysis. Upon the question whether there was any conflict with the act of Congress, after pointing out (225 U. S. 529, 32 Sup. Ct. 724, 56

L. Ed. 1182) that the object of the latter act was to prevent adulteration and misbranding by prohibiting the introduction into any state from another *state of articles of food or drugs adulterated or misbranded within the meaning of the act, and that included in the definition of the term "food" were "all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed or compound," and (225 U. S. 531, 32 Sup. Ct. 725, 56 L. Ed. 1182) that in the enumeration of the acts constituting a violation of the statute Congress had not included (as the Indiana statute did include) a failure to disclose the ingredients of the article, save in specific instances where morphine, opium, cocaine, or other substances particularly mentioned were present, and after reciting the provision of the federal act that an article "for the purposes of this act" shall be deemed misbranded if the package or label bear any statement, design, or device regarding it or the ingredients or substances it contains which shall be false or misleading, the court proceeded to say (225 U. S. 532, 32 Sup. Ct. 725, 56 L. Ed. 1182):

"But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade-names which do not reveal the ingredients of the composition and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain 'any added poisonous or deleterious ingredients,' shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture. Section 8. Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless, *has denied to the state, with respect to the feeding stuffs coming from another state and sold in the original packages, the power the state otherwise would have to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial, it is not to be found in any express declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a state law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the act that 'nothing in this act shall be construed' as requiring manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas 'except in so far as the provisions of this act

may require to secure freedom from adulteration or misbranding.' Section 8. We have already noted the limitations of the provisions referred to. And it is clear that this proviso merely relates to the interpretation of the requirements of the act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions. Is, then, a denial to the state of the exercise of its power for the purposes in question necessarily implied in the federal statute? For when the question is whether a federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. [Citing cases.] But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation *is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state. This principle has had abundant illustration."

And, after citing many previous decisions of this court, and analyzing several of them, the opinion proceeds (225 U. S. 539, 32 Sup. Ct. 728, 56 L. Ed. 1182):

"Applying these established principles to the present case, no ground appears for denying validity to the statute of Indiana. That state has determined that it is necessary in order to secure proper protection from deception that purchasers of the described feeding stuffs should be suitably informed of what they are buying and has made reasonable provision for disclosure of ingredients by certificate and label, and for inspection and analysis. The requirements, the enforcement of which the bill seeks to enjoin, are not in any way in conflict with the provisions of the federal act. They may be sustained without impairing in the slightest degree its operation and effect. There is no question here of conflicting standards, or of opposition of state to federal authority. It follows that the complainant's bill in this aspect of the case was without equity."

An attempt is made to distinguish *Savage v. Jones*, upon the ground that the Indiana statute there under consideration covered a field of regulation which had not been included in the federal statute, whereas, it is said, the Kansas Food and Drugs Law is almost literally a reproduction of the federal law upon the same subject. It is true that the Kansas statute mutatis mutandis follows quite closely the lines of the act of Congress, and that its eighth section, which defines the term "misbranded," is almost a copy of the corresponding section of the federal act; but in the following proviso at the close of the section the words italicized have

been inserted by the state Legislature, they not appearing in the federal act:

"And provided further, that nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods, which contain no unwholesome ingredients, to disclose their trade formulas, except in so far as the provisions of this act, *or the rules and regulations of the state board of health*, may require to secure freedom from adulteration or misbranding."

These italicized words make a very substantial difference. Section 3 of the Kansas act provides that "the state board of health is authorized and directed to make and publish uniform rules and regulations, not in conflict with the laws of this state, for carrying out the provisions of this act"; and under this authority regulation 6 was adopted and published, which requires manufacturers of certain proprietary foods, including syrups that are compounds, mixtures, or blends, to state definitely upon the principal label the percentage of each ingredient. It is insisted that the regulation goes beyond the authority conferred upon the state board because it is inconsistent with the definition of "misbranding" contained in the act, and therefore cannot be deemed to be a regulation required to secure freedom from misbranding. Upon this particular point the opinion of the Kansas Supreme Court is silent; but the decision of the district court upon the demurrer sustained the validity of the regulation as being within the authority of the board; the Supreme Court did not overrule this; the question is one of state law; and we must assume that the regulation, having been adopted by the board and in effect sustained by the decision of the Supreme Court, is within the authorization of the statute. This being so, it must be treated as an enactment proceeding from the legislative power of the state; and hence it stands upon precisely the same basis as the requirement of the Indiana statute (quoted in 225 U. S. 504, 32 Sup. Ct. 715, 56 L. Ed. 1182, and referred to above) that commercial feeding stuffs should bear a label showing among other things a guaranteed analysis stating the *minimum percentage of crude fat and crude protein and the ingredients from which the article was compounded. It was because of the absence from the federal act of a provision requiring the ingredients to be disclosed that this court held that Congress had limited the scope of its prohibitions and had not included that at which the Indiana statute aimed.

The Food and Drugs Act of Congress has not been changed in any material respect from the form it bore when *Savage v. Jones* arose. By Acts of August 23, 1912 (chapter 352, 37 Stat. 416), and March 3, 1913 (chapter 117, 37 Stat. 732 [Comp. St. § 8724]), section 8 has been amended, but not in any manner that affects the present question.

The fact that the Kansas statute *mutatis mutandis* follows quite closely the federal act, and that section 8 defines the term "misbranded" almost in the very words of the corresponding section of the act of Congress, with the significant difference in the final proviso to which we have called attention, is not dispositive of the question whether Congress has covered the field to the exclusion of state regulation. This is to be determined by what the act of Congress omits, not by what it contains, and by considering whether, in words or by necessary implication, Congress has prohibited the states from making any regulation in respect of the omitted matter. Further argument upon the question is foreclosed by the decision in *Savage v. Jones* that an omission from the act of Congress of a provision requiring feeding stuffs transported in interstate commerce to give affirmative information as to the ingredients of the article amounted to a limitation by Congress of the scope of its prohibitions, and that, although not including that at which the Indiana statute aimed, Congress had not denied to the state, with respect to feeding stuffs coming from another state and sold in original packages, the power to prevent imposition upon the public by making a reasonable and nondiscriminatory provision for the disclosure of ingredients and for inspection and analysis.

That decision is conclusive also upon this point: That the proviso in sec. 8 of the federal act that "nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding," merely relates to the interpretation of the requirements of the federal act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions.

Savage v. Jones was decided after elaborate argument and upon full consideration. We see no reason to reconsider the conclusion there reached or to deny to the case its proper authority. Its doctrine was followed and applied in *Sligh v. Kirkwood*, 237 U. S. 52, 61, 62, 35 Sup. Ct. 501, 59 L. Ed. 835; *Hebe Co. v. Shaw*, 248 U. S. 297, 304, 39 Sup. Ct. 125.

It is argued that the present case is controlled rather by *McDermott v. Wisconsin*, 228 U. S. 115, 130, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39, and in effect that this case must be taken as overruling *Savage v. Jones*. The contention is unfounded. The authority of the earlier decision was expressly recognized in the opinion of the court in the later; the distinction being placed (228 U. S. 131, 132, 33 Sup.

Ct. 431, 57 L. Ed. 754, 47 L. R. A. [N. S.] 984, Ann. Cas. 1915A, 39) upon the question whether the regulations of the state concerning the same subject-matter were in conflict with the acts of Congress. The Wisconsin statute was held to be in conflict because it required that packages of foodstuffs received through the channels of interstate commerce, bearing labels intended to be in compliance with the act of Congress, while the goods were still unsold and were in the possession of the importer for the purpose of sale and being exposed and offered for sale by him, as a condition of their legitimate sale within the state, should bear the label required by the state law and none other—in effect requiring the label that showed compliance with the act of Congress to be removed from the package before the first sale by the importer, and while the goods remained still subject to federal inspection.

The judgment under review should be affirmed.

(249 U. S. 448)

CITIZENS' BANK OF MICHIGAN CITY,
IND., v. OPPERMAN.

(Argued March 17, 1919. Decided April 14, 1919.)

No. 234.

1. APPEAL AND ERROR ⇐76(1)—CERTIORARI ⇐16—REVIEW OF STATE COURT—FINAL JUDGMENT.

For purpose of review, whether by error or certiorari, under Act Sept. 6, 1916, § 2 (Comp. St. § 1214), judgment of highest court of state becomes final on its overruling petition to rehear.

2. CERTIORARI ⇐40—To STATE COURT—TIME OF APPLICATION.

The three months from entry of judgment within which, under Act Sept. 6, 1916, § 6 (Comp. St. § 1228a), application for writ of certiorari, other than to the Supreme Court of the Philippine Islands, must be made that it may be entertained by the National Supreme Court, begins to run, in case of petition for rehearing, from denial or other disposition of the petition.

3. COURTS ⇐396(2)—ERROR TO STATE COURT—FEDERAL QUESTION.

Error to a state court cannot, under Act Sept. 6, 1916, § 2 (Comp. St. § 1214), be entertained; the record showing that in the courts below there was not really drawn in question one of the federal questions authorizing it.

In Error to the Supreme Court of the State of Indiana.

Action by Mary Opperman against the Citizens' Bank of Michigan City, Ind. Judgment for plaintiff was affirmed by the Su-

preme Court of Indiana (115 N. E. 55), and defendant brings error. Dismissed.

Messrs. J. B. Collins and Worth W. Pepple, both of Michigan City, Ind., for plaintiff in error.

Messrs. S. J. Crumpacker and Samuel Parker, both of South Bend, Ind., for defendant in error.

*Mr. Justice McREYNOLDS delivered the opinion of the Court.

Section 7855, Burns' Anno. Indiana Statutes 1914, provides:

"A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void."

[1, 2] Relying upon this, defendant in error sued to recover a certificate of national bank stock issued in her name and held by plaintiff in error bank as security for her husband's indebtedness. The bank defended upon the theory that, exercising rights given by section 12 of the National Bank Act (Act June 3, 1864, c. 106, 13 Stat. 102; R. S. § 5139 [Comp. St. § 9676]), she transferred the stock to her husband, and in turn he had hypothecated it to secure his personal note. Being of opinion that the National Bank Act did not inhibit an inquiry concerning all the circumstances, the trial court permitted introduction of proof to that end; the jury found the bank had knowledge of facts sufficient to charge it with notice that the transaction amounted to a contract of suretyship by the wife; and judgment in her favor was affirmed by the state Supreme Court. A petition to rehear was overruled May 18, 1917, and at that time the judgment below became final for purposes of review here. *Andrews v. Virginian Railway Co.*, 248 U. S. 272, 39 Sup. Ct. 101, 63 L. Ed. 236; *Chicago Great Western R. R. v. Basham*, 249 U. S. 164, 39 Sup. Ct. 213, 63 L. Ed. 534, decided March 3, 1919. This writ of error was applied for July 13, 1917—within three months.

Act Sept. 6, 1916, c. 448, 39 Stat. 726, 727, 728, limited our power to review judgments or decrees in state courts which became final subsequent to date when it went into effect (October 6, 1916), upon writs of error, to those cases "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or

where is drawn in question the *validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity." Section 2 (Comp. St. § 1214). It also authorized this court to bring up for review and determination by certiorari "any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity." And it further distinctly directed that, except as to writs of certiorari addressed to the Supreme Court of the Philippine Islands, "no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of." Section 6 (section 1228a). Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months' limitation begins to run from date of such denial or other disposition.

Plaintiff in error presented its petition here for a writ of certiorari to bring up the present cause April 15, 1918; this was denied April 22, 1918. 246 U. S. 673, 38 Sup. Ct. 424, 62 L. Ed. 932. Manifestly the application was not within the prescribed time.

[3] An examination of the record shows that in the courts below there was not really drawn in question (*Wilson v. North Carolina*, 169 U. S. 586, 595, 18 Sup. Ct. 435, 42 L. Ed. 865) "the validity of a treaty or statute of, or an authority exercised under the United States," or "the validity of a statute of, or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties, or laws of the United States." Consequently we are without jurisdiction to entertain the writ of error and it must be

Dismissed.

(249 U. S. 426)

**BOARD OF PUBLIC UTILITY COM'RS v.
COMPANIA GENERAL DE TABACOS
DE FILIPINAS.**

(Submitted March 18, 1919. Decided April 14, 1919.)

No. 253.

1. APPEAL AND ERROR ⇐19 — MOOT QUESTION.

Whether an order for report was based on Philippine Act 2307, § 16(e), invalid in wrongfully delegating power, contrary to Organic Act, c. 1369, 32 Stat. 691, becomes a moot question, where, pending appeal from judgment annulling the order, the statute was amended to itself provide for the report and the details thereof, thus rendering the order inoperative.

2. APPEAL AND ERROR ⇐1107—MOOT QUESTION—REVERSAL WITH DIRECTIONS.

Where, pending appeal, the question has become moot, judgment will be reversed, and cause remanded, with directions that it be dismissed, without costs.

Appeal from and in Error to the Supreme Court of the Philippine Islands.

Proceeding by the Compania General de Tabacos de Filipinas against the Board of Public Utility Commissioners. Judgment for petitioner (34 Phil. Rep. 136), and respondent appeals and brings error. Reversed, with directions.

*Messrs. Edward S. Bailey and S. T. Ansell, both of Washington, D. C., for appellant and plaintiff in error.

Mr. F. C. Fisher, of Manila, P. I., for appellee and defendant in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

By a judgment rendered March 6, 1916, the court below annulled an order of the Board of Public Utility Commissioners of the Philippine Islands requiring a corporate common carrier to report annually various matters pertaining to its finances and operations, the ground of the judgment being that section 16 (e) of Act 2307 of the local Legislature, under which the board acted, violated the organic law of the Philippines (32 Stat. 691, c. 1369), in that it confided to the board the determination of what the reports should contain and therefore amounted to a delegation of legislative power. 34 Phil. Rep. 136. The board brought the judgment here for review, and the carrier now suggests that through a change in the local statute the question on which the judgment turned has become merely a moot one.

[1] After the case was brought here the Legislature, by Act 2694, so amended section 16 (e) as to cause the section itself to prescribe in detail what such reports should contain and thereby abrogated the provision

on which the order was based and which the court held invalid. That provision therefore is no longer in force, and it is to the new provision that the board and carrier must give effect. Even if the original provision was valid, the order made under it became inoperative when the new provision was substituted in its place. Whether the order was based on a valid or an invalid statute consequently has become merely a moot question.

[2] In this situation we are not called upon to consider the propriety of the judgment below, the proper course being, *as is shown by many precedents, to reverse the judgment and remand the cause with a direction that it be dismissed without costs to either party. United States v. Schooner Peggy, 1 Cranch, 103, 2 L. Ed. 49; New Orleans Flour Inspectors v. Glover, 160 U. S. 170, 16 Sup. Ct. 321, 40 L. Ed. 382, and 161 U. S. 101, 16 Sup. Ct. 492, 40 L. Ed. 632; Dinsmore v. Southern Express Co., 183 U. S. 115, 22 Sup. Ct. 45, 46 L. Ed. 111; United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, 239 U. S. 466, 36 Sup. Ct. 212, 60 L. Ed. 387; Berry v. Davis, 242 U. S. 468, 37 Sup. Ct. 208, 61 L. Ed. 441.

Judgment reversed. Cause to be dismissed without costs to either party.

(249 U. S. 479)

HOUSTON et al. v. ST. LOUIS INDEPENDENT PACKING CO.

(Argued March 20, 1919. Decided April 14, 1919.)

No. 264.

1. FOOD ⇐3—MEAT INSPECTION ACT—CONSTRUCTION OF STATUTE.

The provision of Meat Inspection Act June 30, 1906, requiring the Secretary of Agriculture to mark as inspected and passed products which contained no dyes and chemicals and are not unwholesome, must be construed in harmony with the later provision of the same act, forbidding the sale of meat products under false and deceptive names, and authorizing the Secretary of Agriculture to make rules and regulations for the enforcement thereof.

2. CONSTITUTIONAL LAW ⇐73 — MEAT INSPECTION ACT—REGULATIONS.

Whether the term "sausage," when applied to a product containing cereals and water, is false and deceptive, is a question of fact, the decision of which by the Secretary of Agriculture is conclusive under Meat Inspection Act June 30, 1906, where it is fairly arrived at, with substantial evidence to support it.

3. FOOD ⇐1—MEAT INSPECTION ACT—REGULATIONS—EVIDENCE.

Evidence held to show that the Secretary of Agriculture had sufficient reason to conclude

that the sale as sausage of a product containing more than 2 per cent. of cereal, or 3 per cent. of water or ice, would deceive purchasers, so that the adoption by him of a regulation prohibiting such sale was not an abuse of discretion, but was authorized under Meat Inspection Act June 30, 1906, prohibiting the sale of meat under deceptive name and authorizing regulations to enforce its provisions.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the St. Louis Independent Packing Company against David F. Houston and others. A decree of the District Court dismissing the bill (231 Fed. 779) was reversed by the Circuit Court of Appeals (242 Fed. 337, 155 C. C. A. 113), and defendants appeal. Decree of the Circuit Court of Appeals reversed, and cause remanded.

Mr. Assistant Attorney General Frierson, for appellants.

Mr. Alexander F. Reichmann, of Chicago, Ill., for appellee.

Mr. Justice CLARKE delivered the opinion of the Court.

The Secretary of Agriculture, assuming to exercise authority under the Meat Inspection Act, approved June 30, 1906 (34 Stat. 669, 676, 678, c. 3913), promulgated a regulation, effective April 1, 1913, in part as follows, viz.:

"Washington, D. C., Feb. 28, 1913.

"For the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name, under the authority conferred on the Secretary of Agriculture by the provisions of the act of Congress, approved June 30, 1906 (34 Stat. 674), regulation 18 is hereby amended by the addition of sections 15 and 16, to read as hereinafter set out.

"James Wilson, Secretary of Agriculture.

"(Section 16, paragraph 1.) Sausage shall not contain cereal in excess of two per cent.; when cereal is added its presence shall be stated on the label or on the product.

"(Paragraph 2.) Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping and mixing, in which case the added water or ice shall not exceed three per cent., except as provided in the following paragraph."

Immediately after the effective date of this regulation the appellee, an extensive manufacturer of sausage correctly interpreting it as prohibiting the marking, stamping or labeling as "sausage" any compound of chopped or minced meats containing cereal in excess of 2 per cent. and water or ice in excess of 3 per cent. (except as otherwise provided), filed the bill in this case in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, averring that "sausage" made by it with cereal and water in excess of the

requirements of the regulation was wholesome and fit for human food and that the effect of the order would be to exclude its product from interstate commerce, to its great and irreparable damage. The prayer was that *the defendants, the Secretary of Agriculture and the officers subordinate to him, be enjoined from refusing to mark as "Inspected and passed" all "sausage" manufactured by the petitioner found to be sound, healthful, and wholesome, and which contained no dyes, chemicals, preservatives or ingredients which would render such "sausage" unsound, unwholesome or unfit for human food; that they be required by mandatory injunction to mark such "sausage" as "Inspected and passed," and that the regulation be declared to be unauthorized by law, null and void.

The District Court denied the application, on the bill, for an injunction (St. Louis Independent Packing Co. v. Houston, 204 Fed. 120), but on appeal that holding was reversed and the case was remanded by the Circuit Court of Appeals (St. Louis Independent Packing Co. v. Houston, 215 Fed. 553, 132 C. C. A. 65).

The Secretary of Agriculture then answered admitting that it was the purpose of the Department to refuse, and that it had refused, to mark as "Inspected and passed" as "sausage" the product of the appellee unless manufactured in compliance with the regulations complained of, and, as warrant therefor, he quoted in his answer from the act of Congress the following:

"No such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade-name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted, and that said Secretary of Agriculture shall, from time to time make such rules and regulations as are necessary for the efficient execution of the provisions of this act, and all inspections and examinations made under this act shall be such and made in such manner as described in the rules and regulations prescribed by the Secretary of Agriculture not inconsistent with the provisions of this act."

*Answering the allegation of the bill that the appellee's trade in "sausage" would be ruined by the enforcement of the regulation, the Secretary of Agriculture averred that the appellee manufactured and sold large quantities of sausage which did not contain any cereal or added water, and added:

"That the manufacture and sale of a product as sausage which product contains added cereal and water in quantities as described in plaintiff's bill, or in any quantities in excess of the amount designated in said regulation, effective April 1, 1913, is false and deceptive; that the ordinary consumer of sausage manufactured by

the plaintiff has no knowledge or information that sausage contains cereal and added water, that such information is not conveyed to persons who purchase plaintiff's sausage at retail by any method of marking or branding now or heretofore in use by plaintiff, and that it is impracticable and impossible in the ordinary course of manufacture and distribution of sausage to mark or brand the same so that the purchaser at retail or the consumer will be informed as to the amount of cereal and water added thereto."

An elaborate trial on the merits resulted in the dismissal of the bill by the District Court (231 Fed. 779), but this judgment was reversed by a divided Circuit Court of Appeals (242 Fed. 337, 155 C. C. A. 113) and the case was remanded with directions to award the appellee injunctions substantially as prayed for. The case is here for review on appeal.

The claim made by the government in the lower courts that the compound of meats, cereal and water, which the appellee claimed the right to sell as "sausage" was unwholesome is abandoned in this court and the only question argued and submitted is whether it was within the power of the Secretary of Agriculture to prohibit the use of the word "sausage" as false and deceptive, within the meaning of the act, when applied to the appellee's product.

*The foregoing statement shows that the question for decision in this court is: Whether, in promulgating the regulation assailed, the Secretary of Agriculture acted arbitrarily and in excess of the authority given him by the act of Congress, to make, from time to time, such rules and regulations as are necessary for the efficient enforcement of the act, or whether he acted in good faith and upon substantial grounds in deciding that the sale of appellee's product as "sausage" resulted in deception of purchasers and consumers, so that his determination of such question of fact was within the power conferred upon him as the head of an executive department of the government and is not subject to review by the courts.

The contention of the government is that the product of the appellee being a meat food product, put up in containers—casings or canvas coverings—it falls within the prohibition of the act that such product shall not be sold or offered for sale by any corporation in interstate commerce "under any false or deceptive name," and that the regulation being for the purpose of preventing its sale under the false or deceptive name of "sausage," it is plainly within the authority given to the Secretary of Agriculture to make rules and regulations for the efficient execution of the act.

On the other hand, the contention of the appellee is that the product being wholesome and containing no dyes or chemicals,

which render it unfit for human food, an earlier provision of the act applies, which it is asserted deprives the Secretary of all discretion in such a case and requires that he shall cause the product to be marked "Inspected and passed," and also, it is claimed, that the word "sausage," when qualified as was required by prior regulations by including in the label such expressions as "Cereal added," or "Sausage and cereal," was not a false or deceptive name.

[1] The contention of the appellee that if its product is *wholesome, and if it does not contain dyes and chemicals, the act imperatively requires the Secretary to mark its product as "Inspected and passed" is clearly unsound if the word "sausage" as applied to it is false and deceptive, for plainly the provision of the act requiring the marking of the product must be harmonized with the subsequent provision that no such meat or meat food product shall be sold or offered for sale under any false or deceptive name.

[2] Whether or not the term "sausage," when applied to the product of the appellee, in which more than the permitted amount of cereal and water is used, is false and deceptive is a question of fact, the determination of which is committed to the decision of the Secretary of Agriculture by the authority given him to make rules and regulations for giving effect to the act, and the law is that the conclusion of the head of an executive department on such a question will not be reviewed by the courts, where it is fairly arrived at with substantial evidence to support it.

This rule has been most frequently applied in Land Department cases, but often also to decisions by heads of other departments.

Thus, to the action of the Secretary of the Navy in *Decatur v. Paulding*, 14 Pet. 497, 599 Appx., 10 L. Ed. 559, 609, to the action of the Secretary of the Interior, on full consideration of the subject, in *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62, and in *Burfering v. Chicago, etc., Ry. Co.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175, and to decisions of the Postmaster General in *Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894, and *Smith v. Hitchcock*, 226 U. S. 53, 33 Sup. Ct. 6, 57 L. Ed. 119. The doctrine has been extended by act of Congress to decisions by the Secretary of Commerce and Labor. *Tang Tun v. Edsell*, 223 U. S. 673, 32 Sup. Ct. 359, 56 L. Ed. 606; *Zakonaite v. Wolf*, 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. 218; *Lewis v. Frick*, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967.

The scope of the rule is illustrated by this court, saying in *Johnson v. Drew*, 171 U. S. 93, 99, 18 Sup. Ct. 800, 802 (43 L. Ed. 88):

"If there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land

department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts."

And in *New Orleans v. Paine*, 147 U. S. 261, 264, 13 Sup. Ct. 303, 305 (37 L. Ed. 162):

"In *Noble v. Union River Logging Railroad*, decided at the present term [147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123], we had occasion to examine the question as to when a court was authorized to interfere by injunction with the action of the head of a department, and came to the conclusion that it was only where, in any view of the facts that could be taken, such action was beyond the scope of his authority. If he were engaged in the performance of a duty which involved the exercise of discretion or judgment, he was entitled to protection from any interference by the judicial power."

[3] That the case before us is one for the application of this rule is shown by the record, which contains an interesting history of what large manufacturers have come, in a more or less gradual progress, to regard as the proper ingredients of the product which they have sold as sausage, and which also shows, without conflict, that the ultimate purchaser and consumer of the product is not informed and in general does not know of the presence of cereal and added water in it. The evidence shows that the poorer classes of beef and pork are used in making sausage, such as trimmings, hearts, ears, cheeks, liver, snouts and tripe, "and all that kind of things," but the preferred material is bull meat; that such meat, other than bull meat, is dry and has not the cohesive properties which will unite it when ground or minced into the mass popularly known as "sausage" and that, for this reason, corn meal, potato flour and other like substances have come to be used by the trade as "binders" to give it the desired cohesiveness and appearance.

*The president of the appellee testified that when he first began making sausage 25 years ago he used anywhere from 5 per cent. to 12 per cent. of cereal and that when the regulation was promulgated he was using 2 or 3 per cent. to 10 per cent., when he used any at all, but that in a part of his product he did not use any, notably in that which was sent into Pennsylvania, where the use of cereal was prohibited by statute; that when he used 10 per cent. of cereal he added from 15 to 20 per cent. of water, and that

in general water was added in double the percentage of cereal used; and that the cereal, usually corn meal or corn flour, was resorted to to cheapen the product and cost about 2 cents a pound, while the meat used cost from 6 to 15 cents a pound.

Before the regulation assailed was promulgated cereal and water were generally used by large manufacturers of sausage, but all of the representatives of manufacturers, other than those of the appellee, who were called as witnesses, testified that they were obeying the regulation, and the agreement of such witnesses was general that retail purchasers and consumers did not know of the presence of cereal in what they were buying as sausage.

There is conflict in the evidence as to whether the use of cereal in excess of the prescribed amounts renders the product less digestible and wholesome, whether it reduces its food value, and whether the sausage will ferment in a shorter time than when cereal is not used at all, or when used in smaller quantities.

The result, thus stated, of the examination of the record before us shows beyond controversy, that the Secretary of Agriculture in promulgating the regulation complained of acted on substantial evidence and with sufficient reason in concluding that persons purchasing or using as "sausage" the appellee's compound of various meats, cereal and water would be deceived as to its composition and *as to its value as a food product, and we cannot say that it was an abuse of discretion to prohibit the use of the word "sausage" as applied to it, rather than to prescribe qualifying terms explanatory of it. Few purchasers read long labels, many cannot read them at all, and the act of Congress having committed to the head of the department, constantly dealing with such matters, the discretion to determine as to whether the use of the word "sausage" in a label would be false and deceptive or not, under such circumstances as we have here this court will not review, and the Circuit Court of Appeals should not have reviewed and reversed the decision of the Secretary of Agriculture.

The decree of the Circuit Court of Appeals for the Eighth Circuit is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

(249 U. S. 490)

HARTFORD LIFE INS. CO. v. JOHNSON.

(Submitted March 26, 1919. Decided April 14, 1919.)

No. 291.

1. COURTS ⇨396(4)—ERROR TO STATE COURT—FEDERAL QUESTION.

Under the Missouri practice, the question of the full faith and credit to be given a judgment of the court of another state is not presented to the state court, so as to give jurisdiction to the United States Supreme Court, under Judicial Code, § 237, as amended by Act Sept. 6, 1916, § 2 (Comp. St. § 1214), where the judgment in the other state was not rendered until after the judgment in the Missouri trial court, so that the question could be raised only by brief on appeal.

2. COURTS ⇨394(14) — FEDERAL QUESTION—FOREIGN DOCUMENT — FULL FAITH AND CREDIT—CORPORATE CHARTER.

Even if the charter of a corporation is a public act or record of a state, and entitled under Const. art. 4, § 1, to full faith and credit in another state, a decision of the courts of the latter state, treating the charter as valid and giving it a construction not contrary to any statute or decision of its home state, does not deny full faith and credit, so as to give jurisdiction to the federal Supreme Court.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

Action by Nannie M. Johnson against the Hartford Life Insurance Company. Judgment for the plaintiff was affirmed by the Kansas City, Mo., Court of Appeals (166 Mo. App. 261, 148 S. W. 631), and by the Supreme Court of Missouri (271 Mo. 562, 197 S. W. 132), and defendant brings certiorari. Writ dismissed.

Messrs. James C. Jones, George F. Hald, and James C. Jones, Jr., all of St. Louis, Mo., for petitioner.

Messrs. Matthew A. Fyke and Charles W. German, both of Kansas City, Mo., for respondent.

*Mr. Justice CLARKE delivered the opinion of the Court.

This is a suit, on a life insurance policy or certificate, in which judgment was rendered against the company, petitioner, successively, by three courts of the state of Missouri. The case is in this court on writ of certiorari granted on the asserted ground that the state Supreme Court failed and refused to give full faith and credit to the judgment and decree of a superior court of the state of Connecticut, and also to the petitioner's charter, "a public record and act of the state of Connecticut," in violation of the rights secured to it by article 4, section 1, of the Constitution of the United States.

Respondent moves to dismiss the writ for want of jurisdiction.

The decree of the superior court of Connecticut, to which it is claimed full faith and credit was denied, was rendered in the case of Charles H. Dresser et al. v. Hartford Life Insurance Company, of Hartford, Conn., the petitioner. The character of this decree and *the effect which must be given to it when properly pleaded and introduced in evidence in courts of other states are both sufficiently stated in Hartford Life Insurance Co. v. Ibs, 237 U. S. 662, 35 Sup. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765, and in Hartford Life Insurance Co. v. Barber, 245 U. S. 146, 38 Sup. Ct. 54, 62 L. Ed. 208.

The respondent, on this motion to dismiss, does not seek to have the decisions in the cases cited modified, but asserts that the claim of right now made was not so "set up or claimed" in the state courts that full faith and credit could be or was denied to the Dresser decree.

The judgment in this case in the trial court was rendered against the petitioner in September, 1909, and the decree in the Dresser Case was not rendered until six months later, in March, 1910. The latter decree was not set up in any pleading and was not introduced in evidence in this case. The only way in which it came to the notice of the Missouri courts was in argument and as an exhibit to a brief filed in the appellate courts and the Supreme Court of Missouri dealt with it in this single paragraph:

"The case at bar was tried below on May 12, 1909, which was prior in time to the entering of the decree in the Dresser Case, and the record in the Dresser Case was therefore not offered or presented in the trial of this case. Since the record of the Dresser Case is in no manner properly raised or lodged in this case, we do not deem it to be within the scope of our review, and likewise the federal question based thereon. Under such circumstances the rule announced by the Supreme Court of the United States in Hartford Life Insurance Co. v. Ibs, supra [237 U. S. 662, 35 Sup. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765], should not be applied to this case."

[1] The jurisdiction of this court to review the final judgment or decree of the highest court of a state, in such a case as we have here, is defined in section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended September 6, 1916 (39 Stat. 726, c. 448, § 2 [Comp. St. § 1214]), which provides that it shall be competent for this court, by certiorari to require any such cause to be certified to *it for review when there is claimed in it any title, right, privilege or immunity under the Constitution of the United States and "the decision is either in favor of or against the title right, privilege or immunity especially set up or claimed, by either party, under such

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Constitution." It is the settled law that this provision means:

"That the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, * * * and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right." *Atlantic Coast Line R. R. Co. v. Mims*, 242 U. S. 532, 535, 37 Sup. Ct. 188, 189 (61 Ed. 476); *Gasquet v. Lapeyre*, 242 U. S. 367, 371, 37 Sup. Ct. 165, 61 L. Ed. 367, and cases cited.

No suggestion is or could be made that the Missouri state Supreme Court's holding in this case was framed to evade the consideration of the federal right now asserted, for it had long been the established law of that state that under its system of practice the construction of either the federal or state Constitution would not be treated as involved in a case, in a jurisdictional sense, unless it appeared that such question was raised and ruled on in the trial court, and also that constitutional questions could not be injected into a case for the first time in an appellate court by argument or brief of counsel for the purpose of giving jurisdiction. *Miller v. Connor*, 250 Mo. 677, 684, 157 S. W. 81. It has further been uniformly held by that court since 1836 that it will not take judicial notice of the laws of other states, but that they must be proved, as other facts, by evidence introduced at the trial. *Southern Illinois & Missouri Bridge Co. v. Stone et al.*, 174 Mo. 1, 33, 73 S. W. 453, 63 L. R. A. 301.

On the authorities thus cited we are obliged to conclude *that the question as to the faith and credit which should be given to the Dresser decree was not so presented to or ruled upon by the Supreme Court of Missouri as to present a federal question for review by this court.

[2] But, as if anticipating the result we have just reached, the petitioner contends that full faith and credit were denied to its charter, "a public record and act of the state of Connecticut," which was introduced in evidence, for the reason that the Supreme Court of Missouri, interpreting that charter, erroneously approved the charge to the jury by the trial court "that it devolved upon the defendant to prove that the assessment," the nonpayment of which was relied upon as forfeiting the policy sued upon, was made by the directors of the defendant. The petitioner introduced evidence tending to prove that the assessment under discussion was made, not by formal action of the board of directors, but by executive officers of the company, "the president and secretary * * * or the vice president and secre-

tary, or possibly the vice president and assistant secretary," and it contended that this was sufficient in law because it had long been the practice of the company and was recognized by the directors as action taken in their behalf under authority delegated by them.

Even if this charter, which was granted by a resolution of the Assembly of Connecticut, be regarded as a public act or record of that state within the scope of the constitutional provision (article 4, section 1), which is not decided, nevertheless since no statute of Connecticut or decision of any court of that state was pleaded or introduced in evidence in this case, giving a construction to the provision of the charter which the Missouri courts, treating as valid, interpreted, the exercise by those courts of an independent judgment in placing a construction upon it cannot present a federal question under the full faith and credit clause of the Constitution. *Louisville & Nashville R. R. Co. v. Melton*, 218 U. S. 36, 50, 30 Sup. Ct. 676, 54 L. Ed. 921, 47 L. R. A. (N. S.) 84, and *Western Life Indemnity Co. of Illinois v. Rupp*, 235 U. S. 261, 273, 275, 35 Sup. Ct. 37, 59 L. Ed. 220.

It is asserted that the record presents other constitutional questions which give this court jurisdiction to review the case but an examination shows the claims to be too unsubstantial to merit discussion and the writ must be

Dismissed.

(249 U. S. 378)

Ex parte HUDGINGS.

(Argued Dec. 9, 1918. Decided April 14, 1919.)
No. 27.

1. HABEAS CORPUS $\S$ 45(1)—ORIGINAL PETITION TO SUPREME COURT—EFFECT OF PERMISSION TO FILE.

Duty of Supreme Court to consider petition to it for habeas corpus to a District Court arises from permission granted to file it, prima facie implying that the case is of such a character as to be an exception to the general rule of procedure that other available sources of judicial power may not be passed by for purpose of obtaining relief by resort to the original jurisdiction of the Supreme Court, and though whether definitively the case is of such exceptional character must depend on an analysis of the merits on the hearing.

2. WITNESSES $\S$ 21—CONTEMPT—REFUSAL TO TESTIFY.

The contumacious refusal of a witness to testify may so obstruct a court in the performance of its duty as to justify punishment for contempt.

3. CONTEMPT $\S$ 13—PERJURY.

That perjury is a crime, for which one committing it may be tried and punished, does not prevent it, when committed in the presence

of a court, being the subject-matter of punishment for contempt; exceptional conditions justifying.

4. CONTEMPT ⚡31 — POWER TO PUNISH—CONSTITUTIONAL LIMITATIONS.

While power to punish for contempt committed in the presence of the court, existing within the limits of and sanctioned by the Constitution, is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen, judicial authority is not exempt from constitutional limitations; the great and only purpose of the power being to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured.

5. CONTEMPT ⚡13—PERJURY—OBSTRUCTIVE EFFECT.

An obstruction to the performance of judicial duty from an act done in the presence of the court is essential to power to punish for contempt, though the act be perjury.

6. CONTEMPT ⚡64—COMMITMENT—GROUNDS.

A commitment for contempt is void for excess of power; the punishment being imposed for supposed perjury alone without reference to any circumstance or condition giving to it an obstructive effect.

7. HABEAS CORPUS ⚡45(1)—ORIGINAL PETITION TO SUPREME COURT—PROMPT CORRECTION OF ERRONEOUS DOCTRINE.

Prompt correction of the erroneous doctrine on which an order of commitment for contempt was made that it was justified by supposed commission of perjury, without reference to any circumstance or condition giving to it an obstructive effect, authorizes original petition to the Supreme Court for habeas corpus as an exception to the general rule of procedure.

Mr. Justice Pitney dissenting.

Petition for Writ of Habeas Corpus to the District Court of the United States for the Eastern District of New York.

Original petition by William F. Hudgings for writ of habeas corpus to the District Court of the United States for the Eastern District of New York. Petitioner discharged.

See, also, 250 U. S. —, 39 Sup. Ct. 22, 63 L. Ed. —.

*Mr. Jesse Fuller, Jr., of Brooklyn, N. Y., for petitioner.

Mr. Alexander C. King, Sol. Gen., of Atlanta, Ga., for respondent.

Mr. Chief Justice WHITE delivered the opinion of the Court.

After hearing and leave granted on a rule to show cause, this petition for habeas corpus seeking the discharge of the petitioner from custody under a commitment for contempt was filed. The grounds for discharge were that the court had exceeded its jurisdiction by

punishing as a contempt an act which it had no power to so punish, and that even if the act punished was susceptible of being treated as a contempt the action of the court was arbitrary, beyond the limits of any discretion possessed, and violative of due process of law under the Fifth Amendment. Prior to submission and after return and the hearing which ensued an order admitting to bail was made.

[1] The duty to consider the case arises from the permission to file, and therefore *prima facie* implies that it is of such a character as to be an exception to the rule of procedure that other available sources of judicial power may not be passed by for the purpose of obtaining relief by resort to the original jurisdiction of this court. *Ex parte Royall*, 117 U. S. 254, 6 Sup. Ct. 742, 29 L. Ed. 872; *Riggins v. United States*, 199 U. S. 547, 26 Sup. Ct. 147, 50 L. Ed. 303; *Glasgow v. Moyer*, 225 U. S. 420, 428, 32 Sup. Ct. 753, 56 L. Ed. 1147; *Johnson v. Hoy*, 227 U. S. 245, 33 Sup. Ct. 240, 57 L. Ed. 497; *Jones v. Perkins*, 245 U. S. 390, 38 Sup. Ct. 166, 62 L. Ed. 358; *Re Mirzan*, 119 U. S. 584, 7 Sup. Ct. 341, 30 L. Ed. 513; *Re Huntington*, 137 U. S. 63, 11 Sup. Ct. 4, 34 L. Ed. 567. Whether, however, definitively the case is of such exceptional character must depend upon an analysis of the merits, which we now proceed to make upon the petition, the return, argument for the petitioner, suggestions by the United States, a statement by the judge, and a transcript of the stenographer's notes showing what transpired in the court below, made a part of the argument of the petitioner and in substance conceded by all parties to be the record.

In a trial which was proceeding in the court below, presided over by the judge of the district of Vermont assigned to the Eastern district of New York, the petitioner was recalled as a witness by the government for the purpose of proving by his testimony the handwriting of MacMillan and Van Amburgh. On being shown the writings referred to, in answer to questions by the government, he said that he believed, from having often seen the writing of the persons named, that the writings shown him were theirs, but that he could not so state from having seen MacMillan and Van Amburgh write because he could not recollect ever having seen them do so. The court thereupon pointedly questioned the witness on the subject of his recollection and, in view of his persistency in declaring that he could not swear from knowledge derived from a recollection of having seen MacMillan and Van Amburgh write or sign that the writings were theirs, stated to government counsel that because of the evident unwillingness of the witness the widest latitude would be allowed the government in its examination. This was availed of, and

*381 an inquiry followed covering a wide field as to the previous association of the witness with the parties in question, his employment in the business in which they were engaged, and other circumstances deemed to persuasively establish that his connection with them had been such that his statement that he could not remember having seen them write was untrue.

The inquiries, however, made no change in the statements of the witness, who persisted in saying:

"I cannot say that I can recall that I have ever seen him in the act of writing. I would not say I have not, but I would not say that I have."

Finally the court interrupted the examination by saying:

"This witness is going to be committed for contempt of court. The court is thoroughly satisfied, Mr. Witness, that you are testifying falsely when you say that you cannot recall of ever seeing Mr. MacMillan write, and this has happened several times during this trial with other witness, especially with your wife. * * *

"And it becomes the plain duty of the court to commit you to jail, sir, for contempt, and before doing so, I think it is the duty of the court to explain to you that the answer, 'I do not remember of ever having seen him write,' is just as false, is just as much contempt of court if you have seen him write, as it would be for you to say that you had never seen him write, without using the expression, 'I do not remember.'"

In the same direction the court said:

"I am not going to allow you to obstruct the course of justice here, and if this nation has delegated power enough to this court, and I am very sure it has, to deal with you in the manner proposed, I am going to do it."

*382 Before the discharge of the witness from the stand an order for contempt against him was made, and he was committed to the custody of the marshal. On the same day he pleaded not guilty to an indictment for perjury which the grand jury had just presented and obtained an order for release on bail which was inoperative because *he continued to be held under the commitment for contempt.

The record states that on July 8th following a nunc pro tunc order of commitment was spread upon the minutes in which the previous commitment was described as having been made for misbehaviour of the petitioner in the presence of the court when on the witness stand by willfully refusing "to answer certain questions truthfully" concerning his having seen MacMillan and Van Amburgh write and sign. The new commitment directed that it should continue in force until the petitioner had purged himself of the contempt for which he was being punished.

[2] That the contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt is so well settled as to need only statement. Despite some confusion caused by certain ambiguous forms of expression used by the court below in dealing with the subject, it is indisputable that the punishment for contempt was imposed solely because of the opinion of the court that the witness was willfully refusing to testify truthfully, that is, was committing perjury.

[3] Whether, then, power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury, is the test we must here apply. Because perjury is a crime defined by law and one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt. For an application of this doctrine to perjury, see *Berkson v. People*, 154 Ill. 81, 39 N. E. 1079; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *Stockham v. French*, 1 Bing. 365; and see *In re Schulman*, 177 Fed. 191, 101 C. C. A. 361; *In re Steiner* (D. C.) 195 Fed. 299; *In re Ulmer* (D. C.) 208 Fed. 461; *United States v. Appel* (D. C.) *211 Fed. 495. This being true, we must ascertain what is the essential ingredient in addition to the elements constituting perjury under the general law which must be found in perjury when committed in the presence of a court to bring about the exceptional conditions justifying punishment under both.

[4] Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. This, however, expresses no purpose to exempt judicial authority from constitutional limitations, since its great and only purpose is to secure judicial authority from obstruction in the performance of its duties to the end that means appropriate for the preservation and enforcement of the Constitution may be secured. *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186; *Marshall v. Gordon*, 243 U. S. 521, 37 Sup. Ct. 448, 61 L. Ed. 881, L. R. A. 1917F, 279, Ann. Cas. 1918B, 371.

[5] An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted—a principle which, applied to the subject in

hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. As illustrative of this, see *United States v. Appel* (D. C.) 211 Fed. 495. It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteris^{*t}ic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled.

[6] Testing the power to make the commitment which is under consideration in this case by the principles thus stated, we are of opinion that the commitment was void for excess of power—a conclusion irresistibly following from the fact that the punishment was imposed for the supposed perjury alone without reference to any circumstance or condition giving to it an obstructive effect. Indeed, when the provision of the commitment directing that the punishment should continue to be enforced until the contempt, that is, the perjury, was purged, the impression necessarily arises that it was assumed that the power existed to hold the witness in confinement under the punishment until he consented to give a character of testimony which in the opinion of the court would not be perjured.

[7] In view of the nature of the case, of the relation which the question which it involves bears generally to the power and duty of courts in the performance of their functions, of the dangerous effect on the liberty of the citizen when called upon as a witness in a court which might result if the erroneous doctrine upon which the order under review was based were not promptly corrected, we are of opinion that the case is an exception to the general rules of procedure to which we have at the outset ^{*r}eferred, and therefore that our duty exacts that we finally dispose of the questions in the proceeding for habeas corpus which is before us. It is therefore Ordered that the petitioner be discharged.

Mr. Justice PITNEY dissents.

(249 U. S. 440)

UNITED STATES v. LAUGHLIN.

(Argued Jan. 30 and 31, 1919. Decided April 14, 1919.)

No. 200.

1. COURTS ~~§~~449(1)—CLAIMS AGAINST UNITED STATES—JURISDICTION—EXCESS PAYMENT UNDER PUBLIC LAND LAWS.

Jurisdiction conferred on the Court of Claims by Judicial Code, § 145 (Comp. St. § 1136), of claims against the United States founded on "any law of Congress," applies to a claim under Act March 26, 1908, § 2 (Comp. St. § 4492), providing for repayment where it appears to the satisfaction of the Secretary of the Interior that a person has made a payment to the United States under the public land laws in excess of the amount he was lawfully required to pay thereunder, where, though the facts were undisputed and shown to the secretary's satisfaction, he disallowed the claim on the law; he being given exclusive jurisdiction only to determine disputed questions of fact, and his decision on questions of law being reviewable by the courts.

2. PUBLIC LANDS ~~§~~79—RAILROAD GRANT—PRE-EMPTION WITHIN GRANT—PRICE TO BE PAID—"RESERVATION OF PUBLIC LANDS."

Under Act July 2, 1864, § 3, granting to the Northern Pacific Railroad the odd-numbered sections, within defined limits, to which, at the time of definite location of the line, the United States should have title free from pre-emption or other claims or rights, and section 6, providing that the reserved alternate (even-numbered) sections shall not be sold by the government at less than \$2.50 per acre, one pre-empting an odd-numbered section within the limits of the grant, after the filing of map of general route and an order of withdrawal of the odd-numbered sections from entry, no map of definite location being then or afterwards filed, is required to pay only \$1.25 per acre; Rev. St. § 2357 (Comp. St. § 4757), and section 2259, governing in the absence of special provision; section 2364 (Comp. St. § 4773), as to price when a "reservation of public lands" is brought into the market, being inapplicable, and it being immaterial whether the railroad filed a relinquishment pursuant to Act June 22, 1874 (Comp. St. § 4889), providing that entries or filings thus released from conflict may be perfected into title as if such lands had not been granted.

Appeal from the Court of Claims.

Action by Robert A. Laughlin against the United States. Judgment for claimant (52 Ct. Cl. 292), and the United States appeals. Affirmed.

*Mr. C. Edward Wright, of Washington, D. C., for the United States.

Messrs. Francis W. Clements and William R. Andrews, both of Washington, D. C., for appellee.

Mr. Justice PITNEY delivered the opinion of the Court.

This case, although involving but \$200, is deemed by the government to be important, because typical of a large group of cases of like character. Suit was brought by Laughlin in the Court of Claims under section 2 of the Act of March 26, 1908 (35 Stat. 48, c. 102 [Comp. St. § 4492]), for the repayment of an alleged excess charge exacted of him when he made a pre-emption cash entry November 20, 1878, for a tract of 160 acres of public land, part of section 33, township 5 south, range 12 east, W. M. in the Dalles, Oregon, land district, for which he was charged by the proper officer of the United States the sum of \$400, or at the rate of \$2.50 per acre. There was a judgment in favor of the claimant (*Laughlin v. United States*, 52 Ct. Cl. 292), and the present appeal followed.

*142 The land is a part of an odd-numbered section within 40 miles of the general route of the Northern Pacific Railroad *Company, as shown by its map filed in the Interior Department August 13, 1870, upon the basis of which the department, on February 14, 1872, issued an order withholding from disposition the odd-numbered sections of public lands and increasing in price to \$2.50 per acre the even-numbered sections within the limits indicated by the map. No map of definite location of this particular portion of the proposed railroad was ever filed; this portion never was constructed, and the grant as to it was forfeited by act of Congress of September 29, 1890 (26 Stat. 496, c. 1040). Claimant applied to the Secretary of the Interior under the Act of March 26, 1908, for the refund of \$200 of the purchase price, alleging that the lawful price was \$1.25 per acre; but the Secretary, on July 22, 1916, although finding the facts to be as above stated, denied the application upon the ground that the questions of law presented had been previously adjudicated by the Land Department adversely to claimant's contention.

[1] Upon the present appeal it first is insisted in behalf of the government that the Court of Claims had no jurisdiction of the subject-matter. If there was jurisdiction, it arose from the clause of section 145, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1136 [Comp. St. § 1136]), which confers upon that court jurisdiction to hear and determine claims founded upon "any law of Congress"—the act of March 26, 1908, being the law relied on. Section 2 of this act reads as follows:

"That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the

amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives."

The third section provides machinery for the payment of the amount of the excess when ascertained. It is contended by the government that a favorable decision by the Secretary is a condition precedent to the right of recovery under *the section quoted; *443 that since the Secretary disallowed the present claim, because not satisfied that an excessive payment under the law had been made, there has been no violation of any right of claimant; and that hence there is not presented a claim founded upon a law of Congress within the meaning of the term as employed in defining the jurisdiction of the Court of Claims. We cannot accept this construction of section 2 of the act of 1908. According to it, although facts were made to appear to the entire satisfaction of the Secretary showing that a person had made "payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws," it would rest in the uncontrolled judgment and discretion of the Secretary to deny repayment of the excess because not satisfied that it ought to be repaid, notwithstanding Congress had declared that under the precise state of facts it should be repaid. Under this construction the legislative power would in effect be delegated to the Secretary. In our view it was the intent of Congress that the Secretary should have exclusive jurisdiction only to determine disputed questions of fact, and that, as in other administrative matters, his decision upon questions of law should be reviewable by the courts. In the case before us the facts were not and are not in dispute, and were shown to the Secretary's satisfaction; whether, as matter of law, they made a case of excess payment, entitling claimant to repayment under the act of 1908, was a matter properly within the jurisdiction of the Court of Claims. See *Medbury v. United States*, 173 U. S. 492, 497, 498, 19 Sup. Ct. 503, 43 L. Ed. 779; *McLean v. United States*, 226 U. S. 374, 378, 33 Sup. Ct. 122, 57 L. Ed. 260; *United States v. Hyoslef*, 237 U. S. 1, 10, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286.

[2] Upon the merits, the question is: What price could a pre-emptor lawfully be required to pay for public lands in an odd-numbered section within the primary limits of the Northern Pacific Railroad land grant after the filing *of a map of general route and the making of an order withdrawing the odd-numbered sections from entry; no map of definite location of the line in question having at that time or at any time been filed? *444

The company was incorporated by Act

July 2, 1864, c. 217, 13 Stat. 365, by the third section of which there was granted to it—

“every alternate section of public land, not mineral, designated by odd numbers [within defined limits], * * * whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.”

By section 6 it was enacted:

“That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act. * * * And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.”

Notwithstanding certain expressions in *Buttz v. Northern Pacific Railroad*, 119 U. S. 55, 71, 72, 7 Sup. Ct. 100, 30 L. Ed. 330, it came to be settled *by a line of more recent cases ending with *Nelson v. Northern Pacific Railway*, 188 U. S. 108, 116, 119, 121, 23 Sup. Ct. 302, 47 L. Ed. 406, that the act of 1864 granted to the railroad company only those alternate odd-numbered sections to which at the time of definite location the United States had valid title and which then were free from pre-emption or other claims or rights; that the company acquired no vested interest in any particular section of land until after a definite location and acceptance of its map thereof; and that until then the grant was in the nature of a “float.” In that case the right of a homestead settler who went upon unsurveyed land after the filing of a map of general route and after the making and transmission to the proper local land office of a withdrawal order based upon that map, and who, as soon as survey was made developing the fact that his land was within an odd-numbered section, attempted to enter it under the homestead laws in the local land office, his application being rejected solely because of supposed conflict with the grant to the Northern Pacific Railroad, was sustained as against the com-

pany upon the ground that the acceptance by the land department of the map of general route and the making of a withdrawal order based upon it did not, in view of the terms of the granting act, segregate the land from the public domain or withdraw it from occupancy in good faith by homestead settlers prior to definite location. In *Northern Pacific Railroad v. Sanders*, 166 U. S. 620, 17 Sup. Ct. 671, 41 L. Ed. 1139, it was held upon like reasoning that the title of the railroad company was defeated by an entry upon lands within the primary limits of the grant by persons qualified to purchase them as mineral lands, followed by an application to purchase them as such which was pending at the time of the definite location of the railroad although initiated after the filing of the general route, notwithstanding the fact that the lands were not such as properly were to be regarded as mineral lands.

*In short, construing sections 3 and 6 of the granting act together, the filing of a map of general route, although followed by a withdrawal order, did not take the granted sections out of the public domain or exempt them from entry under the pre-emption and homestead laws prior to the filing and acceptance of the map of definite location.

It is said on the part of the government that this land was restored to entry and the claimant's application for purchase accepted because the railroad company had filed a relinquishment pursuant to Act June 22, 1874, c. 400, 18 Stat. 194 (Comp. St. § 4889); at the same time it is insisted that the provisions of that act have no bearing upon the determination of this case because not only had the land office never declared that the company's rights had attached to these lands, but in fact it never had any rights. It is said that under such circumstances the department uniformly has held that the act of 1874 has no application; the practice of the land office having been to permit relinquishments in cases like the present in order to expedite the perfection of settlement claims, while saving to the railroad companies any rights they might have under the act of 1874 to be determined upon the final adjustment of the grant. There being no finding that the lands in question had been relinquished by the railroad company under the act of 1874, we give no weight to its provisions, beyond saying that in any point of view they conferred no authority upon the officials of the government to charge more for the land relinquished than otherwise might have been charged. It declares that “entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted.”

It is clear that the price of lands in odd-

*417
numbered sections was not fixed by the granting act of 1864. Section 6 fixed a price of \$2.50 per acre only for the alternate sections reserved to the United States—that is, those bearing even numbers. We need not pursue the suggestion of counsel for appellee that there could be no “reserved alternate sections,” within the meaning of the price-fixing clause, until ascertainment of the granted sections by the filing and acceptance of a map of definite location; for, in any event, neither section 6 nor the withdrawal order made any provision for the price of land in the odd-numbered sections. In the absence of special provision the minimum price was fixed by section 2357, Rev. Stat. (Comp. St. § 4757), at \$1.25 per acre, and under section 2259 a qualified pre-emptor was entitled to purchase at the minimum price. This was a substantial right, of which he could not be deprived by arbitrary action of the officers of the government.

The government invokes the provisions of section 2364 (Comp. St. § 4773), derived from an act contemporaneous with the land grant (Act July 2, 1864, c. 221, 13 Stat. 374), and reading as follows:

“Whenever any reservation of public lands is brought into market, the Commissioner of the General Land Office shall fix a minimum price, not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of.”

*418
It is argued that the withdrawal order of 1872 amounted to a “reservation of public lands” within the meaning of this section, so far as it concerned the odd-numbered sections within the limits, and that the sale of the particular quarter section to claimant amounted to a “bringing into market” of this part of the reservation, so that the Commissioner of the General Land Office was permitted to fix the minimum at such price as he saw fit, not less than \$1.25 per acre, and was acting within his authority when he set the price of these lands at \$2.50 per acre. But of this it suffices to say, as was pointed out in *Nelson v. Northern Pacific Railway*, supra, that under the terms of the granting act here under consideration the withdrawal on general route neither did nor could effectively reserve any of the odd-numbered sections from homestead or pre-emption settlement in advance of the definite location of the line of the railroad; and, as has been stated, there never was a definite location of that part of the road which had been proposed to be built opposite to the land that claimant took up.

The judgment of the Court of Claims must be

Affirmed.

(249 U. S. 416)

CHICAGO & N. W. RY. CO. v. OCHS.

(Argued Jan. 20, 1919. Decided April 14, 1919.)
No. 159.

1. CONSTITUTIONAL LAW — 297—DUE PROCESS—RAILROAD CONTRIBUTING TO COST OF SIDE TRACK—PRIVATE USE.

Relative to claim that an order of the state Railroad and Warehouse Commission under Gen. St. Minn. 1913, §§ 4231, 4284, requiring a railroad company to extend a side track, partly at its expense, from its main line to a manufacturing plant, is repugnant to the due process of law clause of the Fourteenth Amendment, the company's property is not taken for a private use; such track, under the settled rule of the state, not being merely a private siding, but additional trackage for public use, and becoming the property of the company and an integral part of its system, and wholly under its control, and at the service of all having occasion to use it.

2. CONSTITUTIONAL LAW — 297—TAKING PROPERTY WITHOUT DUE PROCESS — RAILROAD CONTRIBUTING TO COST OF SIDE TRACK.

An order of the Railroad and Warehouse Commission under Gen. St. Minn. 1913, §§ 4231, 4284, requiring a railroad company to extend a side track, partly at its expense, from its main line to a manufacturing plant, does not violate the due process clause of the Fourteenth Amendment, as taking its property for a public use without due compensation; the order being reasonable, viewed from the standpoints of adequate facilities, cost, and revenue to be derived, and full hearing before the commission and in the courts being provided.

In Error to the Supreme Court of the State of Minnesota.

Proceeding by A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company, against the Chicago & Northwestern Railroad Company, begun before the Minnesota Railroad and Warehouse Commission. An order of the Commission was sustained by the district court, and by the Supreme Court of Minnesota (135 Minn. 323, 160 N. W. 866, Ann. Cas. 1918E, 337), and defendant brings error. *Amrmed.*

Messrs. Richard L. Kennedy, of St. Paul, Minn., and L. L. Brown, of Winona, Minn., for plaintiff in error.

Messrs. Henry C. Flannery, of Minneapolis, Minn., and Lyndon A. Smith, of St. Paul, Minn., for defendant in error.

*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

An order of the Railroad and Warehouse Commission of Minnesota requiring a railroad company to alter and extend a side track leading from its main line to an adjacent brick and tile manufacturing plant is

here in question. The order was made under a local statute (Gen. Stat. 1913, §§ 4231, 4284) on complaint of the owner of the plant, after due notice and full hearing and on successive appeals was sustained by the district court of the county and the Supreme Court of the state. *Ochs v. Chicago & N. W. Ry. Co.*, 135 Minn. 323, 160 N. W. 866, Ann. Cas. 1918E, 337.

The principal controversy before the commission was as to who should bear the cost of the work. The railroad company objected to bearing any part and the owner of the plant was not willing to bear all. If the cost was put on the latter, the railroad company was ready to make the alteration and extension. The statute, as construed by the Supreme Court of the state, authorized the commission, if it ordered the work done, to make a reasonable apportionment of the cost. *State v. Chicago, Milwaukee & St. Paul Ry. Co.*, 115 Minn. 51, 131 N. W. 859. By the order the commission practically assigned two-thirds to the railroad company and one-third to the owner of the plant, and required the latter to secure the right of way at its own expense and to invest the railroad company with a perpetual right to use the same for railroad purposes.

[1] In the state courts the railroad company, without questioning the terms of the apportionment, if the cost was to be divided, contended that the statute as construed and the order as made were repugnant to the due process of law clause of the Fourteenth Amendment, in that to require the company to bear any part of the cost was to take its property for a private use without its consent, or, if the use were public, to take the property for such use without compensation. Both phases of the contention were overruled and this is the matter on which error is assigned.

The facts are not in dispute and are these:

The plant is about a quarter of a mile from the railroad company's station at Springfield, Minn., a place of over 1,500 inhabitants, and has been in operation as much as 20 years. During that time the railroad company has maintained and operated a side track leading from its main line to the plant and the products of the latter have been shipped out and fuel and other supplies shipped in over this track. The railroad company has been free to use the track for other purposes and has done so occasionally. The yearly shipments from the plant have been about 250 carloads and those to the plant about 50 carloads, the freight charges thereon exceeding \$10,000. Without the side track the plant would be a failure and the public would be without its products; with it the plant is a success and the products reach and are used by the public. The demand for the products has come to exceed greatly the capacity of the plant and the owner is now enlarging it at a cost

of \$150,000. The output, as also the aggregate freight charges, will be more than doubled thereby. The entire output moves over this railroad, no other being accessible. To serve the enlarged plant and handle the increased shipments, out and in, the present side track—about 460 yards—must be rearranged and extended about 350 yards. The estimated cost of the work according to plans substantially agreed on will be about \$2,300.

Under the settled rule in Minnesota a side track such as is in question here is not merely a private siding, but "additional trackage for public use." If need be the right of way for it may be acquired by condemnation. It becomes the property of the railroad company and an integral part of its railroad system, and is wholly under its control. Besides enabling the public to get the products of the industry served, it is at the service of all who have occasion to use it and must be operated accordingly. *Range Sand-Lime Brick Co. v. Great Northern Ry. Co.*, 137 Minn. 314, 163 N. W. 656, L. R. A. 1918B, 784, and cases cited.

*Of such a track, and of the power of the state to impress on it a public character, this court said in *Union Lime Co. v. Chicago & Northwestern Ry. Co.*, 233 U. S. 211, 222, 34 Sup. Ct. 522, 525 (58 L. Ed. 924):

"The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.¹ There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings [citing cases].

"While common carriers may not be compelled to make unreasonable outlays (*Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196 [30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989]), it is competent for the state, acting within the sphere of its jurisdiction, to provide for an extension of their transportation facilities, under reasonable conditions, so as to meet the demands of trade; and it may impress upon these extensions of the carriers' lines, thus furnished under the direction or authority of the state, a public character regardless of the number served at the beginning. The branch or spur comes into existence as a public utility and as such is always available as localities change and communities grow."

In our opinion the conditions here were such as to bring the action of the state through its Legislature and commission within the range of that power.

[2] Recognizing then that the side track is for a public and not a private use, we come to the question whether requiring the railroad company to bear a part of the cost involves a taking of its property without compensation.

¹ *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 608, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008.

As a common carrier a railroad company assumes and must discharge the obligations which inhere in the nature of its business. Among these obligations is that of providing reasonably adequate facilities for serving the *public. *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 595, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1. To do this requires an expenditure of money, of course, but the expenditure is for property which will belong to the company and be employed in its business. The money is not taken from the company and given to others, nor is the use of the facilities to be uncompensated. Like other property employed by the company in the transportation of persons or property, the facilities have a real bearing on the rates which it is entitled to charge. Therefore an enforced discharge of the duty to provide such a facility does not amount to a taking of property without compensation merely because it is attended with some expense. *Wisconsin, etc., R. R. Co. v. Jacobson*, 179 U. S. 287, 302, 21 Sup. Ct. 115, 45 L. Ed. 194; *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. Ed. 614; *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 26, 27, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398; *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262, 278, 279, 30 Sup. Ct. 330, 54 L. Ed. 472; *Oregon R. R. & Navigation Co. v. Fairchild*, 224 U. S. 510, 529, 32 Sup. Ct. 535, 56 L. Ed. 863; *Michigan Central R. R. Co. v. Michigan Railroad Commission*, 236 U. S. 615, 631, 35 Sup. Ct. 422, 59 L. Ed. 750; *Chesapeake & Ohio Ry. Co. v. Public Service Commission of West Virginia*, 242 U. S. 603, 37 Sup. Ct. 234, 61 L. Ed. 520.

Of course, the expense is an important element to be considered in determining whether the requirement is within the bounds of reasonable regulation or is essentially arbitrary, but it is not the only one. The nature and volume of the business to be affected, the revenue to be derived from it, the character of the facility required, the need for it and the advantage to be realized by shippers and the public are also to be considered. Tested by these criteria we think the order in question is not arbitrary, but reasonable.

The case of *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989, on which the railroad company relies, is plainly distinguishable. The Nebraska statute there condemned, as applied by the state court, required the company to *bear the cost of "reduplicating already physically adequate accommodations," on the demand and for the benefit of certain shippers, and this in the absence of exceptional circumstances, if any there could be, making such an extraordinary requirement reasonable. Besides, the statute

made no provision for a preliminary hearing before an administrative body and yet subjected the company to the risk of a fine of at least five hundred dollars if it awaited a hearing in court on the reasonableness of the demand.

Here there was provision for a full hearing before the commission and also in the district court of the county. Both found the existing facilities inadequate, and there was ample evidence to sustain the finding; so the order cannot be regarded as calling for a reduplication of what already is supplied.

Judgment affirmed.

(249 U. S. 345)

LAKE ERIE & W. R. CO. v. STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS ex rel. CAMERON.

(Argued and Submitted March 13, 1919. Decided April 14, 1919.)
No. 204.

1. COURTS ⇄394(3) — SUPREME COURT — "STATE LAW."

An order of Illinois Public Utilities Commission requiring a railroad company to restore a side track, being legislative in its nature and made by an instrumentality of the state, is a "state law," within Const. U. S. Amend. 14, and the laws regulating jurisdiction of the national Supreme Court.

[Ed. Note.—For other definitions, see Words and Phrases, State Law.]

2. CONSTITUTIONAL LAW ⇄297—DUE PROCESS—RESTORATION OF SIDE TRACK BY RAILROAD.

An order of the Illinois Public Utilities Commission, after notice and hearing, requiring a railroad company to restore a side track passing an individual's elevator and coal yard, does not take its property for private use, or for public use without compensation, in contravention of the due process clause of the Fourteenth Amendment, the track before its removal being one which the State impressed with a public character; *Hurd's Rev. St. 1916, c. 111a, § 45*, under which its restoration is ordered, containing provisions, whereby it will retain that character and be open to use by other shippers, and finding of the commission that the cost is justified by the business to be reasonably expected being sustained by the state Supreme Court.

In Error to the Supreme Court of the State of Illinois.

Petition to the State Public Utilities Commission of Illinois by J. S. Cameron against the Lake Erie & Western Railroad Company. Judgment of the circuit court, upholding the commission's order for restoration of a side track, was affirmed by the Supreme Court of Illinois (277 Ill. 574, 115 N. E. 519), and defendant brings error. Affirmed.

*Mr. George B. Gillespie, of Springfield, Ill., for plaintiff in error.

Messrs. C. S. Schneider, of Northwood Park, Ill., and Edward J. Brundage, of Chicago, Ill., for defendant in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

For 25 years the Lake Erie & Western Railroad Company maintained and operated on its right of way at Elliott, Ill., a side track passing a grain elevator and coal yard operated by one Cameron. The elevator stood partly on the right of way and partly on ground owned by Cameron, his occupancy of the former being under a lease. In May, 1915, the elevator was destroyed by fire, whereupon the company exercised a reserved option to cancel the lease and also took up the side track. Cameron protested against the latter, proceeded to rebuild the elevator at its former location, but wholly on his own ground, and in June, 1915, filed with the Public Utilities Commission a petition praying that a restoration of the track be ordered. After notice and hearing the commission granted such an order and it was upheld by the circuit and supreme courts of the state. State Public Utilities Commission ex rel. v. Lake Erie & W. R. Co., 277 Ill. 574, 115 N. E. 519.

*It is contended here, as it was in the state courts, that the order contravenes the due process of law clause of the Fourteenth Amendment, in that it takes property of the railroad company for private use, or for public use without compensation.

[1] Such an order, being legislative in its nature and made by an instrumentality of the state, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction. Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana, 221 U. S. 400, 403, 31 Sup. Ct. 537, 55 L. Ed. 786; Ross v. Oregon, 227 U. S. 150, 162, 163, 33 Sup. Ct. 220, 57 L. Ed. 458, Ann. Cas. 1914C, 224; Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278, 295, 296, 33 Sup. Ct. 312, 57 L. Ed. 510; Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548, 555, 34 Sup. Ct. 364, 58 L. Ed. 721; Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651, 660, 661, 35 Sup. Ct. 214, 59 L. Ed. 405; Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., 249 U. S. 134, 39 Sup. Ct. 237, 63 L. Ed. 517.

[2] Under the laws of the state the side track before its removal, although used principally in moving freight from and to Cameron's elevator and coal yard, was open to use by the public and subject to public control like other parts of the company's road; in other words, it was a track which the state impressed with a public character.

Truesdale v. Grape Sugar Co., 101 Ill. 561, 567; Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155, 167, 171, 3 N. E. 448; Chicago & Alton R. R. Co. v. Suffern, 129 Ill. 274, 286, 21 N. E. 824. Not only so, but the statute under which its restoration was ordered contains express provisions whereby it will retain that character and be open to use by other shippers as well as by Cameron. Hurd's Stat. 1916, c. 111a, § 45.

The shipments for which the track has been used have yielded the company a revenue of about \$20,000 each year for several years. What the cost of restoration will be the record does not disclose, but the commission, with knowledge of such matters, has found that it is justified by the business reasonably to be expected; and the Supreme Court of the state, besides sustaining that and other findings of the commission, aptly points out that but for the hasty and improper removal of the track the company "would not be at the expense of replacing it." When the track is restored the company will own it and be entitled to make a reasonable charge for its use, just as is the case with other property employed in the company's transportation service.

Applying the decision just announced in Chicago & Northwestern Ry. Co. v. Ochs Brick & Tile Co., 249 U. S. 416, 39 Sup. Ct. 343, 63 L. Ed. 679, we think the order does not take property of the company for private use, or for public use without compensation, in contravention of the Fourteenth Amendment.

Judgment affirmed.

(249 U. S. 460)

J. E. HATHAWAY & CO. v. UNITED STATES.

(Argued March 19 and 20, 1919. Decided April 14, 1919.)

No. 255.

1. COURTS — 389 — REVIEW OF DECISION OF COURT OF CLAIMS — FINDINGS OF FACT.

Finding by Court of Claims that there was no unreasonable delay by the government in approving a contract is one of ultimate fact, by which the Supreme Court is bound on appeal; it not being without supporting evidence or inconsistent with other facts found.

2. DAMAGES — 85 — LIQUIDATED DAMAGES — CONTRACT.

Provision of a building contract, making time of the essence, that, in case of failure to complete in specified time, contractor shall pay, in addition to \$100 a day as liquidated damages, all expenses for inspection and superintendence, is valid.

3. COURTS 389—REVIEW OF DECISION OF COURT OF CLAIMS—ISSUE NOT RAISED BELOW.

Claim that credit of time by government on account of extra work should have been greater is not available on appeal from Court of Claims; no issue thereon appearing to have been raised below.

Appeal from the Court of Claims.

Suit by J. E. Hathaway & Co. against the United States. From an adverse judgment (52 Ct. Cl. 267), claimants appeal. Affirmed.

Mr. George A. King, of Washington, D. C., for appellants.

Mr. Assistant Attorney General Frierson, for the United States.

* Mr. Justice BRANDEIS delivered the opinion of the Court.

The United States solicited sealed proposals for the repair of a revetment in Michigan; and J. E. Hathaway & Co. became the successful bidders. Under a contract, dated May 11, 1910, they agreed to complete the work by December 1, 1910. It was not completed until 68 days later. Of this delay the government conceded that 29 days were attributable to extra work required by it, and 10 more days were not counted against the contractor, being Sundays and holidays. For the remaining 29 days' delay the government deducted from the contract price \$3,082, claiming that amount under the provisions for liquidated and other damages. To recover the amount disallowed, J. E. Hathaway & Co. brought suit in the Court of Claims, which denied them relief (52 Ct. Cl. 267); and the case comes here on appeal.

[1] First. Claimants contend that they were entitled to an extension of more than these 29 days' time for completing the work, because the contract and bond were delivered by them to the government May 18, duly executed, but were not approved by the Chief of Engineers until June 9, and notice of approval was not given them until June 13. The origin of this delay was the failure of the surety company to file with the War Department a copy of the vote of its directors giving him who signed the bond as attorney in fact authority so to do. But claimants insist that this omission could have been quickly supplied, if the government had telegraphed for a copy of the vote, and that practically all the delay was due to its unreasonable failure so to do.

The Court of Claims found:

"There was no unreasonable delay on the part of the government in approving the contract."

This finding, like one of reasonable value (Talbert v. United States, 155 U. S. 45, 46, 15 Sup. Ct. 4, 39 L. Ed. 64), is a finding of

an ultimate fact by which this court is bound, unless it appears that the finding was made without supporting evidence (Cramp v. United States, 239 U. S. 221, 232, 36 Sup. Ct. 70, 60 L. Ed. 238; Stone v. United States, 164 U. S. 380, 17 Sup. Ct. 71, 41 L. Ed. 477; United States v. Clark, 96 U. S. 37, 24 L. Ed. 696), or is inconsistent with other facts found (United States v. Berdan Fire-Arms Co., 156 U. S. 552, 573, 15 Sup. Ct. 420, 39 L. Ed. 530). There is no such lack of supporting evidence or inconsistency here. We have consequently no occasion to determine whether, as was held in American Dredging Co. v. United States, 49 Ct. Cl. 350, unreasonable delay on the part of the government in approving a contract for an accepted bid can entitle the contractor to a corresponding extension of time, where a definite date is fixed by the contract for completion of the work. Compare Monroe v. United States, 184 U. S. 524, 22 Sup. Ct. 444, 46 L. Ed. 670. The case of District of Columbia v. Camden Iron Works, 181 U. S. 453, 461, 21 Sup. Ct. 680, 45 L. Ed. 948, strongly relied upon by claimants, is clearly distinguishable. There the contract, as interpreted by the court, provided that the work should be completed, not (as here) by a date fixed, but within a certain number of days; and the number of days was to be measured, not from the date of the contract, but from "the date of the execution of the contract." What was there decided is merely, that under such circumstances it may be "shown that a deed, bond or other instrument was in fact made, executed and delivered at a date subsequent to that stated on its face."

[2] Second. Claimants contend also that the Court of Claims erred in allowing, in addition to the sum of \$100 a day as liquidated damages, the sum of \$182 for the expense of superintendence and inspection. But the contract expressly provided that time should be deemed of the essence and that in case of failure to complete within the time specified "the contractor shall pay, in addition to the liquidated damages hereinbefore specified, all expenses for inspection and superintendence." There is no reason why parties competent to contract may not agree that certain elements of damage difficult to estimate shall be covered by a provision for liquidated damages and that other elements shall be ascertained in the usual manner. Provisions of a contract clearly expressed do not cease to be binding upon the parties, because they relate to the measure of damages. Henry A. Wise, Trustee, v. United States (No. 214, decided March 31, 1919) 249 U. S. 361, 39 Sup. Ct. 303, 63 L. Ed. 647.

[3] Third. Claimants further contend that the credit of time allowed by the government on account of the extra work should have been greater. On this matter no issue

appears to have been raised below; and it is obviously not open for review here.

The judgment of the Court of Claims is Affirmed.

(249 U. S. 385)

DELAWARE, L. & W. R. CO. v. UNITED STATES.

(Argued March 26, 1919. Decided April 14, 1919.)

No. 158.

1. POST OFFICE 21(4)—CONTRACT TO CARRY MAILS—CHANGE OF RATES.

Even if writings exchanged by railroad company and post office department constituted contract for carrying mails for four years, the words "subject to future orders," in one case, and "unless otherwise ordered," in another, in notice to railroad that compensation had been fixed for four years at certain sums, permit change of rate.

2. POST OFFICE 21(4)—CONTRACT FOR CARRYING MAILS—RESERVATION OF RIGHT TO CHANGE RATES—ADOPTION.

Though Postmaster General had no power to change rates when contract for carrying mails was made, the reservation therein in favor of the United States of right to make such change could be adopted by it, as it was by Act March 2, 1907.

3. POST OFFICE 21(4)—CONTRACT FOR CARRYING MAILS—READJUSTMENT OF COMPENSATION—REWEIGHING.

Reference to average weights, in Act March 2, 1907, authorizing the Postmaster General to readjust compensation to be paid, after a certain date, for carrying mails on certain routes, by deduction of 5 per cent. from present rates on the excess over an average weight per day of a certain amount, held not to require a reweighing before the act could be put in effect.

Appeal from the Court of Claims.

Suit by the Delaware, Lackawanna & Western Railroad Company against the United States. Judgment for defendant (51 Ct. Cl. 426), and claimant appeals. Affirmed.

*Messrs. Benjamin Carter and F. Carter Pope, both of Washington, D. C., for appellant.

Mr. Assistant Attorney General Frierson, for the United States.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a petition to recover additional pay for the carriage of the mails upon two routes from July 1, 1907, to July 1, 1909—the claimant alleging and the United States denying that it had contracts at fixed rates for four years from July 1, 1905. The Court of Claims, without stating in terms what the contracts were, set forth the transactions

that fixed the relations of the parties, and rejected the claims. Under the statutes in force at the time a maximum price per mile was fixed with reference to the average weights carried by the railroad. This average was ascertained by weighing the mails for thirty days once in four years. The quadrennial weighing for the two routes concerned (from Hoboken to Buffalo and from Hoboken to Denville, New Jersey) took place in the spring of 1905, upon a notice from the Post Office Department that it was in order to obtain the data for adjusting the pay from July 1, 1905, to June 30, 1909. At about the same time the Post Office Department in accordance with its practice sent to the railroad a circular calling for a verified return of the distances on the routes and for an acceptance, as it was called, more properly an offer, in the following form:

"In case the Post Office Department authorizes the transportation of mails over this line or any part of it, the railroad company agrees to accept and perform the service upon the conditions prescribed by law and the regulations of the Department."

Before July 1, 1905, these returns were executed, and on September 15 the Post Office Department notified the railroad that the compensation for transporting the mails on the Buffalo route "has been fixed from July 1, 1905, to June 30, 1909," upon returns, at certain sums. "This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week." The notice for the Denville route, sent September 16, 1905, was similar except that there was inserted after "has been fixed from July 1, 1905, to June 30, 1909," the words "unless otherwise ordered." There is nothing else bearing on the contracts except that the Post Office Regulations contemplate contracts for and not exceeding four years.

The rate thus fixed was paid for two years, but on September 12, 1907, in pursuance of an Act of Congress of March 2, 1907, c. 2513, 34 Stat. 1205, 1212, authorizing the Postmaster General to readjust the compensation to be paid after July 1 of that year, and to reduce the rate on certain average weights, he ordered the reduction complained of. The service was continued on an understanding that it was without prejudice to the rights of the railroad in case it should be decided that it was entitled to the old rate for four years from July 1, 1905. The Court of Claims allowed the higher rate up to the time of the notice of the reduction but disallowed the rest, and the Railroad Company appealed.

[1, 2] It would be very difficult to say that the writings to which we have referred constituted a contract on the part of the rail-

road to carry the mails for four years and on the part of the Government to accept the service for that time, even subject to the reservations that were expressed on its side. If in view of the circumstances and past practices a finding of such a contract was warranted no such finding has been made and this Court cannot make it. It is not a conclusion of law from the facts. But, however this may be, the notice to the railroad that the *compensation has been fixed at certain rates, in one case "unless otherwise ordered" and in both "subject to future orders" excludes the possibility of holding that a change of rate could not be made so far as the written words were concerned. So it was decided in *Eastern Railroad Co. v. United States*, 129 U. S. 391, 9 Sup. Ct. 320, 32 L. Ed. 730, which answers the argument that the future orders referred to did not extend to a change of rates. In that case, to be sure, the railroad made no protest, but the decision was not placed upon that ground alone but also upon the effect of the words "unless otherwise ordered." It is said that the Postmaster General had no power to change the rates in 1905 when the papers were signed. But that would not obliterate the reservation and bind the United States to a different contract from that which the documents expressed if they expressed anything more than the rate at which the service was rendered while it was rendered. The United States was free to adopt the reservation in its favor and it did adopt it by the Act of 1907. As the case stands, the railroad was free, as in the *Eastern Railroad Case*, to decline to carry at the new rates, but could not insist upon the old ones after notice that they had been revised.

[3] It is argued that the Act of 1907 could not be put into effect without a reweighing. The Act directs the Postmaster General to readjust the compensation to be paid from and after the first day of July, 1907, for the transportation of mail on certain routes "by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds"; with further reductions arrived at in like manner. The references to *average weights are not enough to require reweighing. They are an enumeration of the elements identifying and determining the present rates that are to be reduced. We see no reason to suppose that Congress intended to require a special and expensive investigation at the cost of the Government rather than to adopt

the existing practice and to order the reduction without reference to the exact time when the last thirty days' weighing occurred or should occur.

Judgment affirmed.

(249 U. S. 399)

COLUMBUS RY., POWER & LIGHT CO. v. CITY OF COLUMBUS, OHIO, et al.

(Argued Jan. 10, 1919. Decided April 14, 1919.)
No. 715.

1. COURTS ⇐282(3)—JURISDICTION OF FEDERAL COURT—FEDERAL QUESTION—ENFORCEMENT OF FRANCHISE.

A bill to restrain a city from enforcing the obligation of a street railroad company to furnish service at the rate fixed by the franchise, on the ground that the increased operating expenses, due to the war and to increased wages awarded by the War Labor Board, were so great that the enforcement of the franchise rates would deprive the company of its property without due process of law, presents questions arising under the Constitution not wholly lacking in merit, so that the federal court has jurisdiction thereof.

2. CARRIERS ⇐12(9)—RATES OF FARE—FRANCHISE—INCREASED OPERATING EXPENSES.

Under the laws of Ohio, the ordinances of Columbus granting street railway franchise for a fixed term of years, which were accepted by the grantees, constitute a binding contract, the obligation of which the company cannot avoid on the ground that the increased operating expenses, due to the war and the higher wages fixed by the War Labor Board, make it unprofitable, especially in the absence of a showing that further operation under the contract was impossible, or even that operation thereunder for the entire term of the franchise would be unremunerative.

Appeal from the District Court of the United States for the Southern District of Ohio.

Suit by the Columbus Railway, Power & Light Company against the City of Columbus, Ohio, and others, for an injunction. From a decree of the District Court dismissing the amended bill (253 Fed. 499), complainant appeals. Affirmed.

Mr. Joseph S. Clark, of Philadelphia, Pa., for appellant.

Mr. Henry L. Scarlett, of Columbus, Ohio, for appellees.

*Mr. Justice DAY delivered the opinion of the Court.

The Columbus Railway, Power & Light Company filed its complaint and amended bill of complaint in the District Court of the United States for the Southern District of Ohio, against the city of Columbus, Ohio.

and officials and members of the city council of the city, asking an injunction against the enforcement of ordinances concerning the operation of street railways upon certain streets in the city of Columbus. Upon motions to dismiss, and for a temporary injunction, the District Court held that there was no jurisdiction as the amended bill of complaint presented no substantial federal question, and, *considering the case upon its merits, held that the amended bill did not state facts constituting a valid cause of action in equity against the defendant, and dismissed the same. An appeal was prosecuted to this court; the case has been argued and submitted.

The amended bill of complaint alleges in substance that the company and its predecessors have since the enactment of two ordinances, hereinafter mentioned, and until the 20th of August, 1918, operated a system of street railway lines in the city of Columbus. The two ordinances in question are referred to in the bill and attached thereto. The one, denominated the "blanket franchise ordinance" was passed February 4, 1901, and the other, called the "Central Market franchise ordinance," was passed January 1, 1901. The allegations as to these two ordinances are supplemented by a statement of certain so-called perpetual franchise ordinances on certain streets. The two ordinances, above referred to, are each for the term of 25 years. The ordinances were duly accepted by the grantees thereof. Under the provisions of the blanket franchise ordinance the grantee and its successors are required to issue and sell eight tickets for 25 cents, and give universal free transfers. The issue and sale of such tickets continued until August 20, 1918, when, it is alleged, the franchise under that ordinance was surrendered and canceled by the railway company. Under the Central Market franchise ordinance the company issued and sold eight tickets for 25 cents, and gave universal transfers, and continued so to do until August 20, 1918, when, it is alleged, the franchise was surrendered and canceled by the company.

The bill sets forth allegations as to the extent of the business of the company: That its railway system includes more than 110 miles of main track, and supplies the only street railway service in the *city of Columbus, except a very limited service furnished by interurban cars running at long intervals upon certain streets; that the company also supplies power for war and industrial purposes, and is the only commercial company furnishing electricity in the city of Columbus. That Columbus and its suburbs contain a population of more than 250,000 persons, and constitute a large industrial, manufacturing, military, and railroad center. That more than 25,000 persons are employed in the manufacture of munitions, clothing, and a great variety of other war materials for use

directly by the United States government, and for the use of others furnishing war supplies to the government; also large railroad shops in which are employed many thousands of persons engaged in the making and repair of railroad engines, cars, and other equipment used and to be used by the United States Railroad Administration. That a large majority of the employés of these shops do and must depend upon the street railway service of the company as their means of transportation to and from their places of employment; and in said area is located the Columbus Barracks, in which are quartered more than 100,000 recruits per annum, who also are dependent upon said street railway service. That the discontinuance or impairment of the plaintiff's street railway service would cause irreparable harm to the government of the United States, to the city of Columbus and to all persons dependent upon the service. That the company has more than \$12,000,000 invested in the street railway lines and equipment. It has large amounts of outstanding mortgage bonds, of which the sum of \$7,295,000 is chargeable against its street railway property, the annual interest charged being more than \$333,000. The operation and management of the company show increased and increasing costs of operation and decreased and decreasing net revenue as a result of the war in which the United States *was then engaged.

The bill charges increases in the cost of coal and in wages paid to the employés. The net earnings of the operations of the lines for the 12 months ending June 30, 1918, after deducting operating expenses, taxes, and a proper charge for depreciation, were \$301,987, an amount insufficient by more than \$31,000 to pay the interest on the outstanding bonds of the company, properly chargeable to the railroad property, and barely enough to pay 2½ per cent. on the value of the property employed by the company in furnishing street railway service to Columbus. That in June, 1918, the street railway employés of the company demanded an increase in wages, and inaugurated a strike, which resulted in the discontinuance of the service of the company for two days. That the controversy was referred to the National War Labor Board, which board on July 31, 1918, rendered its decision increasing the wages of the street railway employés more than 50 per cent., thereby increasing the operating expenses of the street railway line by about \$560,000 per year. It is averred that as a result of such operations, for the current year ending June 30, 1919, the gross earnings will fall short of paying expenses, depreciation and taxes by approximately \$250,000, and that there will be no earnings from which to pay its interest charges, or to yield any return to the company on the value of its property. That on August 20, 1918, the company surrendered and canceled its blanket

*405 franchise and its Central Market franchise by notification in writing addressed to the city of Columbus, the mayor, council and clerk thereof. The company charges that the rates of fare prescribed by the terms and conditions of the two ordinances were not either before or when said franchises were surrendered as above stated and would not be if longer enforced against the company, sufficient to enable it to maintain its street railway property in good order and repair and to perform its duty as a public utility; that the further operation of the street railway lines in the city of Columbus under the two ordinances would be not only impracticable, but impossible, and that the enforcement of the said rates of fare would violate the Fourteenth Amendment to the Constitution of the United States; that said rates of fare are inadequate and confiscatory, and their enforcement will deprive the company of its property without due process of law. The company charges that the defendants, unless enjoined, will attempt to force it to continue to operate its street railway lines under the said blanket and Central Market franchises in violation of rights secured to it by the Fourteenth Amendment to the Constitution. The amended bill further sets forth that controversies, confusion, risks, and multiplicity of suits will result from the resistance of the company to the enforcement of the inadequate and confiscatory rates of fare prescribed in said ordinance. The bill prays for an injunction restraining the defendants from compelling the company, or attempting so to do, to operate its lines of street railway in the city of Columbus under the said ordinances, from in any way forcing, compelling, or attempting to compel, it to charge and collect only the rates of fare prescribed by the two ordinances for carrying passengers, and from interfering in any way with the operation by the company of the lines of street railway covered by the said perpetual franchises.

*406 In the written notice of surrender of the franchises, attached to the bill as part thereof, the alleged facts as to the operation of the company are set forth much as stated in the amended bill, and the award of the National War Labor Board is set out. The request of February 25, 1918, to the city council to authorize the company to charge higher rates, is stated, which was refused, as was a later request. A recital of the recommendation of the War Labor Board for increased rates of fare is also set out in the written notice. The statement is made that the company refused to continue the issue and sale of tickets as prescribed in the blanket franchise and Central Market ordinances and to longer operate its cars thereunder; that in order to give good street railway service to the people of Columbus the company will continue to operate the street railway lines, but not under the two franchises, or either of them,

upon all of the streets of the city, until notified by it to withdraw from those streets not covered by the aforesaid perpetual franchises, and the company gave notice that it would thereafter charge 5 cents for a single ride and 1 cent for each transfer.

The District Court held that the bill made no case properly invoking the jurisdiction of a federal court upon constitutional grounds; that upon the merits, which the District Court considered, the bill should be dismissed for want of equity.

[1] As to the jurisdiction of the court: If the court had decided the case upon the question of jurisdiction alone, that question should have been certified here, and none other would have been presented upon such appeal. Judicial Code (Act March 3, 1911, c. 231) § 238, 36 Stat. 1157 (Comp. St. § 1215). As we have said, the court decided the case upon the merits, and dismissed the bill. As a constitutional question is involved the appeal brings the whole case here. We are of opinion that there was jurisdiction in the District Court to entertain the bill as it presented questions arising under the Fourteenth Amendment to the federal Constitution not so wholly lacking in merit as to afford no basis of jurisdiction. Jurisdiction does not depend upon the decision of the case, and should be entertained if the bill presents questions of a character giving the party the right to invoke the judgment of a federal court. We think the elaborate and careful opinion of the District Judge of itself shows that substantial questions arising under the federal Constitution were presented by the bill and that the court had jurisdiction.

*407 [2] Upon the merits the decision of the case turns upon the nature and character of the ordinances granting the twenty-five year franchises. The theory upon which the bill was framed, and the case argued here by appellant, is that the grants were legislative in character, and gave to the railway company the right and privilege of using the streets of the city for a period of 25 years; that to compel their operation at unremunerative rates is to take the property of the company without due process of law in violation of the Fourteenth Amendment. The insistence on the part of the city is that under the controlling laws of Ohio, in force when these ordinances were passed and accepted, and the terms of the ordinances, binding contracts were created, obligating the city, which had authority from the state for that purpose, to permit the operation by the company upon the streets of the city for the period of 25 years upon the terms and conditions set forth in the ordinances.

That a city, acting under state authority, may in matters of proprietary right make binding contracts of the nature contained in these ordinances, is well established by the adjudications of this court. *Vicksburg v.*

Vicksburg Waterworks Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155.

Whether these ordinances constituted such contracts depends upon the proper construction of the statutes of Ohio in force at the time, and the terms of the ordinances in question.

It is conceded that the statutes of Ohio regulating this matter are substantially the same as those set forth in the margin of the report of the decision of this court in *Cleveland v. Cleveland City Railway Co.*, 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102. After the consideration therein given them, it would be superfluous to state them again or to undertake to repeat the reasons which impelled the decision of the court. In the *Cleveland Case* this court held that upon acceptance of the ordinance it became a binding contract, governed by the rates of **fare* authorized to be charged during the period of 25 years for which the ordinance ran; that the rates contracted for became binding upon the city, and could not be altered by subsequent municipal action consistently with the constitutional rights of the railway company. Summing up the matter this court said:

"In reason, the conclusion that contracts were engendered, would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter, that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion, that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged." 194 U. S. 536, 24 Sup. Ct. 763, 48 L. Ed. 1102.

While the precise question now involved was not presented to the court in *Interurban Railway & Terminal Co. v. Public Utilities Commission*, 98 Ohio St. 287, 120 N. E. 831 (s. c., 16 Ohio Law Reporter, 393), it is evident that the Supreme Court of Ohio takes the same view of the effect of such ordinances as was declared by this court in the *Cleveland Case*. In the opinion in the *Interurban Railway Case*, the previous Ohio cases, as well as the decisions of this court, are reviewed, and the conclusion as to the effect of the Ohio statutes is in accord with that announced by this court.

The ordinances involved in this case are specific in their terms, and in the so-called blanket franchise ordinance they obligate the company during the life of the franchise to furnish adequate and efficient service and **first-class, *commodious cars for the accom-*

modation of its patrons. The company is authorized to charge certain fares during the term named, and no more. It is required to run cars upon certain streets, not in excess of certain intervals. Upon the expiration of the franchise the company, unless a further renewal be granted, was obligated to remove its tracks, etc., from the streets of the city, leaving the same in good condition.

In the *Central Market franchise ordinance* the time was fixed for the running of the cars and the size of the trains was regulated. The company was obligated to pay the city 2 per cent. of the gross receipts from local passenger fares during the term of the franchise. The grant was expressly limited to 25 years. Upon the expiration of that period the city had a right to purchase upon giving notice 2 years before the expiration of the term of its intention to do so. We can have no doubt that under the authority of the laws referred to, and in view of the terms of the ordinances in question and the acceptances by the grantees, the city of Columbus made valid and binding contracts with the companies, binding for the term of 25 years. By these contracts, obligatory alike upon the city and the company, the city granted the right to use the streets and the company bound itself to furnish the contemplated service at the rates of fare fixed in the ordinances. We cannot agree with the contention of the appellant that these were permissive franchises, granted and accepted with the right upon the part of the company to abandon the uses and purposes for which the franchises were granted because the rates fixed became unremunerative as alleged in the amended bill. The authority under which the city acted came from the state, and was granted by proper statutes passed for that purpose. The contracts were made between the city and the company, and became mutually binding for the period named in the ordinances. **This case does not involve the remedies which may be invoked against a street railway company which is or may become insolvent because of conditions arising since it entered into a given contract. The company seeks now by its own action to terminate the contracts, still binding upon it by their terms as to rates of fare to be charged, and seeks to have the aid of a court of equity by enjoining the city from any further requirement of service under them.*

There is no showing that the contracts have become impossible of performance. Nor is there any allegation establishing the fact that taking the whole term together the contracts will be necessarily unprofitable. This case is not like the *Denver Water Works Case*, 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649, and the *Detroit Street Railway Co. Case*, 248 U. S. 429, 39 Sup. Ct. 151, 63 L. Ed. 341, in both of which the franchise to use the streets of the city had expired

by limitation, and it was sought to require continued operation of a waterworks system in the one case and in the other of a street railway system, under rates which would afford no adequate return to the companies. In this case the company seeks the aid of a court of equity to avoid contracts duly made and entered into while the same are yet in force.

We are unable to find in the allegations in this bill any statement of facts which absolves the company from the continued obligation of its contracts, unless the facts to which we have referred bring the case, as is contended, within the doctrine of vis major, justifying the company in its attempt to surrender its franchise, and be absolved from further obligation.

*411 We come then to consider whether the amended bill shows the happening of an event or events which have released the company from the obligations of the contract, and authorized it to cancel the same upon the surrender of its franchise. Justification for that course is said to exist in the conditions following the World War *and resulting therefrom, particularly in the great increase in wages by the arbitral award of the War Labor Board, which was due to the necessity of meeting the high cost of living as a direct result of war conditions. This, it is contended, presents a situation that made the subsequent keeping of the contract practically impossible, except at a ruinous loss to the company. It is insisted that the principle recognized by this court in *Kronprinzessin Cecillie*, 244 U. S. 13, 37 Sup. Ct. 490, 61 L. Ed. 960, when applied to this case shows the existence of conditions excusing the performance of the contract. In that case it was held that the master and owner of the German steamship *Kronprinzessin Cecillie* were justified in apprehending that she would be seized as a prize if she completed her voyage to Plymouth and Cherbourg on the eve of the war, and her return to this country was a reasonable and justifiable precaution in view of the situation; that there was no liability for the shipments of gold agreed to be carried in that case; that the contract, not making an exception in the event of war intervening before delivery of the cargo, the circumstances showing peril of belligerent capture afforded an implied exception to the carrier's undertaking.

Much reliance is had by the appellant on the language used by Mr. Justice Jackson speaking for this court in *Chicago, Milwaukee & St. Paul Ry. Co. v. Hoyt*, 149 U. S. 1, 14, 15, 13 Sup. Ct. 779, 784 (37 L. Ed. 625), wherein it was said:

"There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event

which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting *parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

Particular reliance is had upon the last sentence of the paragraph just quoted. This language was used in interpreting a contract of doubtful import, as the context shows. Such interpretation was made in view of the situation of the parties at the time when the contract was made, and in view of the nature of the undertaking under consideration. It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail. *United States v. Gleason*, 175 U. S. 588, 602, 20 Sup. Ct. 228, 44 L. Ed. 284, and authorities cited; *Carnegie Steel Co. v. United States*, 240 U. S. 156, 164, 165, 36 Sup. Ct. 342, 60 L. Ed. 576. The latest utterance of this court upon the subject is found in *Day v. United States*, 245 U. S. 159, 38 Sup. Ct. 57, 62 L. Ed. 219, in which it was said:

"One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking. The modern cases may have abated somewhat the absoluteness of the older ones in determining the scope of the undertaking by the literal meaning of the words alone. The *Kronprinzessin Cecillie*, 244 U. S. 12, 22 [37 Sup. Ct. 490, 61 L. Ed. 960]. But when the scope of the undertaking is fixed, that is merely another way of saying that the contractor takes the risk of the obstacles to that extent."

In the present case the terms of the contract are not doubtful. The term for which the company was given *the right to use the streets of the city was definitely stated, and the terms, including the rates of fare which the company might charge, were explicitly laid down. There is no occasion to interpret general terms in the light of the intention of the parties or the circumstances of the case.

In the *Kronprinzessin Cecillie* Case the unexpected event which excused performance was the imminent danger of the capture of the vessel by a belligerent which would have

ended the possibility of performing the contract.

In *Metropolitan Water Board, Appellant, v. Dick, Kerr & Co., Ltd., Respondent*, decided by the House of Lords November 26, 1917 [1918] A. C. 119, a firm of contractors contracted with a water board to construct a reservoir to be completed within six years, subject to a proviso that if by reason of any difficulties, impediments, or obstructions howsoever occasioned the contractor should in the opinion of the engineer, have been unduly delayed or impeded in the completion of the contract, it should be lawful for the engineer to grant an extension of time for completion. By a notice given by the Ministry of Munitions in February, 1916, in exercise of the powers conferred by the Defense of the Realm Acts and Regulations, the contractors were required to cease work on their contract, which they did. It was held that the provision for extending the time did not apply to the prohibition of the ministry; that the interruption created by the prohibition was of such a character and duration as to make the contract when resumed a different contract from the contract when broken off, and that it had ceased to be operative. In that case there was a direct intervention of the power of the government, a feature not appearing in the case now under consideration.

It is undoubtedly true that the breaking out of the World War was not contemplated, nor was the subsequent action of the War Labor Board within the purview of the parties when the contract was made. That there might be a rise in the cost of labor, and that the contract might at some part of the period covered become unprofitable by reason of strikes or the necessity for higher wages might reasonably have been within their contemplation when the contract was made and provisions made accordingly. There is no showing in the bill that the war or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing, as in the nature of things there cannot be, that the performance of the contract, taking all the years of the term together will prove unremunerative. We are unable to find here the intervention of that superior force which ends the obligation of a valid contract by preventing its perform-

ance. It may be, and taking the allegations of the bill to be true, it undoubtedly is, a case of a hard bargain. But equity does not relieve from hard bargains simply because they are such. It may be that the efficiency of the service and fairness in dealing with the company which performs such important and necessary service ought to require an advance in rates; such was the strongly announced opinion of the War Labor Board. But these and kindred considerations address themselves to the duly constituted authorities having the control of the subject-matter.

We reach the conclusion that the District Court was right in holding that this bill presented no grounds absolving the company from its contract, and justifying the surrender of its franchise. It follows that the decree is

Affirmed.

(249 U. S. 415)

BURR et al. v. CITY OF COLUMBUS, OHIO,
et al.

(Argued Jan. 10, 1919. Decided April 14, 1919.)

No. 739.

Appeal from the District Court of the United States for the Southern District of Ohio.

Suit by I. Tucker Burr and others against the City of Columbus, Ohio, and others. From a decree of the District Court, dismissing the bill (256 Fed. 261), complainants appeal. Affirmed.

Mr. Joseph S. Clark, of Philadelphia, Pa., for appellants.

Mr. Henry L. Scarlett, of Columbus, Ohio, for appellees.

Memorandum by direction of the Court, by Mr. Justice DAY.

This case was argued and submitted with No. 715, just decided. 249 U. S. 399, 39 Sup. Ct. 349, 63 L. Ed. 669. It was brought by owners and holders of more than \$200,000 of certain mortgage bonds of the street railway company. The bill alleged diversity of citizenship, and also rights alleged to arise under the Constitution. The case was heard upon motion for a temporary injunction and upon defendant's motion to dismiss the bill. The injunction was refused, the motion to dismiss was granted and a decree entered accordingly. To all intents the case is controlled by the decision in No. 715. The decree of the District Court is

Affirmed.

(249 U. S. 515)

GILLIS v. NEW YORK, N. H. & H. R. CO.

(Argued March 26 and 27, 1919. Decided April 21, 1919.)

No. 296.

COURTS ⇐390(2)—ERROR TO STATE COURT—
FOLLOWING DECISION BELOW.

A state court's decision in a case under the Employers' Liability Act (Comp. St. §§ 8657-8665) will not be reversed, where the decision depends upon an appreciation of the testimony and the admissible inferences therefrom.

In Error to the Superior Court of the State of Massachusetts.

Action by Mary E. Gillis, administratrix of the Estate of Alexander J. Gillis, against the New York, New Haven & Hartford Railroad Company. Judgment for defendant (224 Mass. 541, 113 N. E. 212), and plaintiff brings error. Affirmed.

Messrs. James J. McCarthy and H. La Rue Brown, both of Boston, Mass., for plaintiff in error.

Mr. John L. Hall, of Boston, Mass., for defendant in error.

*Mr. Justice McKENNA delivered the opinion of the Court.

Action under the employers' liability statute (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657-8665]). Plaintiff in error's intestate, on March 3, 1912, while in the railroad company's service in interstate commerce, was killed, through the negligence, in whole or in part, it is charged, of one of the company's officers, agents or employes.

The defenses of the company were denial of the declaration and averments that the intestate's injuries and death were due to and caused by his own negligence and besides "were the result of acts, conditions and circumstances the happening of which was assumed" by him.

The case was tried to a jury. At the conclusion of the testimony, upon motion of defendant and over the objection and exception of plaintiff, the court ruled that upon all of the evidence the plaintiff was not entitled to recover and directed a verdict for defendant. It was stipulated that the case was to be reported for the determination of the full court and that if the ruling and direction should be held to be right, then judgment was to be entered for defendant. "If the case ought to have been submitted to the jury, then judgment is to be entered for the plaintiff in the sum of forty-five hundred (\$4,500) dollars." The case was so reported. The full court reviewed the testimony quite elaborately and concluded from that review that "the only person who was negligent was the deceased, and the judge

was right in directing a verdict for the defendant" and cited *Great Northern Ry. v. Wiles*, 240 U. S. 444, 36 Sup. Ct. 406, 60 L. Ed. 732.

That case repeated the established principle that when the evidence justifies it it is competent for a court to direct a verdict for a defendant. The principle is not *attacked by plaintiff. The contention, however, is that the courts below, one of which tried the case, were wrong in their estimate of the evidence, and that plaintiff was entitled to the judgment of the jury upon it. We are unable to yield to the contention. Nor do we think it necessary to give a review of the evidence. It will be found in the opinion of the court, and we have verified its correctness. The case turns, therefore, upon an appreciation of the testimony and admissible inferences therefrom, and even if the conclusions of the courts were more disputable we should have to defer to them. *Baltimore & Ohio R. R. Co. v. Whitacre*, 242 U. S. 169, 37 Sup. Ct. 33, 61 L. Ed. 228; *Erie Railroad Co. v. Welsh*, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. Ed. 319.

Judgment affirmed.

(249 U. S. 534)

LOUISVILLE & JEFFERSONVILLE
BRIDGE CO. v. UNITED
STATES.

(Argued March 28, 1919. Decided April 21, 1919.)

No. 312.

RAILROADS ⇐229—SAFETY APPLIANCE ACT—
TRAIN BRAKES.

The Safety Appliance Act as amended (Comp. St. §§ 8605-8615), requiring trains on interstate railroads to operate a certain percentage of the cars by train brakes through the engineer, applies to a movement of 26 cars three-quarters of a mile in a terminal yard, involving crossing city streets and a considerable movement, including stops and starts, on a main track, but without uncoupling or switching individual cars.

On a Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Action by the United States against the Louisville & Jeffersonville Bridge Company. On a certificate from the Circuit Court of Appeals for the Sixth Circuit. Question answered in the affirmative.

Mr. Edward P. Humphrey, of Louisville, Ky., for Louisville & Jeffersonville Bridge Co.

Mr. Solicitor General W. R. King, of Washington, D. C., for the United States.

*Mr. Justice CLARKE delivered the opinion of the Court.

The Circuit Court of Appeals for the Sixth Circuit certifies to this court for answer the question, whether Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (Comp. St. §§ 8605-8612), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (Comp. St. §§ 8613-8615), requires that 85 per cent. of the train brakes shall be coupled so as to be under engine control when making the transfer of 26 cars, in a movement which is described in the court's certificate.

The pertinent part of the original act approved March 2, 1893 (27 Stat. 531), reads:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic * * * that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose." Comp. St. § 8605.

And the relevant part of the amendment, approved March 2, 1903 (32 Stat. 943) is:

"That the provisions and requirements hereof and of said acts relating to train brakes * * * shall be held to apply to all trains * * * used on any railroad engaged in interstate commerce." Comp. St. § 8613.

Section 2 of the amendment provides that when any train is operated with power or train brakes not less than 50 per cent. of the cars in such train shall have their brakes used and operated by the engineer of the locomotive, etc. Authority was given the Interstate Commerce Commission to increase the percentage of cars in any train which must have their brakes so used and operated, and in 1910 the commission increased it to 85 per cent.

The essential facts, somewhat condensed, from the statement of the Circuit Court of Appeals are:

The Bridge Company, a common carrier engaged in interstate commerce, operates a large terminal yard at Louisville, Ky., which constitutes the joint terminal of the Big Four and the Chesapeake & Ohio Systems of railway. The yard is 1,800 feet in length, 700 feet in width, and consists of two main tracks, with from 15 to 25 approximately parallel tracks, which are connected with the main tracks by leads in the customary manner.

*For the purposes of this proceeding the following movement of cars was adopted by the parties as typical. Twenty-six cars were assembled at the easterly end of the yard of the Bridge Company and were coupled to-

gether, but without any of the air brakes being connected, preparatory to their transfer westerly and delivery into the Illinois Central yard. The engine was at the easterly end of the cars, nearly 1,100 feet in length, which were pushed westerly the entire length of the large and necessarily busy yard. Part of this movement in the Bridge Company's yard, how much does not appear, was over a main line track, it was necessarily over many connections with other tracks on which several other engines and crews must have been working, habitually, and it was over four city streets at grade the crossing over the most westerly one, on account of the grade beyond, being made at a speed of 15 miles an hour. A short distance from the exit from the Bridge Company's yard the cars entered upon a track of the Illinois Central Railroad Company, used as a main line by both the Big Four and the Chesapeake & Ohio Companies, and after they had been pushed westerly on that track a distance of 1,100 feet, they were stopped on this main track. Next, reversing the movement, the engine, now pulling the cars, moved easterly over three city streets at grade a distance of 1,300 feet on a track used by the Chesapeake & Ohio Company for its through main line trains, and stopped on that track. Again reversing, the engine, now pushing the cars, ran westerly over three city streets at grade a distance of 1,300 feet, still on the track used as a through main line track by the Chesapeake & Ohio Company, and then into the Illinois Central yard, where the cars were delivered.

The contention of the Bridge Company is that the foregoing describes a mere switching of cars, not a train movement within the meaning of the act of Congress, and *that, therefore, the requirement that 85 per cent. of the cars shall have the train brakes upon them used and operated does not apply.

An engine and 26 cars assembled and coupled together, not only satisfies the dictionary definition of a "train of cars," but would certainly be so designated by men in general, and in any fair acceptance of the term must be regarded as constituting a train within the meaning of the statute. It was a train greater in length than most regularly scheduled trains were when this Safety Appliance Act was passed 26 years ago, and even yet, probably, exceeds in length, passenger and freight trains considered, more than a majority of the regular road trains in this country.

The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling and the movement of one or a few at a time for short distances, but was a transfer of the 26 cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it cannot therefore

with propriety be called a switching movement.

The movement of this train of cars, 1,100 feet in length, was for a distance of over three-quarters of a mile, and involved crossing, at grade, three city streets once, two streets twice, one street three times, and a main track movement of at least 2,600 feet, with two stops and startings on the main track. This is not only a train movement, but it would be difficult to imagine one in which the control of the cars by train brakes would be more necessary, in order to secure that safety of employes, of passengers and of the public which it is the purpose of the act to secure, by requiring that engineers shall be given control sufficient to stop any train they may be moving, promptly on the first signal or sight of danger. The mere inertia of 26 cars, which must usually be loaded, and especially when running 15 miles an hour, would render it impossible to control or to stop them promptly with power brakes operative only on the engine, and the ability to use such brakes on the entire train must often mean the difference between safety and serious accident when running, as here, in a crowded yard, across busy city streets and on main line tracks of railroads.

It is argued that coupling of the train brakes was not necessary for the reason that the street crossings used were protected by gates, that a yardmaster from an elevated tower watched over the main line movements, and that the coupling of the train-brake appliances would involve more danger to the employes than the movement of the cars without their being used and operated. These suggestions serve to emphasize the dangerous character of the movement. But the construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law, and it has repeatedly been held by this court that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply, and that failure to comply will not be excused by carelessness to avoid the danger which the appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalents of the requirements of the act. *St. Louis, Iron Mountain, etc., Ry. v. Taylor*, 210 U. S. 281, 295, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Great Northern Ry. Co. v. Otos*, 239 U. S. 349, 36 Sup. Ct. 124, 60 L. Ed. 322; *St. Joseph & G.*

I. Ry. Co. v. Moore, 243 U. S. 311, 37 Sup. Ct. 278, 61 L. Ed. 741.

The case falls within the scope of *United States v. Erie Railroad Co.*, 237 U. S. 402, 35 Sup. Ct. 621, 59 L. Ed. 1019, and *United States v. Chicago, Burlington & Quincy Railroad Co.*, 237 U. S. 410, 413, 35 Sup. Ct. 634, 636 (59 L. Ed. 1023), in *the latter of which it is said that "the controlling test of the statute's application lies in the essential nature of the work done."

For the reasons stated in this opinion, the movement as described in the certificate and the essential nature of the work done, require that the question of the Circuit Court of Appeals be answered in the affirmative.

(249 U. S. 510)

PERLEY et al. v. STATE OF NORTH CAROLINA.

(Submitted March 19, 1919. Decided April 21, 1919.)

No. 251.

1. WATERS AND WATER COURSES §182—PROTECTION OF WATERSHEDS—REMOVAL OF ADJACENT WASTE TIMBER—POLICE POWER.

Pub. Laws N. C. 1913, c. 56, requiring one cutting timber within 400 feet of watershed, owned by a municipality for furnishing water supply, to remove waste parts so as to prevent spread of fire and consequent damage to watershed, cannot be said not to have proper relation to the governmental purpose of protection.

2. CONSTITUTIONAL LAW §211—PROTECTION OF WATERSHEDS—EQUAL PROTECTION OF LAWS.

The equal protection of the laws cannot be said to be denied by Pub. Laws N. C. 1913, c. 56, requiring one cutting timber within 400 feet of a watershed, owned by a municipality for furnishing water supply, to remove waste parts so as to prevent spread of fire and consequent damage to watershed, though it imposes no obligation on municipalities.

In Error to the Supreme Court of the State of North Carolina.

Fred A. Perley and another were convicted of violation of Pub. Laws N. C. 1913, c. 56. Judgment was affirmed by the Supreme Court of North Carolina (173 N. C. 783, 92 S. E. 504), and defendants bring error. Affirmed.

Messrs. Julius C. Martin, Thomas S. Rollins, and George H. Wright, all of Asheville, N. C., for plaintiffs in error.

Messrs. James S. Manning, of Raleigh, N. C., and R. H. Sykes, of Durham, N. C., for State of North Carolina.

* Mr. Justice McKENNA delivered the opinion of the Court.

A statute of North Carolina (Pub. Laws 1913, c. 56) provides that any person who owns land or standing timber on land within 400 feet of any watershed held or owned by any city or town for the purpose of furnishing the city or town water supply, upon cutting or removing the timber or permitting either, within 400 feet of the watershed, shall, within three months after cutting, or earlier upon written notice by the city or town, remove or cause to be burned under proper supervision all tree-tops, boughs, laps and other portions not desired to be taken for commercial or other purposes, within 400 feet of the boundary line of the watershed so as to leave such space of 400 feet free and clear of the designated parts required to be removed or burned and other inflammable material caused by or left from cutting the standing timber, so as to prevent the spread of fire from such cut-over area and the consequent damage to the watershed. A violation of the act is a misdemeanor.

Plaintiffs in error (we shall refer to them as defendants) were indicted for violating the act and upon being arraigned filed a motion to quash the indictment on the ground that the act was unconstitutional and void and in violation of the Constitution of the United States, and particularly the Fifth and Fourteenth Amendments thereof in that the act abridged privileges and immunities of defendants as citizens of the United States, deprived them of their property without due process of law and denied them the equal protection of the laws. The motion was denied and defendants were put on trial before a jury which specially found that the city of Asheville owned about 16,000 acres of land having an outside boundary of 12 miles and held the land as a watershed; that defendants were owners of standing and fallen timber adjoining the watershed on the north about 4 miles and within 400 feet of the watershed but did not own the land upon which the timber stood and that the water did not drain from the timber, or the land upon which it stood, on to the watershed. And the jury found all other facts which brought defendants within the provisions of the act and made them violators of it. And the jury found the defendants guilty or not guilty as the court should determine the law to be upon the facts found.

Upon the special verdict the court adjudged defendants guilty and fined each \$300 and costs. Upon appeal the Supreme Court of the state affirmed the judgment.

In considering the contention of plaintiff we may put to one side what property is or what its rights are, in the abstract. It and they necessarily are subject to some exertions of government.

[1] What then is the case? The city of Asheville is the owner of and conducts a

reservoir, and it may be presumed that other cities of the state are in like situation, and the state, by the law in question, seeks to protect their watersheds from damage or devastating fires. The purpose is governmental, but it is contended that the regulation of the statute under review is too distant from the purpose and is simply an arbitrary exercise of power. And this is a certain proposition of law, having no other basis in the record than that the forbidden litter of the cut-down and removed timber is "absolutely harmless" and contains "no element of injury or damage to any one" and cannot "by any possibility be construed into a nuisance." The assertion eludes exact estimation. "Tree-tops, boughs, and laps" left upon the ground may not of themselves be a nuisance; but they may become dry, and the more quickly and certainly so from the denudation of the land of its trees, and therefore become a source of fires and the perils and damage of fires. This was the conclusion of the courts below, and, we may suppose, in application to the Asheville watershed. The conclusion is fortified by the judgment of the state expressed in the statute, and, it may be, from experience in the state and certainly from experience in other states, ignorance of which we cannot feign. We are not able, therefore, to yield to the contention of defendants that the statute is not proportionate in its regulation nor that its application to defendants' property is arbitrary and unconstitutional.

[2] Nor do we find illegal discrimination in the statute. The charge is based upon the contention that the statute condemns acts committed by individuals "when if like and similar acts be done by municipalities there is no violation of the statute." Counsel again insists too much upon the abstract. We concede the aphorism upon which counsel relies that "the equal protection of the laws is a pledge of the protection of equal laws." We, on March 24th last, by an almost prescience of the contention now based on it, defined its extent and declared that the Fourteenth Amendment, which is the foundation of the aphorism, does not regard the impracticable and that distinction may be made by legislation between objects or persons and that the power of the state "may be determined by degrees of evil or exercised in cases where detriment is specially experienced. *Armour & Co. v. North Dakota*, 240 U. S. 510, 517, 36 Sup. Ct. 440, 60 L. Ed. 771, Ann. Cas. 1916D, 548." Moreover, we pointed out that "the deference due to the judgment of the Legislature on the matter" had "been emphasized again and again. *Hebe Co. v. Shaw*, 248 U. S. 297, 303, 39 Sup. Ct. 125." *Dominion Hotel, Inc., v. State of Arizona*, 249 U. S. 265, 39 Sup. Ct. 273, 63 L. Ed. 597.

Necessarily the Legislature of the state did not think, and the courts below did not think, that individuals and municipalities stood in the same relation to the evil aimed at or that a public body charged with the care of the interests and welfare of the people would need the same restraint upon its action as an individual, or be induced to detrimental conduct.

Judgment affirmed.

(249 U. S. 503)

RAND v. UNITED STATES.

(Argued March 10 and 11, 1919. Decided April 21, 1919.)

No. 213.

1. INTERNAL REVENUE §36—REFUND—STATUTES.

Under Act June 27, 1902, § 3, and Act July 27, 1912, § 2, authorizing refund of certain taxes on application to the Commissioner of Internal Revenue, a refund can be made though no appeal was taken as required by Rev. St. §§ 3226, 3228 (Comp. St. §§ 5949, 5951), made applicable by War Revenue Act June 13, 1898, § 31, and though the tax was voluntarily paid.

2. INTERNAL REVENUE §38—RECOVERY OF TAXES PAID—NECESSITY OF APPLICATION FOR REFUND.

The beneficiary of a testamentary trust fund cannot recover the internal revenue tax erroneously paid thereon, under Act June 27, 1902, § 3, and Act July 27, 1912, § 2, without making the application for refund required by those acts, though an application had been made by the personal representative of the estate and by the trustee, and though an application by the beneficiary would have been useless because similar applications had been denied.

Appeal from the Court of Claims.

Claim by Jennie Lathrop Rand against the United States. Claim dismissed (52 Ct. Cl. 72, 285), and claimant appeals. Affirmed.

Mr. H. T. Newcomb, of New York City, for appellant.

Mr. Assistant Attorney General Brown, for the United States.

*504 *Mr. Justice McKENNA delivered the opinion of the Court.

This case involves a consideration of the inheritance tax law of June 13, 1898, generally called the War Revenue Act (30 Stat. 448, 464, 465, c. 448), and was brought in the Court of Claims to recover the amount of a tax assessed and collected under that law.

The Court of Claims dismissed the case on the grounds: (1) That appellant did not file any claim with the Commissioner of Internal Revenue; (2) that the tax was voluntarily paid. The decision is resisted by appellant

and other contentions are made against the tax.

Section 29 of the act of 1898 provided that any person or persons having in charge or trust, as administrators, etc., any legacies or distributive shares arising from personal property, the amount of the property exceeding \$10,000 in actual value, passing, after the passage of the act, from any person possessed of the property, either by will or by the intestate laws of any state or territory, was made subject to a tax to be paid to the United States; the amount of tax being dependent upon the degree of relationship of the taker to the person who died possessed of the property. And there was an increase of the tax with an increase of the value of the property possessed in excess of \$25,000.

The facts found we give only in summary: June 6, 1900, Edmund Dwight died testate. His will was admitted to probate June 28, 1900. Elizabeth Cabot, his sister, was named executrix of the will. She accepted and qualified, but died January 30, 1902, and Philip Cabot, her son, was appointed administrator, with the will annexed. He qualified. The will, so far as material, *provided as follows: *505

"I give to the New England Trust Company, a corporation duly chartered by the state of Massachusetts, and located in the city of Boston, the sum of one hundred and twenty-five thousand dollars (\$125,000), to be invested in the general trust fund of the company and held upon the following trusts: To pay to Mrs. Jennie Lathrop Rand * * * the annual income thereof in semi-annual payments during her life."

October 1, 1900, the trust fund was deposited with the New England Trust Company, the trustee designated in the will, which accepted the trust. The fund was not invested separately but as part of the general trust fund of the company. Semi-annual payments of the accrued net income were made to Mrs. Rand to January 14, 1914. No other payments were made to her or for her benefit, nor did she become entitled to any other or additional payments on account of the trust.

September 27, 1900, Elizabeth Cabot made to the United States Bureau of Internal Revenue a return of the legacies in her charge as executrix and passing from Dwight's estate to the persons named therein, in which was included the legacy to Mrs. Rand, aged 63, stranger to the decedent, of the clear value of \$125,000, the taxable amount of which, after a particular exemption, she stated to be \$40,355.91, with \$7.50 per hundred dollars as the rate of taxation, and the amount of tax as \$3,026.69, and she reported the legacy as in trust with the New England Trust Company. It is not shown that the collector of internal revenue or other officer made a demand for the tax, but September 28, 1900,

Elizabeth Cabot paid to the proper collector the tax out of the funds and it has since been retained by the United States. The sum was advanced by Elizabeth Cabot, at the request of Mrs. Rand and other legatees, pursuant to an agreement made September 28, 1900, by which the taxes paid by Elizabeth Cabot were to be refunded to her and were repaid to her. *The tax paid by her was determined to be the proper tax by regulations of the Commissioner of Internal Revenue on December 16, 1898. The regulations contained rules and tables for the determination of the duty or tax to be paid to the United States upon legacies or distributive shares arising from personal property, imposed by the act of June 13, 1898.

The only assessment ever made under sections 29 and 31 of the act of 1898 and amendments upon the interest of Mrs. Rand in the interest created in the trust fund under Dwight's will was made in pursuance of the rules, tables and instructions of the commissioner and there was no specific investigation by that officer of her expectancy of life or as to the earning capacity of the trust fund otherwise than by application of the tables. The value of her interest was so determined to be \$42,320.60, from which was deducted the inheritance tax of Massachusetts, leaving a net balance of \$40,355.91, upon which the tax was assessed at the statutory rate of \$7.50 per hundred dollars. The computation was from the death of Dwight, the decedent.

Under authority of the act of Congress of July 27, 1912 (37 Stat. 240, c. 256), a claim for the refund of the sum paid, to wit, \$3,026.69, was filed with the Commissioner of Internal Revenue, December 24, 1913, by H. T. Newcomb, representing himself to be the attorney for the New England Trust Company, trustee under the will of Dwight. And on December 30, 1913, Attorneys Lyon & Lyon, of Washington, D. C., acting for and in behalf of the administrator de bonis non of Edmund Dwight, filed with the Commissioner of Internal Revenue a claim for the refund of the tax. The grounds of both claims were that the tax was illegally and erroneously assessed and collected and contrary to the provisions of the act of 1898 and amendments and that the same should be refunded by virtue of the act of June 27, 1902 (32 Stat. 406, c. 1160), and the act of July 27, 1912. The claims were rejected by the acting commissioner March 28, 1914. It is not shown that Mrs. Rand or any person acting for her or in her behalf filed a claim with the commissioner.

[1] The court, as we have said, dismissed the claim without considering the validity of the assessment. The conclusion is contested by appellant in an elaborate brief and defended by the government, relying primarily

upon section 3226, R. S. (Comp. St. § 5949), as the Court of Claims did. The case presents, therefore, at the outset the question whether the conditions of suit required by that section were satisfied as qualified or relieved by the acts of 1902 and 1912, hereafter referred to.

Section 3226 provides that no suit shall be maintained for the recovery of a tax illegally or erroneously assessed or collected, "until appeal shall have been duly made to the Commissioner of Internal Revenue, according to provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the commissioner has been had therein." If, however, it is provided, decision be delayed more than six months from the date of the appeal, suit may be brought within another period prescribed, which it is not necessary to mention.

The section is clear enough and unless modified or changed precludes the present suit as it was applicable to the tax involved (section 31 of the Act of 1898). But section 3 of the Act of 1902 and section 2 of the Act of 1912, supra, are invoked as removing the bar of section 3226. Section 3 of the Act of 1902 directs the Secretary of the Treasury to refund upon proper application being made to the Commissioner of Internal Revenue any tax that may have been collected on contingent beneficial interests which shall not have become vested prior to July 1, 1902. Section 2 of the Act of July 27, 1912, has a like direction to the Secretary of the Treasury to pay "such claimants as have presented *or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them." There is no question that the cited sections remove the bar of sections 3226 and 3228 (Comp. St. §§ 5949, 5951) if appellant has met their requirements and presented to the Commissioner of Internal Revenue a claim for the refund of the tax. Nor is the fact that the tax was voluntarily paid, that is, without protest, an impediment to the application of the act of 1912. *United States v. Hvoslef*, 237 U. S. 1, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286.

[2] It will be observed that the repayment is to be made to "such claimants as have presented or shall hereafter so present their claims." Has the appellant satisfied these requirements? Two claims were presented, one by the attorney of the trust company and one by attorneys acting for and in behalf of the administrator de bonis non of the estate of Edmund Dwight. Both claims were disallowed because, to quote the commissioner's letter:

The "tax was paid upon the absolutely vested interest of a stranger amounting to more than \$25,000 and taxed at the legal rate of \$7.50

per \$100 and accordingly, under the decision of the Supreme Court in the Knowlton and Fidelity Trust cases¹ all this tax was legally due."

The first demand, it is said, "was presented by the testamentary trustee then holding trust funds to the use of the claimant, and authorized and required to protect her interests under and in connection with the trust fund. The other claim was filed by the personal representative of the decedent, successor to the executrix who had actually made the payment, although such payment was at the cost of" Mrs. Rand. And it is urged that—

"The officers of the government were not misled at any time; there was no question as to the identity of the payment sought to be recovered or that of the person to whose benefit recovery would accrue."

609* The demands, therefore, it is the further contention, satisfied the statute and should be ascribed to Mrs. Rand, and that, the statute being remedial, its remedy is to be promoted by a liberal construction, not impeded by a strict and technical one; and there are adduced statutes that have been liberally construed. Booth's Case, 49 Ct. Cl. 699; Newcomber v. United States, 51 Ct. Cl. 408.

The inutility of another demand is emphasized, either for information to the department or for the assertion of her claim. She knew, it is said, the precise facts of the demands that had been made and she knew, besides, that claims of the class to which hers belonged had been uniformly rejected and that another claim in her own name would have been no less a "useless ceremony" than that which was declared in one of the cited cases. And she insists that such ceremony finds exemption in the case of Weaver v. Ewers, 195 Fed. 247, 115 C. C. A. 219. The case is not similar to that at bar. The tax there involved was paid under protest and there had been an application in writing by the payer of it for a refund of the amount. The application was held to have satisfied section 3226 and that there was no necessity for another after the tax was paid. The case at bar does not present the same situation. Its tax was paid without protest, and appellant seeks to avail herself of the act of 1912—not by performing its condition, but by asserting an exemption from performance because of its supposed inutility. The government besides contests the sufficiency and sincerity of her excuse and points out that, not only does the record fail to show that the presented claims were made in her behalf, but that one of the claims was made eight days and the other two days before the time

within which claims could have been made and that the decisions rejecting them were several months afterwards, and she could not therefore have been influenced by the rejection. If it be replied that she relied on the rulings upon claims of the class to which hers belonged, the query occurs: Why did not the trustee of the fund and the representative of the estate *rely on those rulings? *510 Their relation to the taxes, whatever it was, was not as intimate as hers and hers would seem to have called for more solicitude and a demand by her as necessary as suit by her. It seems, therefore, that this suit is a post-fact resolution and an experiment with the situation after the indulgent period of the statute. The act of 1912 cannot be made so compliant. It had its purpose and it is not satisfied by representative or negative action; it requires a positive and individual assertion of claim. The condition was easy of performance, its grant a concession, and there is no room for the plea to enlarge it beyond its words. It is direct and clear and liberal enough of itself. It says to the taxpayer: Make a claim for the tax you have paid, show its illegality, and it will be repaid to you. We cannot relax its requirements—certainly not on the assumption that they might have been useless if complied with.

We see no reason for granting the motion for further findings nor the motion for certiorari, and both are denied.

Judgment affirmed.

(249 U. S. 517)

UNITED RAILROADS OF SAN FRANCISCO v. CITY AND COUNTY OF SAN FRANCISCO et al.

(Argued March 25, 1919. Decided April 21, 1919.)

No. 282.

1. STREET RAILROADS ⚡29 — COMPETING MUNICIPAL RAILROAD.

Civ. Code Cal. § 499, prohibiting two street railroads from using the same street for over five blocks, and a San Francisco city franchise containing similar provisions, held inapplicable to a municipal street railway system.

2. STREET RAILROADS ⚡29 — FRANCHISE — SUBSEQUENT LEGISLATION.

A street railway took its franchise subject to the risk that subsequent legislation and constitutional amendment might empower the municipality to establish its own street railway system.

3. EMINENT DOMAIN ⚡2(1) — WHAT CONSTITUTES TAKING—STREET RAILWAY.

The establishment of a municipal street railway system, which was not prohibited by

¹ Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; United States v. Fidelity Trust Co., 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed. 137.

plaintiff street railway's franchise, did not constitute a taking of its property, requiring a resort to eminent domain.

4. EQUITY ⚡39(3) — DETERMINATION OF CASE—RIGHT TO DAMAGE.

A bill to prevent the construction of a municipal street railway system will not be retained to determine the question of damages against the city, under Const. Cal. 1879, art. 1, § 14, where more evidence would be required and the right to damages is at least doubtful; but the bill will be dismissed without prejudice to plaintiff's right to damages.

5. STREET RAILROADS ⚡13 — ACQUISITION OR ESTABLISHMENT BY CITY.

San Francisco City Charter, art. 12, § 2, requiring the municipality to consider offers to sell existing public utilities before constructing new ones, held sufficiently complied with where a general solicitation of offers for the sale of any existing street railway was sent to plaintiff street railway and others.

Appeal from the District Court of the United States for the Northern District of California.

Bill by the United Railroads of San Francisco against the City and County of San Francisco and others. From a decree for defendants (239 Fed. 987), the plaintiff appeals. Affirmed, as modified.

*Messrs. Garret W. McEnerney and Wm. M. Abbott, both of San Francisco, Cal., for appellant.

Messrs. Hiram W. Johnson and Thos. E. Haven, both of San Francisco, Cal., for appellees.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the appellant to prevent the construction of a municipal street railway on Market street and adjoining streets in San Francisco with tracks on the two sides of the plaintiff's double track, for more than five blocks, and also to prevent the incidental cutting of the plaintiff's tracks. The appellant claims the right by grant and contract to forbid the proposed action and relies upon the Constitution of the United States, upon the State Constitution which provides that private property shall not be taken or damaged for public use without just compensation having first been made, and upon Article XII, § 2, of the charter of the city, requiring it to consider offers for the sale of existing public utilities before constructing new ones. The answer denies that damage to the plaintiff will ensue from the new tracks and denies as matter of law that the plaintiff has the contract or property rights alleged. On application for a preliminary injunction the District Court held that the plaintiff had failed to make out a case for it, and denied it, intimating an opinion against the plain-

tiff upon the matter of law involved. It then entered what is called a final decree denying all relief to the plaintiff with costs to the defendant. 239 Fed. 987. The present appeal is from that decree.

The franchise of the plaintiff to maintain its two tracks on Market street was granted to its predecessor in title in September, 1879. At that time by section 499 of the Civil Code of California, "two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroad corporations occupy and use the same street or track for a distance of more than five blocks." The existence of this general law is the first ground relied upon for the assertion of exclusive rights in the street by the plaintiff. The other ground is the order of the Board of Supervisors of San Francisco granting the franchise, and especially section 5 which is as follows:

"It shall be lawful for the Board of Supervisors of the city and county of San Francisco to grant to one other corporation, and no more, the right to use either of the aforesaid streets for a distance of five blocks, and no more, after the forms and *conditions specified in the 499th section of the civil code of the State. This section shall apply to persons and companies, as well as corporations."

We agree with the District Court that these sections did not give to the plaintiff the right it claims.

[1-3] The section of the Code would seem to be a limitation of the powers conferred upon the Board of Supervisors by that and the adjoining sections, not a contract by the State, or an authority to the Board to contract, against a larger use of the streets. It most naturally is read as merely a general law declaring the present legislative policy of the State. *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 292, 11 Sup. Ct. 201, 34 L. Ed. 967; *Williams v. Wingo*, 177 U. S. 601, 20 Sup. Ct. 793, 44 L. Ed. 906; *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S. 379, 387, 24 Sup. Ct. 107, 48 L. Ed. 229; *San Jose-Los Gatos Interurban Ry. Co. v. San Jose Ry. Co.*, 156 Fed. 455, 458, 84 C. C. A. 265, 13 Ann. Cas. 571. But however this may be neither that section nor section 5 of the order granting the franchise purports in terms to prevent the city from itself establishing a parallel road. If it be true, as the plaintiff argues, that the grant or contract in section 5 of the order means what the statute means and is to be construed by that, we have suggested what seems to us the natural construction of the act. But in any event it is decided by *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353, that a covenant by a city not to grant to any other person or corpora-

tion a privilege similar to that granted to the covenantee does not restrict the city from itself exercising similar power; and it is assumed in that case, that the principle already established as to legislative grants. 200 U. S. 34, 26 Sup. Ct. 224, 50 L. Ed. 353. That is the assumption also of an amendment of section 499 by an Act of April 24, 1911. The city now is given power to establish and operate transportation service by the amendment of section 499 just mentioned and by the Constitution of the State. Article 11, § 19. Amendment approved October 10, 1911. The plaintiff took the risk of the judicial interpretation of its franchise, and of this possible event. *Madera Water Works v. Madera*, 228 U. S. 454, 33 Sup. Ct. 571, 57 L. Ed. 915. Of course, so far as the harm to the plaintiff is an inevitable consequence of the city's doing what the plaintiff's franchise did not make it unlawful for the city to do, the infliction of that harm is not a taking of the plaintiff's property that requires a resort to eminent domain.

[4] We understand that the municipal road now has been built, and the question is whether to retain the bill for a claim of damages. But as that would require new evidence and practically would present a new case, and as further, with such light as we now have, the right to damages seems at least doubtful, we deem it sufficient if the rights of the plaintiff, if any, in that regard, are reserved. The question is raised pointedly by Article I, § 14, of the Constitution of 1879. That provides that "private property shall not be taken or damaged for public use without just compensation having first been made," etc. The plaintiff seems to argue that this section entitles it to preliminary compensation for any considerable pecuniary detriment that the City may inflict by the establishment of the new road, however lawfully it may act. Courts and judges have differed widely in their interpretation of this class of provisions in statutes of different sorts; but we should suppose, until otherwise instructed by the Supreme Court of the State, that the damage referred to in this section of the State Constitution in the main would be damage resulting from conduct that, like taking, would be tortious unless in proceedings under eminent domain or some law authorizing it on condition that damages be paid.

As to crossing the plaintiff's tracks we are inclined to agree with the District Court that the plaintiff's franchise must be understood to be subject to this incident and that a taking by eminent domain was not necessary. *Market Street Railway Co. v. Central Ry. Co.*, 51 Cal. *583; *Consolidated Traction Co. v. South Orange & Maplewood Traction Co.*, 56 N. J. Eq. 569, 574, et seq., 40 Atl. 15; 3 Dillon, *Municipal Corporations* (5th Ed.) § 1241, p. 1983. If we are wrong

and if the crossings or the manner of operating the parallel tracks should give or has given rise to any claim, the decree will be without prejudice to such claim. We assume in accordance with the plaintiff's evidence and argument that the damage may be considerable and we think it just to leave open whatever can be left open, but at present we cannot say that the loss is or will be of such a character that it must be paid for, and we are satisfied that it is not such as to call for equitable relief.

[5] A general solicitation of offers for sale to the City of any existing street railway in San Francisco was passed by the Board of Supervisors and was ordered to be sent and was sent to the plaintiff, among others. We agree with the District Court that Article XII, § 2, of the City Charter does not better the plaintiff's case.

Decree affirmed without prejudice to further proceedings to recover any damages to which the plaintiff may be entitled.

(249 U. S. 495)

BROUGHAM et al. v. BLANTON MFG. CO.

(Argued March 19, 1919. Decided April 21, 1919.)

No. 247.

1. FOOD — MEAT INSPECTION ACTS — OLEOMARGARINE.

The meat inspection acts of June 30, 1906 (Comp. St. § 8682), and March 4, 1907 (section 8681), apply to "Creamo Oleomargarine," which contains, among other ingredients, oleo oil and neutral lard.

2. FOOD — MEAT INSPECTION ACTS — TRADE-MARKS.

Whether the name "Creamo Oleomargarine" is deceptive is subject to test by the meat inspection laws, although the name has been sanctioned as an appropriate trade-mark by the Patent Office.

3. FOOD — REGULATION — POWER — CONCLUSIVENESS.

The Secretary of Agriculture's determination whether a trade-name is false or deceptive within the meat inspection acts of June 30, 1906 (Comp. St. § 8682) and March 4, 1907 (section 8681), is, unless arbitrarily exercised, conclusive.

4. FOOD — TRADE-NAME — MEAT INSPECTION ACT.

Evidence that the trade-name "Creamo Oleomargarine" was sanctioned by the Secretary of Agriculture under the meat inspection acts of June 30, 1906 (Comp. St. § 8682) and March 4, 1907 (section 8681), when the producer was using 30 per cent. cream, but that such sanction was withdrawn when cream was no longer used, does not establish an arbitrary action by the Secretary, although the producer offered to use 10 per cent. cream.

5. FOOD — MEAT INSPECTION ACTS — CONSTRUCTION.

The Meat Inspection Acts of June 30, 1906 (Comp. St. § 8682), and March 4, 1907 (section 8681), confer a continuing inspecting power upon the Secretary of Agriculture which is not exhausted by the one exercise.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the Blanton Manufacturing Company against James J. Brougham and Arthur N. Stankey. A decree for complainant was affirmed (243 Fed. 503, 156 C. C. A. 201), and the defendants appeal. Reversed, with directions to dismiss the bill.

Mr. Assistant Attorney General Frierson, for appellants.

Mr. Shepard Barclay, of St. Louis, Mo., for appellee.

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*Mr. Justice McKENNA delivered the opinion of the Court.

Appellants are officers of the Department of Agriculture charged with the administration of the meat inspection acts. The appellee, Blanton Manufacturing Company, is a manufacturer of oleomargarine and brought this suit against appellants to enjoin and restrain them from interfering with it in the use of the word "Creamo" as a trade-mark in the manufacture and sale of its product and the use of that mark upon packages of its product shipped from St. Louis in interstate commerce.

The District Court granted the injunction and its decree was affirmed by the Circuit Court of Appeals. 243 Fed. 503, 156 C. C. A. 201.

As a ground of suit and recovery the company relies upon the following facts and they express, in a general way, its contentions. To what extent they should be modified will be apparent as we proceed.

The company is a manufacturer of oleomargarine, having a factory at St. Louis, Mo., which comprises a group of buildings specially arranged and equipped for the purpose of such manufacture and where the company has made an investment of many thousands of dollars. Its product has been sold in packages of various sizes, marked with a trade label or stencil adopted for that purpose, which trade-mark is the word "Creamo," used since 1904. Its trade has become extensive and valuable, its product has acquired a high reputation and become a source of profit, increasing yearly, and an interruption in the use of its trade-mark and label would cause serious injury in a sum exceeding \$5,000.

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January 6, 1908, the company applied to the United States Patent Office for the registration of "Creamo" as a trade-mark, it was duly registered June 9, 1908, and the com-

pany has since enjoyed the use of it and made contracts with dealers under it, and the company's oleomargarine is known to its customers far and wide by that label, trade name and mark.

In 1906, after the enactment of the act of June 30, 1906 (34 Stat. 669, c. 3913 [Comp. St. § 8682]), concerning the inspection of "meat and meat food products," the company was informed by the Bureau of Animal Industry that its [the company's] plant would be subject to inspection under the act of Congress. The company objected but yielded to avoid controversy and hazard to its interest, and an inspector was installed. The company, however, contends that its manufacture of oleomargarine is not subject to the power and authority of the bureau.

The Secretary of Agriculture, in 1907, approved the company's trade-mark of "Creamo," and upon the faith of the approval the company has used the same and by expenditure of large sums of money has extended its popularity and publicity; but, notwithstanding, Dr. Brougham [one of the appellants] threatened the company that from and after March 1, 1914, its use would not be allowed and that the inspector in the establishment of the company would enforce the threat and attempt to prevent the use of the trade-mark and label.

The trade-mark is duly registered in the office of the Secretary of State of the State of Missouri.

[1] Some of the contentions of the company are somewhat difficult to handle—indeed, to get at in separation. One of these is that the Bureau of Animal Industry has no authority or power over the company's product, its manufacture or market. The basis of the contention is that the food products indicated by "the meat inspection act do not include a food product bearing the trade-name 'oleomargarine,' prescribed by a special revenue law to *be used in the sale thereof, and that statutory name is not 'false or deceptive' when so used." And for the contention the company relies on *Homer v. Collector*, 1 Wall. 486, 17 L. Ed. 688, and *Chew Hing Lung v. Wise*, 176 U. S. 156, 20 Sup. Ct. 320, 44 L. Ed. 412. The further contention is that section 6 of the Oleomargarine Act (Act Aug. 2, 1886, c. 840, 24 Stat. 210 [Comp. St. § 6218]) requires the article to be packed in a particular way which is not the same as that prescribed by the meat inspection act and was in force before the latter was enacted, and therefore excluded "an article like this oleomargarine having a 'trade-name by law.'" And yet again that the Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [Comp. St. §§ 8717-8728]), which is "in pari materia," enacts that articles of food containing no poisonous or deleterious ingredients shall not

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be deemed misbranded" which shall thereafter be known as articles of food under their own distinctive names and not offered for sale under the distinctive name of another article if the name be accompanied on the same label or brand by the name of the place where manufactured or produced. And it is said that the company's oleomargarine bears that statutory trade-name and hence should not be considered misbranded. *United States v. Coca Cola Co.*, 241 U. S. 265, 36 Sup. Ct. 573, 60 L. Ed. 995, Ann. Cas. 1917C, 487, is adduced to support the contention. We do not consider it necessary to follow the company's argument in detail. It is rather involved. We disagree with it. In other words, we are of opinion that the meat inspection act is applicable. This was the decision of the Circuit Court of Appeals. The company's oleomargarine is a meat product, compounded, among other things, of oleo oil and neutral lard.¹ Besides, it is not sold under the name of oleomargarine alone; there is the qualifying addition of the word "Creamo," and used, as we shall hereafter see, to qualify and distinguish it from other combinations which might bear the designation oleomargarine.

* We pass to the consideration of the meat inspection acts of June 30, 1906, and March 4, 1907 (34 Stat. 669, c. 3913 [Comp. St. § 8682]; 34 Stat. 1260 [Comp. St. § 8681]). They require an inspection of all meat and meat food products prepared for interstate and foreign commerce and provide that no persons or firm or corporation shall offer for transportation, and no carrier shall transport in interstate or foreign commerce, any such products unless marked "Inspected and Passed," and that "no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade-name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted."

[2, 3] It is the contention of the government that the use of the word "Creamo" is deceptive and induces the belief that cream is a substantial ingredient of the oleomargarine. The company earnestly contends to the contrary and that, besides, the designation "Creamo" has received the approval of the Department of Agriculture and has been sanctioned as an appropriate trade-mark by the Interior Department (Patent Office). The latter contention may be immediately put to one side. The test of the product is the meat inspection laws, not the trade-mark laws, and therefore we are concerned with the action of the Department of Agriculture and not with that of the Interior Department.

¹ Defined in the testimony to be "a lard produced from the leaf of a pig, neutralized so as to take the taste and smell out of it."

And so intimately is the case concerned with the action of the Department of Agriculture that the basic and dominant contention of the government is that to the department is committed the power of determining the fact of the influence of the name and label of the company. In other words, the power of determining whether a trade-name is "false or deceptive" given by the law to the Secretary of Agriculture is, when exercised, conclusive of the falsity or deception of the name. *(Bates & Guild Co. v. Payne*, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894, and cases cited; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036), and the power necessarily is a continuing one. The contention and the cited cases have been approved very lately in *Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479, 39 Sup. Ct. 332, 63 L. Ed. 717, in which it is declared that the decision of the department, unless arbitrary, is conclusive. A sketch of the evidence, therefore, becomes necessary.

[4, 5] As early as 1904 there was, if not controversy, discussion between the company and the department. It was not of serious extent. The company was indulged in the representation that its product was composed of "Butter, Oleo Oil, Neutral, Cream and Salt," and that these were "churned in an abundance of richest cream, resulting in a perfect substitute for butter." But there was objection to a statement that the oils were "doubly inspected" by the United States inspectors, "insuring absolute purity and cleanliness." Such was the condition of things, we may deduce from the testimony, until 1908.

We may say, in passing, that in the beginning 30 per cent. of cream was used and the word "Creamo" was selected to suggest such ingredient to repel the criticisms of the butter makers who represented that oleomargarine was produced from "sewerage and dead horses." But it appears from the testimony that the use of cream was discontinued, skimmed milk being used instead, it having been discovered by the government chemists that it was not the butter fat in the milk which produced the flavor, but it, the flavor, came from skimmed milk.

October 2, 1912, an objection came from the department to the use of the company's label and discussion ensued, extending over a period of 12 or 15 months. The department then announced that the use of the word "Creamo" was "considered deceptive and misleading and its future use could not be permitted." It was, however, suggested that "Creamo Brand Oleomargarine" *be used, the words to be displayed alike in prominent type, and that cream should be used in the product, its use having been discontinued. Upon this ruling of the department and the resistance of the company to it the contest was waged for a time. The company contended that the word "Creamo" was arbi-

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trary and not descriptive; the department asserted the contrary and that it "conveyed a false inference to the consuming public," and, notwithstanding an offer by the company to use 10 per cent. of cream, insisted upon the use of the word "brand" and required also some modifications of the label. It further declared that if the requirements of the bureau should not be complied with on and after March 1, 1914, the inspector in charge at St. Louis would be instructed to prohibit "the use of all labels, wrappers, cartons, etc., which do not bear the bureau stamp of approval and number."

Such is the testimony in outline, and it is manifest that the action of the department was not arbitrary, but given upon a consideration of the circumstances and the fact of the trade-name "Creamo" having a deceptive implication to the consuming public.

But against the decision of the department the company opposes the previous approval of "Creamo" as a trade-name and alleges that upon the faith of the approval the company has used the same and by the expenditure of large sums of money—testified to be about \$10,000 a year—has made its product public and popular under that name. The answer to the contention is that the meat inspection acts contemplate and confer a continuing inspection and power, a power necessarily not exhausted by one exercise. Besides, the approval was given at a time when the company used 30 per cent. of cream in its product and declared that it and other ingredients were "churned in an abundance of richest cream, resulting in a perfect substitute for butter." The indulgence of the department had justification. When the practice of the company changed, when it commenced to vary the percentages of cream and finally used none at all, naturally the department changed its ruling. The company can, therefore, claim no right from the prior ruling. There may be value in the use of the trade-name "Creamo," as the company asserts, and detriment, it may be, in any change or qualification of it; but its value may be in its deception—its suggestion of cream appealing to the popular preference for that article over skimmed milk, though the scientific judgment may be in favor of the latter, a judgment possibly not known or if known not appreciated or accepted. And the deception would not be taken away and the purpose of the law satisfied by the addition of 10 per cent. of cream which the company offered to make. At least such was the judgment of the department, and we cannot pronounce it arbitrary.

It will be observed from the quoted provisions of the meat inspection act that two conditions are presented: If "Creamo Oleomargarine" is to be regarded as the name of the product, it is false and deceptive, what-

ever it may have been formerly; if it be asserted to be an established trade-name, it has not received the approval of the Secretary of Agriculture, and hence its use is without legal permission.

Decree of the Circuit Court of Appeals is reversed, and the case remanded to the District Court, with direction to dismiss the bill.

Mr. Justice McREYNOLDS took no part in the decision of the case.

(249 U. S. 522)

CHALKER et al. v. BIRMINGHAM & N. W. RY. CO. et al.

(Argued March 25 and 26, 1919. Decided April 21, 1919.)

No. 283.

1. CONSTITUTIONAL LAW $\S$ 207(4)—LICENSES $\S$ 7(6) — CONSTITUTIONALITY — PRIVILEGES AND IMMUNITIES—CITIZENS OF THE SEVERAL STATES.

Acts Tenn. 1909, c. 479, $\S$ 4, imposing a higher privilege tax on construction companies having their chief office outside the state than on those having it within the state, violates Const. U. S. art. 4, $\S$ 2, insuring equal privileges and immunities to citizens of the several states, since the classification is arbitrary and in practical effect discriminates against citizens of other states.

2. CONSTITUTIONAL LAW $\S$ 42 — VALIDITY — RIGHT TO QUESTION.

Acts Tenn. 1909, c. 479, $\S$ 4, imposing a higher privilege tax on construction companies having their chief office outside the state than on those having it within the state, may be attacked as unconstitutional without tendering the lower tax, in view of the state court's holding that the higher tax was due.

In Error to the Supreme Court of the State of Tennessee.

Suit by J. W. Wright, Jr., revived in the name of A. P. Chalker, administrator de bonis non, against the Birmingham & Northwestern Railway Company, the Jackson Construction Company, and others. A decree dismissing the bill was affirmed (138 Tenn. 145, 196 S. W. 488), and complainant and C. E. Pigford, the surety on the appeal bond in the state court, bring error. Reversed and remanded.

*Messrs. C. E. Pigford, of Jackson, Tenn., and Watson E. Coleman, of Washington, D. C., for plaintiffs in error.

Mr. R. F. Spragins, of Jackson, Tenn., for defendants in error.

*Mr. Justice McREYNOLDS delivered the opinion of the Court.

The point for determination is the liability

of J. W. Wright, Jr., a citizen and resident of Alabama with his chief office therein, who engaged in the business of constructing a railroad in Tennessee, for the tax prescribed by section 4 of "An act to provide revenue for the state of Tennessee and the counties and municipalities thereof," approved May 1, 1909 (Acts of Tenn. 1909, c. 479, pp. 1726, 1727, 1735), which provides:

"Sec. 4. Be it further enacted, that each vocation, occupation, and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk as provided by law for the collection of revenue.

* * * * *

"Each foreign construction company, with its chief office outside of this state, operating or doing business *in this state, directly or by agent, or by any subletting contract, each, per annum, in each county.....\$100.00

"Each domestic construction company and each foreign construction company, having its chief office in this state, doing business in this state, each, per annum, in each county..\$25.00

"The above tax shall be paid by persons, firms, or corporations engaged in the business of constructing bridges, waterworks, railroads, street-paving construction work, or other structures of a public nature."

Replying to the claim that the statute in effect discriminates against citizens of other states the Supreme Court of Tennessee, in *Wright v. Jackson Const. Co.*, 138 Tenn. 145, 152, 153, 196 S. W. 488, 490, said:

"The determining feature in the legislation quoted is the having of one's chief office in this state. Any citizen of this state, as well as any citizen of a foreign state, who has his chief office out of the state, must pay the \$100 tax; so of any domestic corporation, as well as foreign corporation, having its chief office out of the state. Any foreign corporation or citizen of another state, or firm, as well as domestic corporations, citizens of this state, and firms of this state having its or their chief office in this state, are all alike entitled to carry on a railroad construction business here on the payment of \$25. There is no discrimination at all."

[1] With this conclusion we are unable to agree. Accepting the construction placed upon it by the Supreme Court, we think the quoted section does discriminate between citizens of Tennessee and those of other states by imposing a higher charge on the latter than it does on the former, contrary to section 2, art. 4, of the federal Constitution:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The power of a state to make reasonable and natural classifications for purposes of

taxation is clear and not questioned; but neither under form of classification nor *otherwise can any state enforce taxing laws which in their practical operation materially abridge or impair the equality of commercial privileges secured by the federal Constitution to citizens of the several states.

"Excise taxes, it is everywhere conceded, may be imposed by the states, if not in any sense discriminating; but it should not be forgotten that the people of the several states live under one common Constitution, which was ordained to establish justice, and which, with the laws of Congress, and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden, and forbids discrimination in state taxation when the power is applied to the citizens of the other states. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system." *Ward v. Maryland*, 12 Wall. 418, 431 (20 L. Ed. 449); *Guy v. Baltimore*, 100 U. S. 434, 439, 25 L. Ed. 743; *Blake v. McClung*, 172 U. S. 239, 254, 19 Sup. Ct. 165, 43 L. Ed. 432; *Darnell & Son v. Memphis*, 208 U. S. 113, 121, 28 Sup. Ct. 247, 52 L. Ed. 413.

As the chief office of an individual is commonly in the state of which he is a citizen, Tennessee citizens engaged in constructing railroads in that state will ordinarily have their chief offices therein, while citizens of other states so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other states by imposing higher charges against them than citizens of Tennessee are required to pay. We can find no adequate basis for taxing individuals according to the location of their chief offices—the classification, we think, is arbitrary and unreasonable. Under the federal Constitution a citizen of one state is guaranteed the right to enjoy in all other states equality of commercial privileges with their citizens; but he cannot have his chief office in every one of them.

[2] *It is insisted that no tender of any sum for license tax was made in time, and therefore plaintiff in error cannot question the validity of the enactment because of discrimination. But the Supreme Court expressly declared that the statute fixed the liability of Wright at \$100. A tender of less would have availed nothing and it was therefore unnecessary.

The judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

(249 U. S. 531)

YAZOO & M. V. R. CO. et al. v. MULLINS.

(Argued March 21, 1919. Decided April 21, 1919.)

No. 273.

1. APPEAL AND ERROR ⇨1064(1)—HARMLESS ERROR—AFFIRMANCE OF JUDGMENT ON WRONG THEORY.

Error to the State Supreme Court, in action, under the federal Employers' Liability Act (Comp. St. §§ 8657-8665), for injury of flagman in switching, in resting affirmance of judgment for plaintiff on the Mississippi Prima Facie Act, cannot be said to be harmless because the trial court gave no instruction concerning the state act, and there was sufficient evidence of negligence, and its general instructions concerning negligence were proper; it having, though the company's duty was merely to use reasonable care, instructed that it was the absolute duty of defendant to furnish the employé with a safe place to perform the duties incident to his employment.

2. APPEAL AND ERROR ⇨1032(1)—HARMLESS ERROR—EXAMINATION OF RECORD.

From whatever court a case comes, the national Supreme Court, for determining whether an error found was harmless, will examine the whole record; state questions being left to the decision of the state courts in cases coming from those courts.

3. COURTS ⇨391(1)—SUPREME COURT—CERTIORARI.

The questions presented being properly before the national Supreme Court on error to state court, certiorari will be denied.

In Error to the Supreme Court of the State of Mississippi.

Action by Mrs. Clara J. Mullins, administratrix of James Davis Mullins, deceased, against the Yazoo & Mississippi Valley Railroad Company and others. Judgment for plaintiff was affirmed by the Supreme Court of Mississippi (115 Miss. 343, 76 South. 147), and defendants bring error. Reversed, and writ of certiorari denied.

Mr. Charles N. Burch, of Memphis, Tenn., for plaintiffs in error.

Mr. Marion W. Reilly, of Meridian, Miss., for defendant in error.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Mullins, a flagman on the Yazoo & Mississippi Valley Railroad, was injured while engaged in switching an interstate train. He died within a few hours; and his administratrix brought suit in a state court of Mississippi *under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657-8665]). At the trial the railroad requested a directed verdict on the ground that there was no evi-

dence of negligence on its part. This request was refused; the case was submitted to the jury under instructions, some of which were objected to; and the verdict was for the plaintiff. Upon appeal from the judgment entered thereon the Supreme Court of Mississippi refused to consider the question of sufficiency of the evidence of negligence, and affirmed the judgment on the ground that the so-called "Prima Facie Act" of Mississippi (section 1985 of the Code of 1906, as amended by chapter 215, Laws 1912, p. 290), as to which the trial court had given no instruction, applied and relieved the plaintiff of the burden of establishing negligence. 115 Miss. 343, 76 South. 147. The case comes here by writ of error under section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

[1, 2] Since the decision below, this court has decided that the Mississippi "Prima Facie Act" cannot be applied to suits under the federal Employers' Liability Act, *New Orleans & Northeastern Railroad Co. v. Harris*, 247 U. S. 367, 38 Sup. Ct. 535, 62 L. Ed. 1167; and the Supreme Court of Mississippi now recognizes this rule, *New Orleans & Northeastern Railroad Co. v. Hanna* (Miss.) 78 South. 953. The administratrix contends that, as the trial court did not give any instruction concerning the "Prima Facie Act," the error of the Supreme Court in resting its decision on that statute should not prevent an affirmance of the judgment below, because the railroad was not prejudiced by the error.

It is true generally in cases coming from lower federal courts that the rendering of an erroneous decision on a particular question, *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 351, 22 Sup. Ct. 833, 46 L. Ed. 1193; *West v. Camden*, 135 U. S. 507, 521, 10 Sup. Ct. 838, 34 L. Ed. 254; or the assignment by the lower court of an erroneous reason for a right decision, *Seaboard Air Line Railway v. Moore*, 228 U. S. 433, 435, 33 Sup. Ct. 580, 57 L. Ed. 907; *United States v. One Distillery*, *174 U. S. 149, 151, 19 Sup. Ct. 624, 43 L. Ed. 929, will not entitle the complaining party to reversal, if it is clear that his rights were not prejudiced thereby. And this is likewise true of cases coming from state courts. *Chicago, Rock Island & Pacific Railway Co. v. Wright*, 239 U. S. 548, 551, 36 Sup. Ct. 185, 60 L. Ed. 431; *New York, Philadelphia & Norfolk Railroad Co. v. Peninsular Exchange*, 240 U. S. 34, 41, 42, 36 Sup. Ct. 230, 60 L. Ed. 511, L. R. A. 1917A, 193. See *Murdock v. City of Memphis*, 20 Wall 590, 22 L. Ed. 429. Whether the case comes from a state court or a federal court, this court

will, for the purpose of determining whether the error found may have been prejudicial, examine the whole record; state questions being left to the decision of the state court in cases coming here from those courts.

[3] But we cannot say here that the rights of the railroad were not prejudiced by the error of the Supreme Court of Mississippi. It may be, as contended by the administratrix, that there was sufficient evidence of negligence to go to the jury, and that the general instructions concerning negligence were proper. But the trial court also instructed the jury that "it was the absolute duty of the defendant to furnish the deceased with a safe place to perform the duties incident to his employment." It is clear that, under the circumstances of this case, the duty was not an absolute one; there was merely a duty to use reasonable care. *Chicago & Northwestern Railway Co. v. Bower*, 241 U. S. 470, 36 Sup. Ct. 624, 60 L. Ed. 1107; *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *Choctaw, Oklahoma & Gulf Railroad Co. v. Tennessee*, 191 U. S. 326, 331, 24 Sup. Ct. 99, 48 L. Ed. 201. As examination of this record does not convince us that the admitted error was harmless, the judgment of the Supreme Court of Mississippi is reversed. The questions presented being properly here on writ of error, the petition for a writ of certiorari is denied.

Reversed.

(249 U. S. 523)

NEW ORLEANS & N. E. R. CO. et al. v. SCARLET.

(Argued and Submitted March 18, 1919. Decided April 21, 1919.)

No. 242.

1. APPEAL AND ERROR ⇐1064(1)—HARMLESS ERROR—INSTRUCTIONS.

It cannot be said that a railroad, sued under the federal Employers' Liability Act of April 22, 1908 (Comp. St. §§ 8657-8665), and the Boiler Inspection Act of February 17, 1911, amended by Act March 4, 1915 (Comp. St. §§ 8630-8639d), for injury to locomotive fireman by uncoupling of engine and tender, apparently due to breaking of king pin and coupling chains, was not prejudiced by erroneous instruction that Mississippi Prima Facie Act applied; the evidence not establishing as matter of law that the pin or the chains were defective, but at most presenting a question for the jury.

2. COURTS ⇐391(1)—SUPREME COURT—ERROR TO STATE COURT—CONFLICT OF STATE AND FEDERAL STATUTES—CERTIORARI.

The conflict of a state statute with a valid law of the United States being involved, and

the decision having been in favor of the validity of the statute, the case is properly brought to the national Supreme Court on a writ of error; and petition for certiorari is denied.

In Error to the Supreme Court of the State of Mississippi.

Action by Joe Scarlet against the New Orleans & Northeastern Railroad Company and another. Judgment for plaintiff was affirmed by the Supreme Court of Mississippi (115 Miss. 285, 76 South, 265), and defendants bring error. Reversed, and writ of certiorari denied.

Messrs. J. Blanc Monroe, of New Orleans, La., Albert S. Bozeman, of Meridian, Miss., Monte M. Lemann, of New Orleans, La., and H. O'B. Cooper, of Washington, D. C., for plaintiff in error.

Mr. Thomas G. Fewell, of Meridian, Miss., for defendant in error.

*Mr. Justice BRANDEIS delivered the opinion of the Court.

Scarlet was a fireman on the New Orleans & Northeastern Railroad. While engaged in the performance of his duties he was injured by being thrown down between the engine and the tender. The accident was caused by the uncoupling of engine and tender; and this was apparently due to the breaking of the king pin, which fastened the drawbar to the tender, and the breaking of the coupling chains between engine and tender. He brought suit in a state court of Mississippi under the federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. §§ 8657-8665), and the Boiler Inspection Act of February 17, 1911, c. 103, 36 Stat. 913 (Comp. St. §§ 8630-8639), as amended by the Act of March 4, 1915, c. 169, 38 Stat. 1192 (Comp. St. §§ 8639a-8639d), and recovered judgment which was affirmed by the Supreme Court of the state (115 Miss. 285, 76 South, 265). The case comes here by writ of error under section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

[1] The railroad contends that the Supreme Court of Mississippi erred in sustaining the action of the trial court, which charged the jury that the so-called "Prima Facie Act" of Mississippi (section 1985 of the Code of 1906, as amended by chapter 215, Laws 1912, p. 290) applied, and that it relieved the plaintiff of the burden of proof to establish negligence. Scarlet concedes now that the statute cannot constitutionally be applied to suits under the federal Employers' Liability Act, since this court has so decided in *New Orleans & Northeastern Railroad Co. v. Harris*, 247 U. S. 367, 38 Sup. Ct. 535, 62 L. Ed.

1167, and that the judgment must be reversed if the rights of the railroad were prejudiced by this error. But he contends that the railroad was not prejudiced, because negligence on its part is not essential to recovery. He insists that the Boiler Inspection Act, as amended, imposes upon the railroad the absolute duty (compare *St. Louis & Iron Mountain Railway Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061) to have the "locomotive and tender and all parts and appurtenances thereof" in "proper condition and safe to operate"; that the mere breaking of the king pin and coupling chains shows conclusively that they were defective; that the evidence shows conclusively that this was the proximate cause of the injury; and that the plaintiff was therefore entitled, under the federal act, to have the jury peremptorily instructed to render a verdict in his favor. It does not appear that this contention was made before the Supreme Court of the state, and it was apparently not considered by that

court. But whether Scarlet is now in a position to avail himself of the contention need not be determined (compare *Yazoo & Mississippi Valley Railroad Co. v. Mullins*, No. 273, 249 U. S. 531, 39 Sup. Ct. 368, 63 L. Ed. 754, decided this day); for it is clear that the evidence did not establish as a matter of law that the king pin or the chains were defective. At most it presented a question for the jury. Compare *Minneapolis & St. Louis Railroad Co. v. Gotschall*, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995. We cannot say, therefore, that the railroad was not prejudiced by the error of the trial court in instructing the jury that the "Prima Facie Act" was applicable.

[2] The conflict of a state statute with a valid law of the United States being involved and the decision having been in favor of the validity of the statute, the case is properly here on a writ of error; and the petition for a writ of certiorari is denied.

Reversed.

(249 U. S. 540)

DARLING v. CITY OF NEWPORT NEWS.

(Argued April 15, 1919. Decided April 28, 1919.)

No. 600.

1. COURTS ⇐394(9, 10)—JURISDICTION—FEDERAL QUESTION.

Allegations that statutory permission given a city to discharge its sewage in water over oyster beds previously granted complainant by the state violates the contract clause and the Fourteenth Amendment to the federal Constitution, *held* to confer appellate jurisdiction upon the Supreme Court.

2. NAVIGABLE WATERS ⇐35—POLLUTION—MUNICIPAL DRAINAGE.

Unless precluded by some act of its own or some right of a neighboring state or the federal government, a state may authorize a municipality to empty its drains into the sea, at least so long as a nuisance interfering with private constitutional rights is not created.

3. NAVIGABLE WATERS ⇐36(2)—LANDS UNDER WATER—POLLUTION OF WATERS—DRAINAGE.

Mere ownership of land under salt water does not empower the owner to prevent the fouling of the water.

4. CONSTITUTIONAL LAW ⇐121(1)—FISH ⇐7(3)—CONTRACT IMPAIRMENT—DRAINAGE—INTERFERING WITH OYSTER BED.

The right given the city of Newport News by its charter, and Acts 1908, c. 349, to discharge its sewage into the ocean does not violate the contract rights of an oyster bed lessee holding under Code Va. 1904, §§ 2137, 2137a, granting the absolute right of occupancy for fixed periods, since these provisions relate to the possession of the land, and not to the quality of the water over it.

5. COURTS ⇐366(11)—RULES OF DECISION—DECISION FOLLOWING STATE COURT.

The state court's construction of Const. Va. 1902, § 58, requiring compensation for property taken or damaged for public use, will be followed by the federal Supreme Court.

In Error to the Supreme Court of Appeals of the State of Virginia.

Bill by Frank W. Darling against the City of Newport News was dismissed by the Supreme Court of Appeals of Virginia (96 S. E. 307), and plaintiff brings error. Affirmed.

Messrs. Maryus Jones and J. Winston Read, both of Newport News, Va., for plaintiff in error.

Mr. J. A. Massie, of Newport News, Va., for defendant in error.

* Mr. Justice HOLMES delivered the opinion of the Court.

[1] The plaintiff in error brought this bill in equity to prevent the City of Newport News from discharging its sewage in such a

way as to pollute and ruin the plaintiff's oysters upon his beds under the tidal waters of Hampton Roads. A demurrer was sustained by the Court of first instance and on appeal by the Supreme Court of Appeals, and the bill was dismissed. 96 S. E. 307. The material facts are few. The plaintiff holds leases of the beds *from the State. The original ones were made in 1884 and 1885 for twenty years. In 1903, 1905 and 1912 they were what is called reassigned to the plaintiff by what we understand to have been new leases, by statute to be deemed continuations of the original leases. In 1896 the City of Newport News was incorporated with the grant of the right to build sewers, which the City built in the manner complained of. The grant, coupled with Acts of 1908, c. 349, pp. 623, 624, authorizes the present discharge through Salter's Creek into the tide waters of Hampton Roads, with the effect alleged. By section 2137 of the Code of Virginia it is provided that so long as a lessee of oyster beds continues to pay the rent reserved "he shall have the exclusive right to occupy said land for a period of twenty years, subject to such rights, if any, as any other person or persons may previously have acquired." By section 2137a, originally Act of March 5, 1894, c. 743, § 2, Acts 1893-94, pp. 840, 847, while he pays rent as required "the State will guarantee the absolute right to the renter to continue to use and occupy the same for the period of twenty years the renter acquired." The bill alleges that if the statutes purport to authorize the destruction of the plaintiff's oysters they are contrary to the Constitution of the United States and specifically to the Fourteenth Amendment. In the assignment of errors to the Supreme Court of Appeals the statutes are said also to violate the contract clause. Article 1, § 10. The jurisdiction of this Court is clear.

[2, 3] The fundamental question as to the rights of holders of land under tide waters does not present the conflict of two vitally important interests that exists with regard to fresh water streams. There the needs of water supply and of drainage compete. *Missouri v. Illinois*, 200 U. S. 496, 521, 522, 26 Sup. Ct. 268, 50 L. Ed. 572. The ocean hitherto has been treated as open to the discharge of sewage from the cities upon its shores. Whatever science may accomplish in the future *we are not aware that it yet has discovered any generally accepted way of avoiding the practical necessity of so using the great natural purifying basin. Unless precluded by some right of a neighboring State, such as is not in question here, or by some act of its own, or of the United States, clearly a State may authorize a city to empty its drains into the sea. Such at least would be its power unless it should create a nuisance

that so seriously interfered with private property as to infringe Constitutional rights. And we apprehend that the mere ownership of a tract of land under the salt water would not be enough of itself to give a right to prevent the fouling of the water as supposed. The ownership of such land, as distinguished from the shore, would be subject to the natural uses of the water. So much may be accepted from the decisions in Virginia and elsewhere as established law. *Hampton v. Watson*, 119 Va. 95, 89 S. E. 81, L. R. A. 1916F, 189; *Haskell v. New Bedford*, 108 Mass. 208, 214; *Marcus Sayre Co. v. Newark*, 60 N. J. Eq. 361, 45 Atl. 985; *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 459, 13 Sup. Ct. 110, 36 L. Ed. 1018.

[4] The question before us then narrows itself to whether the State has done any act that precludes it from exercising what otherwise would be its powers. On that issue we shall not inquire more curiously than did the Supreme Court of Appeals into the statutory warrant for the leases, or go into relative dates, but shall assume, for the purposes of decision, that the plaintiff is a lessee and is entitled to the benefit of the clauses that we have quoted from the Code. But we agree with the Court below that when land is let under the water of Hampton Roads, even though let for oyster beds, the lessee must be held to take the risk of the pollution of the water. It cannot be supposed that for a dollar an acre, the rent mentioned in the Code, or whatever other sum the plaintiff paid, he acquired a property superior to that risk, or that by the mere making of the lease, the State contracted, if it *could, against using its legislative power to sanction one of the very most important public uses of water already partly polluted, and in the vicinity of half a dozen cities and towns to which that water obviously furnished the natural place of discharge. See *Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; *Trimble v. Seattle*, 231 U. S. 683, 34 Sup. Ct. 218, 58 L. Ed. 435. The case is not changed by the guaranty in section 2137a. That is directed to the possession of the land, not to the quality of the water. It is unnecessary to cite the cases that have affirmed so frequently that the construction of public grants must be very strict.

[5] The Constitution of Virginia, like some others, requires compensation for property taken or damaged for public use. Const. 1902, § 58. But this seems to be construed by the dissenting Judge as well as by the Court below as not including damage like this, which would not have been a wrong even without the act of the legislature. It is a question that has been subject to much debate. See for example, *Caledonian Railway v. Walker's Trustees*, 7 App. Cas. 259, 293, et seq.; *Taft v. Commonwealth*, 158 Mass. 526, 548, 33 N. E. 1046; *Transportation Co.*

v. Chicago, 99 U. S. 635, 642, 25 L. Ed. 336. But upon that point we follow the Supreme Court of the State.

Decree affirmed.

(249 U. S. 545)

COLLETT v. ADAMS.

(Submitted March 21, 1919. Decided April 28, 1919.)

No. 274.

1. BANKRUPTCY ⇨297—JURISDICTION—RECOVERING PREFERENCE.

Bankruptcy Act, §§ 1(8), 2, 23b, 60b (Comp. St. §§ 9585, 9586, 9607, 9644), authorize suits by a bankrupt's trustee to recover preferences under sections 67b, 67e, and 70e (sections 9651, 9654) to be brought in the federal District Court of the district where the real and personal property is located, although the bankruptcy proceedings were instituted, and defendant resides, in another district in the same state.

2. COURTS ⇨269—UNITED STATES COURTS—JURISDICTION—"LOCAL ACTION."

Suit by a bankrupt's trustee to recover as a preference real and personal property conveyed by the bankrupt is a local action, within Judicial Code, § 54 (Comp. St. § 1036), and is excepted by section 51 (section 1033) from the general provision that defendants must be sued in the district of which they are inhabitants.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Local Action.]

3. COURTS ⇨296—FEDERAL COURT—PENDING SUIT.

Suit by a bankrupt's trustee in a federal court to avoid a conveyance of real and personal property by the bankrupt as a preference is not precluded because a suit by defendant against the bankrupt, which did not tend to avoid the transfer and to which the trustee was not a party, was pending in the state court.

4. BANKRUPTCY ⇨302(1)—PETITION—FEDERAL QUESTION.

Bill by bankrupt's trustee to avoid a conveyance of real and personal property by the bankrupt as a preference held sufficiently substantial to confer jurisdiction on a federal District Court.

Appeal from the District Court of the United States for the Southern District of Texas.

Suit by J. D. Collett, trustee in bankruptcy of the estate of Ford C. Cotten, bankrupt, against James R. Adams. From a decree dismissing the bill, complainant appeals. Reversed.

Messrs. Wilmer S. Hunt, of Houston, Tex., and H. B. Seay, of Dallas, Tex., for appellant.

*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This suit is equity was brought in the District Court for the Southern District of Texas by a trustee in bankruptcy. A motion to dismiss the bill for want of jurisdiction was sustained, and the propriety of that ruling is the sole question presented on this direct appeal. See Judicial Code (Act Jan. 28, 1915, c. 22) § 238, 38 Stat. 804 (Comp. St. § 1215).

The allegations of the bill are to this effect: March 17, 1917, a petition in bankruptcy against Ford C. Cotten was filed in the District Court for the Northern District of Texas, on which in due course he was adjudged a bankrupt. The plaintiff became the trustee. On December 22, 1916, and for some time theretofore, Cotten was the owner and in possession of certain real and personal property in Wharton county, Tex., and on that day transferred the same to James R. Adams, the defendant. Adams was then asserting that Cotten was indebted to him in the sum of \$45,311 for property obtained from him through deceit and fraud, and a suit to enforce that claim was pending in a state court in Collin county, Tex. In August, 1916, a writ of attachment in that suit had been levied on the property here in question, but under the laws of Texas the attachment lien was void and of no effect. The transfer from Cotten to Adams was made with the purpose of effecting a settlement of that suit and the claim involved therein, and at the time of the transfer the parties entered into a written agreement wherein it was stipulated that if Cotten was not adjudged a bankrupt on a petition presented within four months after the transfer was filed for record, Adams should dismiss the suit and pay the unpaid costs, and, if on a petition so filed Cotten was adjudged a bankrupt, Adams should have the *right to prosecute the suit to judgment and to enforce all liens acquired through the attachment. The deed transferring the real property was filed for record shortly after it was executed, but the agreement never was so filed and constituted a secret understanding between the parties. Following the transfer Adams took possession of the property, real and personal; was still in possession, claiming title and exercising the rights of an owner, when this bill was brought, and had refused, on demand made, to surrender the property to the trustee. At the time of the transfer Cotten was insolvent and intended thereby to effect a preference in favor of Adams, all of which the latter knew or had reasonable cause to believe; and in fact the transfer resulted in such a preference, for the assets were not sufficient to pay all creditors. The property transferred was not exempt, but was such as creditors lawfully could subject to the payment of their claims. Some or all of the

personalty has been disposed of by Adams. The real property is in the Southern District of Texas, where this suit was brought. Cotten and the trustee reside in the Northern district, where the bankruptcy proceeding is pending, and Adams resides in the Eastern district. The suit in the state court has not been dismissed, but is still pending in substantially the same condition as when the transfer was made.

The bill contains a prayer for the recovery of the real property or its value, for an accounting as to the proceeds of the personality, and for other relief the detail and propriety of which require no attention here.

The motion which the court below sustained challenged its jurisdiction on the grounds (1) that the bill could not be brought in that court without the defendant's consent, which was not given; (2) that the bill was not brought in the district where the bankruptcy proceeding was pending or in that of the residence of the defendant; and (3) that the subject-matter of the bill already was involved *in the pending suit in the state court in Collin county, a court of competent jurisdiction, and adequate relief could be had in that suit.

[1] On its face the bill shows very plainly that it is brought to avoid a transfer by the bankrupt, which the trustee regards as a voidable preference within the meaning of section 60b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. § 9644]), and to recover the property transferred or its value. There are also present some indications of a purpose to claim relief under sections 67e and 70e (Comp. St. §§ 9651, 9654), but this does not call for special comment, for in point of jurisdiction there is no distinction between a suit under these sections and one under section 60b.

It well may be that under the original terms of the Bankruptcy Act, c. 541, 30 Stat. 544, the bill could not have been brought in the court below without the defendant's consent, (*Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175), but the act was amended materially in 1903 and again in 1910 (Act Feb. 5, 1903, c. 487, 32 Stat. 797; Act Jan. 25, 1910, c. 412, 36 Stat. 838), and it was after those amendments became effective that the bill was brought. The pertinent provisions, with the amendments affecting jurisdiction in italics, are as follows:

Section 23b: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e.*" (Comp. St. § 9607.)

Section 60b: "If a bankrupt shall have procured or suffered a judgment to be entered

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against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and *being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. *And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"¹

Sections 1 (8) and 2 (Comp. St. §§ 9585, 9586) define "courts of bankruptcy" as including the several District courts of the United States, and section 2 (20) invests the courts of bankruptcy with power to "*exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy.*"

The amendments are couched in plain words and effect a material change in the jurisdiction of suits by trustees to avoid preferential transfers and recover the property or its value under section 60b. The exception ingrafted on section 23b takes such suits out of the restrictive provisions of that section; the sentence added to section 60b makes them cognizable in the courts of bankruptcy, as well as in such state courts as could have entertained them if bankruptcy had not intervened; and the new clause in section 2 dispels any doubt that otherwise might exist respecting the power of a court of bankruptcy other than the one in which the bankruptcy proceeding is pending to entertain such a suit where the property sought to be recovered is within its territorial limits.

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[2] *The court below is a court of bankruptcy and the property in question is within its territorial limits, so the jurisdiction under the terms of the Bankruptcy Act is plain. The suit is a local one in the sense of section 54 of the Judicial Code (Comp. St. § 1036) and this enabled the court to reach the defendant, who resides in another district in the same state, by original process sent to and served in the district of his residence. Such a suit, apart from the terms of the Bankruptcy Act, is excepted by section 51 of the Code (Comp. St. § 1033) from the general provision that a defendant may

not be sued in any district other than that of which he is an inhabitant.

[3] Of the objection based on the pendency of the suit in the state court in Collin county it is enough to say that the trustee is not a party to that suit and that it has none of the elements of a suit to avoid the transfer in question. Whether if this were otherwise it would affect the jurisdiction of the court below as a court of the United States we need not consider. See *Louisville Trust Co. v. Knott*, 191 U. S. 225, 24 Sup. Ct. 119, 48 L. Ed. 159; *Courtney v. Pradt*, 196 U. S. 89, 25 Sup. Ct. 208, 49 L. Ed. 398; *Mississippi Railroad Commission v. Louisville & Nashville R. R. Co.*, 225 U. S. 272, 279, 32 Sup. Ct. 756, 56 L. Ed. 1037.

[4] We conclude that the court should have overruled the objections urged against its jurisdiction, but we intimate no opinion on the merits other than that the case made by the bill has enough of substance to entitle the plaintiff to a decision therein in the court below in regular course. See *Geneva Furniture Co. v. Karpen*, 238 U. S. 254, 258, 259, 35 Sup. Ct. 788, 59 L. Ed. 1295.

Decree reversed.

(249 U. S. 551)

In re TRACY.

(Submitted April 21, 1919. Decided April 28, 1919.)

1. HABEAS CORPUS $\S$ 45(1)—ORIGINAL PROCEEDING IN SUPREME COURT.

In the absence of exceptional conditions, other competent courts may not be passed by, and the original jurisdiction of the Supreme Court invoked for redress by habeas corpus.

2. HABEAS CORPUS $\S$ 117(1) — REFUSAL—SUCCESSIVE APPLICATIONS.

Where Supreme Court denies application for habeas corpus, because relief should have first been asked for in other competent courts, a motion for leave to renew application in a District Court is unnecessary.

Motion for Leave to Renew Application for Writ of Habeas Corpus in the United States District Court for the District of Colorado.

On motion for leave to renew application for writ of habeas corpus. Denied.

For former report, see 249 U. S. 588, 39 Sup. Ct. 385, 63 L. Ed. —.

Mr. C. M. O'Neill, of Seattle, for petitioner.

PER CURIAM. For the purpose of redressing assumed violations of the Constitution and laws of the United States by means of habeas corpus the jurisdiction of other competent courts to afford relief may not be passed by and the original jurisdiction of

¹ A sentence like that in italics was added to sections 67e and 70e by chapter 487, 32 Stat. 797.

this court be invoked, in the absence of exceptional conditions justifying such course. *Matters v. Ryan*, 249 U. S. 375, 39 Sup. Ct. 315, 63 L. Ed. 654, decided April 14, 1919.

[2] When leave to file the petition for habeas corpus was previously denied (249 U. S. 588, 39 Sup. Ct. 385, 63 L. Ed. —), without a suggestion as to the existence of any exceptional condition which would have justified a contrary view, such refusal presumably was based on the existence of the right to seek, if desired, other and appropriate sources of relief. From this it follows that although we pass the application of the doctrine that the refusal of habeas corpus is not the thing adjudged precluding a subsequent granting of such writ *upon the same facts, nevertheless there is here no reason to grant the order prayed, since the previous order rested upon the right and duty to petition for relief, if habeas corpus was desired, to other and appropriate sources of judicial power.

No reason, therefore, exists for granting the motion, and to avoid any implication of a necessity which does not obtain, the motion is denied.

(249 U. S. 557)

SKINNER & EDDY CORPORATION v.
UNITED STATES et al.

(Argued March 11, 1919. Decided May 5, 1919.)

No. 215.

1. COMMERCE ⇨96—COMMISSIONER'S ORDERS
—ENJOINING ENFORCEMENT—JURISDICTION.

The courts have jurisdiction to enjoin increase of rates under authority of order of Interstate Commerce Commission, and that without redress being first sought in a proceeding before the commission, where the claim is not that the rate is unjust as unreasonably high or discriminatory, but that the commission has exceeded its authority, and therefore the order is void, in view of Act to Regulate Commerce, § 4, as amended by Act June 18, 1910, § 8 (Comp. St. § 8566), last paragraph prescribing conditions on which, only, an increase shall be permitted, where a carrier by rail shall in competition with a water route reduce rates.

2. COMMERCE ⇨92—ORDER OF COMMISSION—
SUIT TO SET ASIDE—JURISDICTION.

Within Act Oct. 22, 1913 (Comp. St. § 994), declaring venue of suit to set aside order of Interstate Commerce Commission to be the district wherein is the residence of the party or any of the parties on whose petition the order was made, the carriers making fourth section applications (constituting the proceedings) wherein the order was made, and not the other parties (a merchants' association and a state railroad commission) whose applications were instrumental in securing a reopening of the proceedings resulting in the order, are the parties whose residence is controlling.

3. CARRIERS ⇨31—RATES—INCREASE AFTER
REDUCTION IN COMPETITION WITH WATER
ROUTE—FINDING BY COMMISSION.

Act to Regulate Commerce, § 4, last paragraph, amended by Act June 18, 1910, § 8 (Comp. St. § 8566), providing that when a carrier by rail shall, in competition with a water route, reduce rates, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that the proposed increase rests on changed conditions other than the elimination of water competition, *held*, when construed in the light of the purpose of its enactment, of the earlier paragraphs of the section, and of other sections in the Act to Regulate Commerce designed to prevent unjust discrimination, not to apply where reduction in rates was, with the approval of the commission, given after hearing, by order entered on application of the carrier for relief from operation of the section, the specific purpose of which was to prevent discrimination by charging less for the longer haul, unless in the opinion of the commission the circumstances made it just.

4. CARRIERS ⇨31—RATES—INCREASE AFTER
REDUCTION—CHANGED CONDITIONS—ELIMI-
NATION OF WATER COMPETITION.

Changed conditions found by Interstate Commerce Commission *held* to be something other than the "elimination of water competition" which Congress intended should not justify raising rates reduced by a carrier by rail in competition with a water route.

5. COMMERCE ⇨85—RATES—INCREASE AFTER
REDUCTION—APPLICATION BY CARRIER.

Application by carrier is not a prerequisite to an order of Interstate Commerce Commission allowing increase of long-haul rates, which on a fourth section application by carrier it has allowed to be reduced; necessarily implied in such order being "till otherwise ordered by the commission," Interstate Commerce Act, § 4, as amended by Act June 18, 1910, § 8 (Comp. St. § 8566), providing that "the commission may from time to time prescribe the extent to which such * * * carrier may be relieved from the operation of this section," and the original application being always subject to be reopened.

Appeal from the District Court of the United States for the District of Oregon.

Suit by the Skinner & Eddy Corporation against the United States and others. Bill dismissed, and plaintiff appeals. Affirmed.

*Mr. Joseph N. Teal, of Portland, Or., for appellant.

Mr. Assistant Attorney General Frierson, for the United States.

Mr. Albert L. Hopkins, of Washington, D. C., for appellee Interstate Commerce Commission.

Mr. John F. Finerty, of St. Paul, Minn., for appellee Railroad Companies.

Mr. Justice BRANDEIS delivered the opinion of the Court.

The last paragraph of section 4 of the Act

to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 380), as amended by Act June 18, 1910, c. 309, § 8, 36 Stat. 539, 547 (Comp. St. § 8566), declares that:

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission, it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

*550 On August 21, 1916, Skinner and Eddy Corporation brought this suit in the District Court of the United States for the District of Oregon to enjoin an increase in carload rates on iron and steel products from Pittsburgh to Seattle. The United States, the commission, and sixteen railroads were joined as defendants. The bill charged that the action of the carriers in increasing *their rates and that of the commission in authorizing such increase violated the above provision of the Commerce Act and, being beyond their respective powers, was void. The relief asked against the carriers was to prevent the collection of the proposed increased rates until the "commission shall have held a hearing to determine whether the proposed increases rest upon changed conditions other than the elimination of water competition." The relief asked against the commission was to prevent its taking any steps to enforce certain orders "so far as the same permit" such increases. An application for an interlocutory injunction heard before three judges on December 29, 1916, was denied; and later the bill and a supplemental bill, filed December 16, 1916, were dismissed on the ground that they do not state any cause of action. The case comes here by direct appeal. The essential facts are these:

After the decision by this court in *Inter-Mountain Rate Cases*, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408, and while the *Sacramento Case* (*United States v. Merchants' & Manufacturers' Traffic Association*, 242 U. S. 178, 37 Sup. Ct. 24, 61 L. Ed. 233) was pending in the District Court, carriers forming connecting lines between Pittsburgh and Seattle applied to the commission in the same proceeding for further modification of amended fourth section order No. 124, so as to permit a reduction in carload rates on iron and steel products from Pittsburgh to Seattle without making such reduced rates applicable to intermediate points of destination. An order granting leave for a reduction from 80 cents¹ to 65 cents per 100 pounds was entered March 1, 1916. Rates on Iron and Steel Ar-

titles, 38 Interst. Com. Com'n R. 237. The carriers soon thereafter filed tariffs making that reduction *effective April 10, 1916; and on that date, the 65-cent rate became operative. *560

During March, 1916, two applications had been made to the commission in the same proceeding on behalf of shippers to reopen for further consideration other fourth section applications of carriers concerning west-bound transcontinental rates and for modification of orders issued thereon. The petitioners for such modification were the Spokane Merchants' Association and the Railroad Commission of Nevada, which had theretofore taken an active part in the proceedings. Railroad Commission of Nevada v. Southern Pacific Co., 21 Interst. Com. Com'n R. 329; *Commodity Rates to Pacific Coast Terminals*, 32 Interst. Com. Com'n R. 611. Their prayer was for removal of the existing discrimination in transcontinental freight rates against the intermountain territory and in favor of the Pacific Coast ports. The ground alleged for seeking the modification was that by reason of slides in the Panama Canal and the increased demand for shipping due to the world war, water competition, which had theretofore been held to justify lower rates to the Pacific Coast ports, had in large part disappeared. Thereupon the commission reopened on April 1, 1916, these applications, including that on which was entered the order of March 1, 1916, respecting iron and steel rates from Pittsburgh to Seattle; and a hearing was ordered "respecting the changed conditions which are alleged in justification of a modification of the commission's orders."

None of the railroads had requested the reopening of the applications or the hearing; and, when it was held, all opposed further modification of the transcontinental rates. No increased rates were proposed by them; and no specific increased rates were considered by the commission. The petitioners introduced evidence respecting the changed conditions as a basis for modifying the several fourth section orders. On June 5, 1916, the com*mission filed a report (*Reopening Fourth Section Applications*, 40 Interst. Com. Com'n R. 35), in which it found that while the Panama Canal had been meanwhile reopened, there was not then "any effective water competition between the two coasts," or likely to be any in the near future, and that "the war and an unparalleled rise in prices for ocean transportation have so changed the situation as to transform a relation of rates which was justified when established to one that is now unjustly discriminatory against intermediate points." It found also that these conditions were temporary. An order (amended July 13, 1916) was then entered, effective September 1, 1916, rescinding those previously entered on the sev- *561

¹ 80 cents was the specific published rate; but the combination of the Pittsburgh-Chicago rate of 18.9 cents and the Chicago-Seattle rate of 55 cents was 73.9 cents, and it was at this rate that the traffic from Pittsburgh actually moved.

eral applications of carriers, including that of March 1, 1916, authorizing the 65-cent Pittsburgh-Seattle rate; and the carriers were directed to reduce the degree of discrimination then existing in favor of Pacific Coast ports as against intermediate territory.

Upon entry of this order the carriers filed tariffs effective September 1, 1916, raising, among others, the Pittsburgh-Seattle iron and steel rates from 65 cents to 94 cents. Promptly, on August 4, 1916, Skinner & Eddy Corporation protested, requested that the tariffs effective September 1, 1916, raising, had thereon, and alleged that the proposed increase violated, as later set forth in its bill of complaint, the last paragraph of the fourth section. Their request was not then granted. Thereafter, by action of the commission and the carriers, not necessary to detail, the effective date of the tariff fixing the 94-cent rate was postponed to December 30, 1916; and meanwhile these tariffs were, with consent of the commission, canceled upon the understanding that new tariffs fixing a 75-cent rate effective on that day would be filed. When the 75-cent rate was filed, Skinner & Eddy Corporation again protested on the same ground, and made, as theretofore, the same request for a suspension of the tariffs and a hearing; and again the request was not granted.

[1] First. The defendants contend that the District Court did not have jurisdiction of the subject-matter of this suit; because orders entered in a fourth section proceeding cannot be assailed in the courts; at least, not until after a remedy has been sought under sections 13 and 15 of the Act to Regulate Commerce (Comp. St. §§ 8581, 8583). This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the commission, *Loomis v. Lehigh Valley Railroad Co.*, 240 U. S. 43, 50, 36 Sup. Ct. 228, 60 L. Ed. 517; *Texas & Pacific Ry. Co. v. American Tie & Timber Co.*, 234 U. S. 138, 146, 34 Sup. Ct. 885, 58 L. Ed. 1255; *The Minnesota Rate Cases*, 230 U. S. 352, 419, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; *Robinson v. Baltimore & Ohio Railroad Co.*, 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288; *Baltimore & Ohio Railroad Co. v. Pitcairn Coal Co.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292; and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law; *Manufacturers' Ry. Co. v. United States*, 246 U. S. 457, 482, 38 Sup. Ct. 383, 62 L. Ed. 831; *Pennsylvania Co. v. United States*, 236 U. S. 351, 361, 35 Sup.

Ct. 370, 59 L. Ed. 616; *Los Angeles Switching Case*, 234 U. S. 294, 311, 34 Sup. Ct. 814, 58 L. Ed. 1319; *Kansas City Southern Ry. Co. v. United States*, 231 U. S. 423, 440, 34 Sup. Ct. 125, 58 L. Ed. 296, 52 L. R. A. (N. S.) 1; *Procter & Gamble Co. v. United States*, 225 U. S. 282, 297, 298, 32 Sup. Ct. 761, 56 L. Ed. 1091; *Interstate Commerce Commission v. Union Pacific Railroad Co.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308. But plaintiff does not contend that 75 cents is an unreasonably high rate, or that it is discriminatory, or that there was mere error in the action of the commission. The contention is that the commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the commission. *Interstate Commerce Commission v. Dittenbaugh*, 222 U. S. 42, 49, 32 Sup. Ct. 22, 56 L. Ed. 83; *Louisiana & P. Ry. Co. v. United States (Com. C.)* 209 Fed. 244, 251; *Atlantic Coast Line R. Co. v. Interstate Commerce Commission (Com. C.)* 194 Fed. 449, 451. *Sacramento Case*, supra, was a case of this character. Compare *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88, 92, 33 Sup. Ct. 185, 57 L. Ed. 431; *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283. The District Court properly assumed jurisdiction of this suit.

[2] Second. The defendants contend, also, that if the subject-matter was within the jurisdiction of a District Court of the United States, it was not within that of Oregon. The objection is based upon Act Oct. 22, 1913, c. 32, 38 Stat. 208, 219 (Comp. St. § 994), which declares:

"The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made."

And it is asserted that the parties upon whose petition the order was made are the Merchants' Association of Spokane, a resident of the Eastern district of Washington, and the Railroad Commission of Nevada, a resident of the district of Nevada. The applications of these parties, filed in March, 1916, were doubtless instrumental in securing a reopening of the proceedings which resulted in the order complained of. But the proceedings in which the order was made were the original application of carriers for relief under the fourth section. The report and the order are entitled, "In the Matter of Reopening Fourth Section Applications." One of the carriers which had made such application for relief from the provisions of the fourth section was a resident of Oregon, namely, the

Oregon-Washington Railroad & Navigation Company; and, as it was joined as defendant in the suit, the District Court of Oregon had jurisdiction over the parties.

[3] *Third. The main contention of plaintiff is that, as the carriers had in 1916 reduced the rate from 80 cents to 65 cents, neither the carriers nor the commission had power to increase the rate without a prior finding by the commission upon proper hearing "that such proposed increase rests upon changed conditions other than the elimination of water competition," and that no such hearing had been had or finding made.

In construing this provision it is important to bear in mind the limits of the commission's control over rates. Neither the Act to Regulate Commerce nor any amendment thereof has taken from the carriers the power which they originally possessed, to initiate rates; that is, the power, in the first instance, to fix rates or to increase or to reduce them.² Legislation of Congress confers now upon the commission ample powers to prevent by direct action the exaction of excessively high rates. The original act, proceeding upon the common-law rule which prohibits public carriers from charging more than reasonable rates, gave the commission power to declare illegal one unduly high; but even after such a determination the commission lacked the power to fix the rate which should be charged. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 196, 197, 16 Sup. Ct. 700, 40 L. Ed. 935; *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243; *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 161, 18 Sup. Ct. 45, 42 L. Ed. 414. Effective control was not secured until the act of 1906 (Act June 29, 1906, c. 3591, 34 Stat. 584) had given to the commission the *power to fix, after such hearing, the rate which should be charged, *Interstate Commerce Commission v. Humbolt Steamship Co.*, 224 U. S. 474, 483, 32 Sup. Ct. 556, 56 L. Ed. 849; and the act of 1910 had given it power to suspend, during investigation, tariffs for new rates, and placed upon the carrier the burden of proof to establish the reasonableness of the increased rates, *M. C. Kiser Co. v. Central of Georgia Ry. Co. (D. C.)* 236 Fed. 573.

Congress, however, steadfastly withheld from the commission power to prevent by direct action the charging of unreasonably

low rates. The common law did not recognize that the rate of a common carrier might be so low as to constitute a wrong; and Congress has declined to declare such a rule. Despite the original Act to Regulate Commerce and all amendments, railroads still have power to fix rates as low as they choose and to reduce rates when they choose.³ The commission's power over them in this respect extends no further than to discourage the making of unduly low rates by applying deterrents. One such deterrent is found in the fact that low rates, because voluntarily established by the carrier, may be accepted by the commission as evidence that other rates, actual or proposed, for comparable service are unreasonably high. *Board of Trade of Carrollton, Ga., v. Central of Georgia Ry. Co.*, 28 Interst. Com. Com'n R. 154, 164; *Sheridan Chamber of Commerce v. Chicago, Burlington & Quincy Railroad Co.*, 26 Interst. Com. Com'n R. 638, 647. Compare *Louisville & Nashville Railroad Co. v. United States*, 238 U. S. 1, 11, et seq., 35 Sup. Ct. 696, 59 L. Ed. 1177. The voluntary making of unremuneratively low rates in important traffic may also tend to induce the commission to resist appeals of carriers for general rate increases on the ground of financial necessities. But the main source of the commission's influence to prevent excessively low *rates lies in its power to prevent unjust discrimination. Compare *Houston, East & West Texas Ry. Co. v. United States*, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341. The order prohibiting the unjust discrimination, however, leaves the carrier free to continue the lower rate; the compulsion being that if the low rate is retained, the rate applicable to the locality or article discriminated against must be reduced. That is, the carrier may remove the discrimination either by raising the lower rate to the relative level of the higher, or by lowering the higher to the relative level of the lower, or by equalizing conditions through fixing rates at some intermediate point. *American Express Co. v. Caldwell*, 244 U. S. 617, 624, 37 Sup. Ct. 656, 61 L. Ed. 1352.

A special group of cases in which the commission may indirectly prevent unduly low rates through its power to prevent unjust discrimination is that provided for by the long and short haul clause. It was enacted to remedy one large class of discriminations by creating a legislative presumption that the charge of more for a short haul under substantially similar circumstances and conditions than for a longer distance over the same line in the same direction was unjust. As originally enacted, the provision was construed to authorize the carrier to determine primarily whether the required dissimilarity

² By Act of August 9, 1917, c. 50, § 4, 40 Stat. 270, 272 (Comp. St. 1918, § 8583), it was provided that until January 1, 1920, no increased rate or fare shall be filed except after approval thereof has been secured from the commission. On the 28th day of December, 1917, the government took control of the railroads, as a war measure, under Act of August 29, 1916, c. 418, 39 Stat. 619, 645 (Comp. St. § 1974a). Proclamation of December 26, 1917, Proclamations 1917-1918, pp. 89, 90.

³ Subject only to the requirement of notice as provided in section 6 of the Act to Regulate Commerce, as amended (Comp. St. § 8569).

of circumstances and conditions existed and also to authorize the acceptance of competitive conditions as a justification of a lower rate for the longer distance. So construed, the provisions proved inefficacious, and the act was amended in 1910 by striking out the "substantially similar circumstances and conditions" clause and making the prohibition absolute except to "the extent to which such designated common carrier may be relieved from the operation of this section" by the commission. *Inter-Mountain Rate Cases*, supra. But the lack of power to prevent by direct action excessively low rates remains; the carrier still having the option, if relief from the operation of the fourth section is denied, *to keep in effect the low rate to the more distant point by lowering the rates to intermediate points.

The last paragraph of section 4, here in question, which was added by the act of 1910, was designed to prevent the railroads from killing water competition by making excessively low rates. But again Congress refrained from prohibiting the carrier to reduce the rate and declined to confer upon the commission power to prevent by direct action a reduction. The act still leaves the carrier absolutely free to make as low a rate as it chooses, and merely provides another deterrent, in declaring that, if the rate is once reduced in competition with a water route or routes, it cannot thereafter be increased, "unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition." This provision may become operative in any case where there has been competition between a railroad and a water line, inland or coastwise. But we have now to determine merely whether the prohibition applies where the rates in question were reduced with the approval of the commission given after hearing, by order entered upon application of the carrier for relief from the operation of the fourth section.

The language of the paragraph is general and read alone might compel that construction. But it may not be read alone. It must be construed in the light of the purpose of its enactment, of the earlier paragraphs of section 4, and of other sections in the Act to Regulate Commerce designed to prevent unjust discrimination. The specific purpose of section 4 was to prevent discrimination by charging less for the longer haul, unless in the opinion of the commission the circumstances make such action just. Discrimination, just when sanctioned, may become most unjust. Recognizing this fact, Congress provided that the judgment of the commission should be exercised * "from time to time" to determine "the extent to which [the] * * * carrier may be relieved from the

operation of this section." In other words, the leave granted is not for all time. It is revocable at any time, either because it was improvidently granted or because new conditions have arisen which make its continuance inequitable. The specific purpose of the last paragraph of section 4 is to ensure and preserve water competition; to prevent competition that kills. A reduction made under the authority of a fourth section order after full hearing must have been found by the commission to have been reasonably necessary in order to preserve competition between the rail and the water carrier. A reduction so made is not within the reason of the prohibition declared by the last paragraph. Transportation conditions are not static; the oppressor of to-day may to-morrow be the oppressed. And in order to preserve competition between rail and water carriers it is necessary that the commission's power to approve a modification of rates be as broad as it is to approve a modification in order to prevent unjust discrimination. Even a literal reading of section 4 would not require that prohibition contained in the last paragraph be extended to reductions made with the approval of the commission. The preceding paragraph declares that:

"The commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section."

The last paragraph is a part of the section. Why should not the commission's power to relieve be extended to it?

The construction contended for by plaintiff would rather ensure monopoly than preserve competition. If a rail rate reduced in competition with a water route for the avowed purpose of preserving competition by rail should result, contrary to the commission's expectations, in eliminating the water competition, because so low as to drive the water carrier out of business, then the prohibitively low rate would have to be continued permanently and other water competition be thereby prevented from arising; unless, perchance, some changed condition should develop which might make removal of the bar possible. Or, if the reduction in the rail rate, sanctioned by the commission under the fourth section as not unjustly discriminating against intermediate points, because forced upon the rail carriers by oppressive water competition designed to destroy its business to the port, should become thereafter unjustly discriminatory, because the water carrier, destroyed by its own rate cutting, abandoned the route, still the low rail rate and resulting discrimination would have to continue. Only compelling language could cause us to impute to Congress the intention to produce results so absurd; and the language of the last paragraph of section 4 is clearly susceptible

ble of the more reasonable construction contended for by defendants.

[4] Fourth. The defendants further contend that, even if the prohibition of the last paragraph of section 4 be construed to apply also where the reduction was made with the authority of the commission, the increase of the Pittsburgh-Seattle rate to 75 cents is valid, because the finding of the commission complies with the prescribed condition that the increased rate must rest "upon changed conditions other than the elimination of water competition." It found in terms that: "The conditions formerly existing have materially changed;" that "the withdrawal of boats from this [coast to coast] service has not been on account of the rates made by the rail carriers with which the boats compete, but on account of slides in the Panama Canal and the extraordinary rise in ocean freights;" that the substantial disappearance of water competition was merely temporary; that competing water carriers "announced their intention ultimately to return to this service;" and "that the time of such return depended in *part upon the measure of the rates they would be able to secure for this service in competition with the rail lines." It is clear that the changed conditions so found are something other than the "elimination of water competition" which Congress intended should not justify raising the reduced rates. Compare *American Insulated Wire & Cable Co. v. Chicago & Northwestern Ry. Co.*, 26 Interst. Com. Com'n R. 415, 416.

[5] Fifth. The plaintiff attacks, however, the validity of the order of June 5, 1916 (amended July 13, 1916) also on the ground that it was not made upon application of the carrier—insisting that application by the carrier is not only a prerequisite to the original granting of relief under the fourth section, but also to the modification from time to time by the commission of the relief afforded. This court expressed in the *Sacramento Case*, supra, 242 U. S. at page 187, 37 Sup. Ct. 24, 61 L. Ed. 233, its doubt whether such application was a prerequisite even to the original granting of relief. It is clear that application by the carrier is not a prerequisite to modification. As shown above, orders granting relief under the fourth section are not grants in perpetuity. Neither a carrier nor a favored community acquires thereby vested rights. Necessarily implied in each such order is the term, "until otherwise ordered by the commission"; and the original application is always subject to be reopened, as it was here.

The District Court did not err in dismissing the bill (and supplemental bill) on the merits; and its decree is

Affirmed.

(249 U. S. 571)

STANDARD COMPUTING SCALE CO., Limited, v. FARRELL, State Superintendent of Weights and Measures.

(Argued March 14, 1919. Decided May 5, 1919.)

No. 228.

COMMERCE §57 — WEIGHTS AND MEASURES
§2—REGULATION OF WEIGHTS AND MEASURES — SPECIFICATIONS IN BULLETIN OF STATE SUPERINTENDENT—NATURE AND CONSTITUTIONALITY—"REGULATION"—"LAW."

So-called "specifications," as to automatic computing scales, appearing in "bulletin of instruction and information to dealers and weights and measures officials" published and distributed by state superintendent of weights and measures, under authority of Laws N. Y. 1914, c. 521, held not a "regulation" or "law," within the prohibition of the federal Constitution as to state legislation; their function being educational, and at most advisory.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law; Regulation.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit by the Standard Computing Scale Company against John F. Farrell, State Superintendent of Weights and Measures of the State of New York. Bill dismissed (242 Fed. 87), and plaintiff appeals. Affirmed.

Mr. H. C. Smyth, of New York City (Messrs. C. Scofield and Frederick W. Bisgood, of New York City, of counsel), for appellant.

Messrs. Charles D. Newton, of Geneseo, N. Y., and Edward G. Griffin, Deputy Atty. Gen., of Albany, N. Y., for appellee.

*Mr. Justice BRANDEIS delivered the opinion of the Court.

By the statutes of New York a sealer of weights and measures is appointed in every county and every city by the local authorities, with the duty, among other things, to keep safely the standards and to seal and mark such weights as correspond with the standards in his possession. The statutes provide also for a state superintendent of weights and measures with, among other things, a like duty to keep the state standards, and "where not otherwise provided by law" to "have a general supervision of the weights, measures and measuring and weighing devices of the state, and in use in the state." General Business Law of New York (Consol. Laws, c. 20) §§ 11-15; Laws 1909, c. 25, amended by Laws 1910, c. 187. Under a specific appropriation he publishes and distributes "bulletins of instruction and infor-

mation to dealers, and weights and measures officials." Laws 1914, c. 521, p. 2093. In the bulletin for August, 1914, there appeared, among other matter, the following item:

"Specifications.

"Automatic Computing Scales.

"All combination spring and lever computing scales must be equipped with a device which will automatically compensate for changes of temperature at zero balance and throughout the whole range of weight graduations."

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The Standard Company manufactures a combination spring and lever computing scale which was then being used and sold in New York. It is equipped with a compensating device which is not automatic. Because of these "specifications," some county and city sealers of weights neglected to seal scales of plaintiff's make and warned scale users to discontinue the use thereof. A state inspector, who was a subordinate of the state superintendent, also marked some of these scales "slow and faulty." As a result, the Standard Company's business in New York was injured; sales diminished and collections for scales theretofore sold became difficult. The Standard Company contends that its scales with a mechanical compensating device are at least as trustworthy as those of its competitor with the automatic device; and it presented these views to State Superintendent Farrell, both before the "specifications" were issued and thereafter. Failing to secure a withdrawal of the "specifications," it brought, in February, 1915, this suit in the District Court of the United States for the Southern District of New York against the state superintendent, setting forth, in substance, the facts above stated and praying that the issuing of the "specifications," which it termed a "rule," be declared an invalid exercise of the police power of the state, and their enforcement enjoined on the ground that the rule violates the federal Constitution, in that it impairs the obligation of contracts, interferes with interstate commerce, abridges the privileges and immunities of a citizen, deprives the plaintiff of property without due process, and denies to it equal protection of the laws. An answer was filed, and upon full hearing on the evidence the bill was dismissed on the merits. 242 Fed. 87. The Circuit Court of Appeals affirmed the decree; but, at appellant's request, the mandate was later withdrawn, and the appeal dismissed for want of jurisdiction, because it appeared that the jurisdiction of the District Court had been invoked solely under section 24, par. 14, of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1092 [Comp. St. § 991 (14)]), on the ground that the defendant's "rule" was unconstitutional. Carolina Glass

Co. v. South Carolina, 240 U. S. 305, 318, 36 Sup. Ct. 293, 60 L. Ed. 658. Thereupon the case was brought here by direct appeal under section 238 of the Judicial Code (Comp. St. § 1215).

No question is made as to the constitutionality of the statute creating the office of state superintendent and defining his duties. The attack is upon the "specifications" in the bulletin which plaintiff assumes are a regulation; that is, a law. Its contention is that the so-called "rule" is not a proper exercise of the police power, and is void, because it is arbitrary and unreasonable, because it unjustifiably discriminates against plaintiff's product, and because it interferes with interstate commerce. The claim that it impairs the obligation of contracts is not now insisted upon.

The "specifications" were not published as a regulation purporting to prescribe a course of action to be enforced by the power of the state. They embody, as the evidence shows, the result of prolonged investigation and extensive experimentation, and formulate the conclusion reached by the state superintendent that every known automatic computing scale without an automatic compensating device is likely to mislead the customer who purchases at retail. In other words, the vice in this kind of scales was found by him to be generic, and, as the objection was not one due to a defect of an individual machine, it was deemed useless to make individual tests. The "specifications" are a law only in the sense that every truth of general application may be spoken of as a law. If they may be termed a rule, it is only in the sense that they furnish a guide for the action of those interested; that is, the function of the "specifications" is educational, and at most advisory.

The item was one appropriate for a bulletin "of instruction and information to dealers and weights and measures officials." That such was its purpose is shown also by the other items contained in the same issue of the bulletin. In the pages preceding the "specifications" here in question was one item giving elementary information as to how prosecutions for violation of the General Business Law may be conducted, and two recent opinions of the Attorney General of New York addressed to the state superintendent. The first concerned the power of *local magistrates to punish for violation of that law; the other the right to mark containers in terms of the metric system. Following the "specifications" in question are two more opinions of the Attorney-General and the opinion of a Municipal Court. The last item of the bulletin is entitled "Specifications—Measuring Pumps," and conveys useful information concerning automatic measuring devices. The information given

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in the "specifications" complained of may, as the plaintiff contends, be incorrect; the instruction may be unsound, and, if it is so, may be mischievous, and seriously damage the property rights of innocent persons. But the opinions and advice, even of those in authority, are not a law or regulation such as comes within the scope of the several provisions of the federal Constitution designed to secure the rights of citizens as against action by the states.

If the state superintendent had undertaken to introduce a regulation legislative in character—that is, to prescribe rules of action which the city and county sealers would be forced to follow, and to prohibit the use in the state of scales not sealed in accordance with his regulations—he would have exceeded his powers; for the few conferred upon him are not of that character. The General Business Law, substantially as enacted in 1909, provided by section 11 that:

"The state superintendent of weights and measures shall take charge of the standards adopted by this article as the standards of the state; cause them to be kept in a fireproof building belonging to the state, from which they shall not be removed, except for repairs or for certification, and take all other necessary precautions for their safe-keeping. He shall maintain the state standards in good order and shall submit them once in ten years to the national bureau of standards for certification. He shall correct the standards of the several cities and counties, and, as often as once in five years, compare the same with those in his possession, and where not otherwise provided by law he shall have a general supervision of the weights, measures and measuring and weighing devices of the state, and in use in the state."

The statutes give the state superintendent no control of county or city sealers. He does not appoint them and they are, in no respect, his subordinates. The powers which they now exercise are substantially the same as those conferred upon them by the Colonial Act of June 19, 1703,¹ which created those offices. Section 11 of the General Business Law was a re-enactment of section 11 of the Domestic Commerce Law (Laws 1896, c. 376), and the latter was substantially a re-enactment of section 17 of chapter 134 of the Laws of 1851, which act created (by section 16) the office of state superintendent.² Section 11, as enacted in 1909, was amended (Laws 1910, c. 187), so as to prescribe ad-

ditional specific duties of the state superintendent.³ But none of these *is legislative in character, and the enumeration of them serves rather to limit than to enlarge the meaning of the clause, giving "general supervision of the weights * * * in use in the state."

If the "specifications" had been issued as a regulation—that is, a law—we might have been called upon to inquire whether it was a proper exercise of the police power, or was, as plaintiff contends, void, because arbitrary and unreasonable, or because it was discriminatory, or as interfering with interstate commerce. For the protection of the federal Constitution applies, whatever the form in which the legislative power of the state is exerted; that is, whether it be by a Constitution, an act of the Legislature, or an act of any subordinate instrumentality of the state exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission. *Great Northern Ry. Co. v. Minnesota*, 238 U. S. 340, 35 Sup. Ct. 753, 59 L. Ed. 1337; *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U. S. 278, 286-288, 33 Sup. Ct. 312, 57 L. Ed. 510; *Oregon Railroad & Navigation Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863; *Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana*, 221 U. S. 400, 403, 31 Sup. Ct. 537, 55 L. Ed. 786. But since the "specifications" are not in the nature of a law or regulation, the prohibitions of the federal Constitution cannot apply.

The District Court did not err in dismissing the bill, and its judgment is Affirmed.

*"He shall upon the written request of any citizen, firm, corporation or educational institution of the state, test or calibrate weights, measures, weighing or measuring devices and instruments or apparatus used as standards in the state. He, or his deputies or inspectors by his direction, shall at least once annually test all scales, weights and measures used in checking the receipt or disbursement of supplies in every institution under the jurisdiction of the fiscal supervisor of state charities and he shall report in writing his findings to said fiscal supervisor and to the executive officer of the institution concerned; and at the request of said officers the superintendent of weights and measures shall appoint in writing one or more employes, then in actual service, of each institution, who shall act as special deputies for the purpose of checking the receipt or disbursement of supplies. He shall keep a complete record of the standards, balances and other apparatus belonging to the state and take receipt for the same from his successor in office. He shall annually during the first two weeks of January make to the Legislature a report of the work done by his office. The state superintendent, or his deputies or inspectors by his direction, shall inspect all standards used by the counties or cities at least once in two years and shall keep a record of the same. He, or his deputies or inspectors at his direction, shall at least once in two years visit the various cities and counties of the state in order to inspect the work of the local sealers and in the performance of such duties he may inspect the weights, measures, balances or any other weighing or measuring appliances of any person, firm or corporation."

¹ Report upon Weights and Measures, by John Quincy Adams, Secretary of State, February 22, 1821, p. 189.

² An act passed February 2, 1804, had provided that the Secretary of State should be ex officio state sealer of weights and measures and that "from time to time, as occasion may require," "one assistant state sealer" might be appointed. Report upon Weights and Measures, by John Quincy Adams, Secretary of State, February 22, 1821, p. 194.

(249 U. S. 554)

BEAUMONT v. PRIETO et al.

(Argued April 17, 1919. Decided May 5, 1919.)

No. 303.

1. APPEAL AND ERROR $\hookrightarrow$ 364—DISMISSAL—SEASONABLE RETURN.

Motion to dismiss, on the ground that the writ of error and citation were not made returnable in time, denied, on the ground that, as appellant had color of authority from the court and a judge thereof, justice will be better served by dealing with the merits.

2. VENDOR AND PURCHASER $\hookrightarrow$ 16(4)—OFFER TO SELL—COUNTER OFFER—EFFECT.

Right of plaintiff to hold defendant to the terms of his offer to sell is lost by a reply amounting to a counter offer, with different terms as to time of payment; this constituting a rejection of defendant's offer, which cannot be revived by a subsequent tender of acceptance.

Appeal from and in Error to the Supreme Court of the Philippine Islands.

Suit by Hartford Beaumont, assignee of W. Borck, against Mauro Prieto and others. Decree for plaintiff was reversed by the Supreme Court of the Philippine Islands, and plaintiff appeals and brings error. Affirmed.

Messrs. Joseph D. Sullivan and Timothy Ansberry, both of Washington, D. C., for appellant and plaintiff in error.

Messrs. Alexander Britton and H. W. Van Dyke, both of Washington, D. C., for appellees and defendants in error.

Mr. Justice HOLMES delivered the opinion of the Court.

[1] This is a suit for the specific performance of an alleged contract to sell land. The court of first instance made a *decree for the plaintiff, but the decree was reversed by the Supreme Court of the Philippine Islands and the defendants were absolved from the complaint. There is a motion to dismiss, on the ground that the writ of error and citation were not made returnable in time. But without going into particulars, as the appellant had color of authority from the court and a judge of that court, it appears to us that justice will be better served by dealing with the merits of the case. See *Southern Pine Co. v. Ward*, 208 U. S. 126, 137, 28 Sup. Ct. 239, 52 L. Ed. 420.

[2] On the merits the only question is whether the alleged contract was made. The first material step was the following offer, dated December 4, 1911:

"Mr. W. Borck, Real Estate Agent, Manila, P. I.—Sir: In compliance with your request I herewith give you an option for three months to

buy the property of Mr. Benito Legarda, known as the Nagtahan hacienda, situated in the district of Sampaloc, Manila, and consisting of about 1,993,000 square meters of land, for the price of its assessed government valuation. B. Valdes."

There is no dispute that the assessed government valuation was 307,000 pesos, that Legarda owned the land and that Valdes had power to make the offer. On January 17, 1912, Borck wrote to Valdes:

"In reference to our negotiations regarding" the property in question, "I offer to purchase said property for the sum of three hundred and seven thousand (307,000.00) pesos, Ph. C., cash, net to you, payable the first day of May 1912, or before and with delivery of a torrens title free of all encumbrances as taxes and other debts."

There was dispute about the admissibility of this letter and its being signed, but we see no occasion to disturb the opinion of the Supreme Court that it was a part of the transaction and was admissible. No answer was received, and on January 19 Borck wrote again, saying that he was ready to purchase the property at the price and that full payment would be made on or before *March 3, provided all documents in connection with the hacienda were immediately placed at his disposal and found in good order. On January 23, Borck wrote again that he could improve the condition of payment and would pay ten days after the documents had been put at his disposal for inspection, etc., and finally, on February 28, wrote that the price was ready to be paid over and requesting notice when it was convenient to allow inspection of all papers. Before this last letter was written Valdes had indicated that he regarded compliance as an open question by saying in conversation that he wished to communicate with Mr. Legarda. Subsequently conveyance was refused.

The letter of January 17 plainly departed from the terms of the offer as to the time of payment and was, as it was expressed to be, a counter offer. In the language of a similar English case:

"The plaintiff made an offer of his own * * * and he thereby rejected the offer previously made by the defendant. * * * It was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it." *Hyde v. Wrench*, 3 Beavan, 334; *Langdell*, Cont. § 18.

We do not find it necessary to go into the discussion of the later communications, which led the Supreme Court to the conclusion that they also would not have been sufficient. The right to hold the defendant to the proposed terms by a word of assent was

gone, and after that all that the plaintiff could do was to make an offer in his turn. It would need a very much stronger case than this to induce us to reverse the decision of the court below. *Cardona v. Quinones*, 240 U. S. 83, 88, 36 Sup. Ct. 346, 60 L. Ed. 538.

Judgment affirmed.

(249 U. S. 552)

RATON WATERWORKS CO. v. CITY OF RATON.

(Argued April 29 and 30, 1919. Decided May 5, 1919.)

No. 348.

COURTS 405(7) — REVIEW OF DISTRICT COURT—APPELLATE JURISDICTION.

Jurisdiction of the District Court to entertain the suit being based solely on the ground that it was one arising under the Constitution and the laws of the United States, the Circuit Court of Appeals has no jurisdiction of appeal therein; exclusive power to review being, under Judicial Code, §§ 128, 238 (Comp. St. §§ 1120, 1215), vested in the Supreme Court.

On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit between the Raton Waterworks Company and the City of Raton. Appeal was taken from the District Court to the Circuit Court of Appeals, which certifies the question of its jurisdiction. Question answered in the negative.

Mr. Abram J. Rose, of New York City, for Raton Waterworks Co.

Mr. John Henry Fry, of Denver, Colo., for City of Raton.

Memorandum Opinion by the CHIEF JUSTICE.

The certificate states that, in a cause pending before it on appeal from the District Court, the jurisdiction of the court below to entertain the cause on appeal was questioned on the ground that the judgment of the District Court was exclusively susceptible of being reviewed by direct appeal to this court. The certificate further states that the parties to the cause in the district court were both corporations of New Mexico and the jurisdiction of the District Court to entertain the suit was based solely upon the ground that it was one arising under the Constitution and laws of the United States.

Resulting from these conditions the question which the certificate propounds is this: "Has this court (the Circuit Court of Appeals) jurisdiction of the appeal?" The solution of the question is free from difficulty, since, whatever at one time may have been the basis for hesitancy concerning the question, the necessity for a negative answer is now conclusively manifest as the result of a line of decisions determining that, under the circumstances as stated, the Circuit Court of Appeals was without jurisdiction of the appeal as the exclusive power to review was vested in this court. Judicial Code, §§ 128, 238 (Act March 3, 1911, c. 231, 36 Stat. 1133, 1157 [Comp. St. §§ 1120, 1215]); *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277-281, 21 Sup. Ct. 646, 45 L. Ed. 859; *Huguley Manufacturing Co. v. Galeton Cotton Mills*, 184 U. S. 290, 295, 22 Sup. Ct. 452, 46 L. Ed. 546; *Union Planter's Bank v. Memphis*, 189 U. S. 71, 73, 23 Sup. Ct. 604, 47 L. Ed. 712; *Vicksburg v. Waterworks Co.*, 202 U. S. 453, 458, 26 Sup. Ct. 660, 50 L. Ed. 1102; *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318, 36 Sup. Ct. 293, 60 L. Ed. 658.

A negative answer to the question propounded is therefore directed.

And it is so ordered.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1918

(249 U. S. 579)

No. —. *Ex parte* in the matter of Albert Herschel DE PROPPER. March 3, 1919. Order of admission vacated, the name of the respondent to be removed from the rolls, and the certificate evidencing his enrollment canceled. The Court expresses its grateful acknowledgment to the committee of the bar for the alacrity with which they responded to the request to take charge of the subject-matter of the rule which has been disposed of by the order just stated, and for the promptness, intelligence, and efficiency with which they discharged their duty.

(249 U. S. 619)

No. 250. John E. ROLLER, plaintiff in error, v. O. B. COOLEY. March 17, 1919. In error to the Supreme Court of Appeals of the State of Virginia. For opinion below, see 119 Va. 209, 89 S. E. 136. Mr. John E. Roller, of Harrisonburg, Va., for plaintiff in error. Dismissed with costs, pursuant to the 16th rule, on motion of Mr. Chas. A. Hammer for the defendant in error.

(249 U. S. 620)

No. 295. J. F. HAZELTON et al., plaintiffs in error, v. The CITY OF ATLANTA. March 26, 1919. In error to the Supreme Court of the State of Georgia. For opinion below, see 147 Ga. 207, 93 S. E. 202. Mr. James K. Hines, of Atlanta, Ga., for plaintiffs in error. Dismissed with costs, pursuant to the sixteenth rule, on motion of Mr. Walter T. Colquitt for the defendant in error.

(249 U. S. 620)

No. 354. The UNITED STATES, appellant, v. SHERIDAN-KIRK CONTRACT COMPANY; and

No. 355. SHERIDAN-KIRK CONTRACT COMPANY, appellant, v. The UNITED STATES. March 28, 1919. Mr. Attorney General, for the United States. Messrs. George A. King and William B. King, both of Washington, D. C., for appellee. Dismissed on motion of counsel for the appellants.

(249 U. S. 588)

No. —. Original. *Ex parte*: In the matter of J. A. TRACY, petitioner. April 14, 1919. Motion for leave to file petition for a writ of habeas corpus denied. See, also, 249 U. S. 551, 39 Sup. Ct. 374, 63 L. Ed. 768.

(249 U. S. 587)

No. 175. The DENVER & RIO GRANDE RAILROAD COMPANY, plaintiff in error, v. James R. BAIRD. April 14, 1919. In error to the Supreme Court of the State of Utah. For opinion below, see 49 Utah, 58, 162 Pac. 79. Messrs. Waldemar Van Cott, Edward M. Allison, Jr., and William D. Riter, all of Salt Lake City, Utah, for plaintiff in error.

39 SUP. CT.—25

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by the act of September 6, 1916, chap. 448, § 2, 39 Stat. 728 (Comp. St. § 1214).

(249 U. S. 621)

No. 252. The SEATTLE ELECTRIC COMPANY et al., appellants, v. The CITY OF SEATTLE et al. April 14, 1919. In error to the District Court of the United States for the Western District of Washington. Mr. James B. Howe, of Seattle, Wash., for appellants. Dismissed, with costs, on motion of counsel for the appellants.

(249 U. S. 621)

No. 297. Minerva B. CRUZAN, Administratrix, etc., plaintiff in error, v. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY. April 14, 1919. In error to the Superior Court of the State of Massachusetts. For opinion below, see 227 Mass. 594, 116 N. E. 879. Mr. H. La Rue Brown, of Boston, Mass., for plaintiff in error. Mr. Lowell A. Mayberry, of Boston, Mass., for defendant in error. Dismissed, per stipulation.

(249 U. S. 622)

No. 302. SANBORN-CUTTING COMPANY, appellant, v. V. A. PAINE, as trustee, etc. April 14, 1919. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 244 Fed. 672, 157 C. C. A. 120. Mr. G. C. Fulton, of Astoria, Or., for appellant. Dismissed with costs, on motion of counsel for the appellant.

(249 U. S. 622)

No. 307. ALAMEDA MINING COMPANY, plaintiff in error, v. SUCCESS MINING COMPANY. April 14, 1919. In error to the Supreme Court of the State of Idaho. For opinion below, see 29 Idaho, 618, 161 Pac. 862. Mr. John P. Gray, of Cœur D'Alene, Idaho, for plaintiff in error. Mr. James F. Ailshie, of Cœur D'Alene, Idaho, for defendant in error. Dismissed with costs, per stipulation.

(249 U. S. 622)

No. 314. GREAT NORTHERN RAILWAY COMPANY et al., plaintiffs in error, v. MINNEAPOLIS CIVIC & COMMERCE ASSOCIATION et al. April 14, 1919. In error to the Supreme Court of the State of Minnesota. For opinions below, see 137 Minn. 10, 163 N. W. 294; 137 Minn. 10, 162 N. W. 689. Mr. E. C. Lindley, of St. Paul, Minn., for plaintiffs in error. Mr. Frank J. Morley, of Minneapolis, Minn., for defendant in error. Dismissed with costs, per stipulation.

(249 U. S. 587)

No. 704. **R. E. ODEN**, Sheriff of Allen Parish, Louisiana, plaintiff in error, v. **A. V. COCO**, Attorney General of Louisiana. April 14, 1919. In error to the Supreme Court of Louisiana. For opinion below, see 143 La. 718, 79 South. 287. Messrs. Cline & Bell and T. A. Edwards, all of Lake Charles, La., for plaintiff in error. Mr. A. V. Coco, of New Orleans, La., for defendant in error.

PER CURIAM. Dismissed for the want of jurisdiction upon the authority of (1) *Farrell v. O'Brien*, 199 U. S. 89, 100, 25 Sup. Ct. 727, 60 L. Ed. 101; *Empire State-Idaho Mining Co. v. Hanley*, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; *Goodrich v. Ferris*, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544; (2) *Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co.*, 228 U. S. 596, 599, 33 Sup. Ct. 605, 57 L. Ed. 982; *Municipal Securities Corporation v. Kansas City*, 246 U. S. 63, 69, 38 Sup. Ct. 224, 62 L. Ed. 579; *Bilby v. Stewart*, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701.

(249 U. S. 611)

No. 835. **ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY**, plaintiff in error, v. **H. T. TRUE, Jr.** April 14, 1919. For opinion below, see 176 Pac. 758. Messrs. Edward J. White, of St. Louis, Mo., and Thomas B. Pryor, of Fort Smith, Ark., for plaintiff in error. Mr. Finis E. Riddle, of Tulsa, Okl., for defendant in error. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(249 U. S. 611)

No. 888. **Stewart A. HEWETT**, petitioner, v. **THE STATE OF WASHINGTON**. April 14, 1919. For opinion below, see 173 Pac. 726. Mr. Hannis Taylor, of Washington, D. C., for petitioner. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied.

(249 U. S. 611)

No. 899. **Etha DAVIS**, née Hutton, petitioner, v. **Alice R. THOMPSON et al.** April 14, 1919. For opinion below, see 177 Pac. 67. Mr. E. J. Van Court, of Eufaula, Okl., for petitioner. Messrs. Geo. S. Ramsey, of Muskogee, Okl., and Wm. M. Matthews, of Okmulgee, Okl., for respondents. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(249 U. S. 611)

No. 906. **C B LIVE STOCK COMPANY**, petitioner, v. **CROSBYTON INDEPENDENT SCHOOL DISTRICT**. April 14, 1919. For opinion below, see 254 Fed. 753. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(249 U. S. 611)

No. 911. **Maud MORRISON**, administratrix, etc., petitioner, v. **CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY**. April 14, 1919. For opinion below, see 175 Pac. 325. Messrs. Plummer & Lavin, H. G. Kinzel, and O. C. Moore, all of Spokane, Wash., for petitioner. Mr. George W. Korte, of Seattle, Wash. (Mr.

H. H. Field, of Chicago, Ill., of counsel), for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied.

(249 U. S. 612)

No. 923. **W. O. WELCH** and **Lizzie Welch**, petitioners, v. **George W. KIRBY**, administrator, etc. April 14, 1919. For opinion below, see 255 Fed. 451. Mr. I. N. Watson, of Kansas City, Mo., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(249 U. S. 596)

No. 924. **George D. HORNING**, petitioner, v. **THE DISTRICT OF COLUMBIA**. April 14, 1919. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted.

(249 U. S. 612)

No. 925. **Christoffer HANNEVIG** and **Vidkunn Johnsen**, as **Hannevig & Johnsen**, petitioners, v. **R. W. J. SUTHERLAND & COMPANY**. April 14, 1919. For opinion below, see 256 Fed. 445. See, also, 249 U. S. 587, 39 Sup. Ct. 291, 63 L. Ed. —. Messrs. Frederic R. Coudert and Howard Thayer Kingsbury, both of New York City, for petitioners. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(249 U. S. 612)

No. 928. **Roy J. BISHOP**, administrator, etc., petitioner, v. **John H. HUNGATE**, executor, etc., et al. April 14, 1919. Mr. Thomas E. D. Bradley, of Chicago, Ill., for petitioner. Mr. Felix T. Hughes, of Keokuk, Iowa, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied. For opinion below, see *Laswell v. Hungate*, 256 Fed. 635.

(249 U. S. 612)

No. 941. **HASSAN ABDU et al.**, petitioners, v. **THE NIGRETIA, etc.** April 14, 1919. For opinion below, see 255 Fed. 56. Mr. Silas B. Axtell, of New York City, for petitioners. Messrs. L. De Grove Potter and John M. Woolsey, both of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(249 U. S. 569)

No. 943. **T. M. DUCHE & SONS, Limited**, petitioner, v. **American schooner JOHN TWO-HY, etc.** April 14, 1919. For opinion below, see 256 Fed. 224. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit granted.

(249 U. S. 622)

No. 982. **George J. WAGONER et al.**, plaintiffs in error, v. **THE CITY OF LA GRANDE**, Oregon, et al. April 15, 1919. In error to the Supreme Court of the State of Oregon. For opinion below, see 89 Or. 192, 173 Pac. 303. Mr. Will R. King, of Washington, D. C., for defendant in error. Docketed and dismissed, on motion of Mr. Will R. King for the defendants in error.

No. 304. UNITED STATES FIDELITY & GUARANTY COMPANY, plaintiff in error, v. The STATE OF OKLAHOMA et al. April 16, 1919. See, also, 168 Pac. 234. Mr. C. B. Ames, of Oklahoma City, Okl., for plaintiff in error. Mr. S. P. Freeling, of Oklahoma City, Okl., for defendant in error. Expiration of the terms of office of R. L. Williams, governor; J. L. Lyon, as secretary of state; E. B. Howard, as auditor; Frank Gault, as president of the Board of Agriculture of the State of Oklahoma, suggested, and appearance of J. B. A. Robertson, governor; Joe S. Morris, as secretary of state; F. C. Carter, as auditor; and J. W. Whitehurst, as president of the Board of Agriculture of the State of Oklahoma, as parties plaintiffs in error, filed and entered, per stipulation, and on motion of Mr. C. B. Ames for the plaintiffs in error.

(249 U. S. 588)

No. 22. Original. The STATE OF TENNESSEE, complainant, v. The STATE OF ARKANSAS et al. April 21, 1919. Messrs. Frank M. Thompson, of Chattanooga, Tenn., and Barnette E. Moses, of Memphis, Tenn., for complainant. Mr. W. J. Lamb, of Osceola, Ark., for respondent.

PER CURIAM. Bill dismissed with costs for want of equity on the authority of Jackson v. United States, 230 U. S. 1, 33 Sup. Ct. 1011, 57 L. Ed. 1363, Hughes v. United States, 230 U. S. 24, 33 Sup. Ct. 1019, 57 L. Ed. 1374, 46 L. R. A. (N. S.) 624, and Cubbins v. Mississippi River Commission, 241 U. S. 351, 36 Sup. Ct. 671, 60 L. Ed. 1041.

(249 U. S. 588)

No. 26. Original. Ex parte In the matter of Robert H. THORBURN, petitioner. April 21, 1919. Petition for mandamus. Rule to show cause discharged and petition dismissed. Leave to file supplementary petition denied. See, also, 250 U. S. —, 39 Sup. Ct. 21, 63 L. Ed. —.

(249 U. S. 588)

No. 80. John H. COCHNOWER, appellant, v. The UNITED STATES. April 21, 1919. Appeal from the Court of Claims. Messrs. L. T. Michener, of Washington, D. C., and William E. Russell, of New York City, for appellant. Mr. Attorney General, for the United States. It is hereby ordered that the judgment in this case entered on January 13, 1919 (248 U. S. 405, 39 Sup. Ct. 137, 63 L. Ed. 328, which reverses judgment, 51 Ct. Cl. 461) be, and the same is hereby, restated so as to cause the following to be substituted therefor: This cause came on to be heard on the transcript of the record from the Court of Claims, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this court that the judgment of the said Court of Claims in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said Court of Claims with directions to enter a judgment for the claimant for compensation for his services at the rate of one dollar per day from the first of July, 1910, to the thirtieth of June, 1913, inclusive; that is, so as to make up the difference between the four dollars per day actually re-

ceived during the period stated and the five dollars per day which it is adjudged he was entitled to receive during the said period.

No. 94. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY et al. appellants, v. The SOUTHERN COTTON OIL COMPANY; and

No. 95. ST. LOUIS SOUTHWESTERN RAILWAY COMPANY et al., appellants, v. The SOUTHERN COTTON OIL COMPANY. April 21, 1919. For former opinion, see 249 U. S. 134, 39 Sup. Ct. 237, 63 L. Ed. 517. Messrs. J. M. Moore and George A. McConnell, both of Little Rock, Ark., for appellants. Motion to modify decree in these cases denied.

(249 U. S. 590)

No. 163. CENTRAL OF GEORGIA RAILWAY COMPANY, plaintiff in error, v. William A. WRIGHT, Comptroller General, etc. April 21, 1919. For former opinion, see 248 U. S. 525, 39 Sup. Ct. 181, 63 L. Ed. 401, which reverses 146 Ga. 406, 91 S. E. 471. Messrs. A. R. Lawton and T. M. Cunningham, both of Savannah, Ga., for plaintiff in error. Messrs. John C. Hart, of Atlanta, Ga., and Samuel H. Sibley, of Union Point, Ga., for defendant in error. The application to file petition for rehearing is allowed and the rehearing is granted in so far as the validity of the tax in question is involved in or depends upon the charters of the Southwestern and the Muskogee Railroad and the subsequent relevant legislation. As to all other questions in the case, therefore, the request for leave to file the application for rehearing is denied and the case for rehearing, limited as above stated, is ordered restored to the docket for reargument.

No. 185. OKLAHOMA GIN COMPANY, plaintiff in error, v. The STATE OF OKLAHOMA, and

No. 494. The OKLAHOMA OPERATING COMPANY, appellant, v. J. E. LOVE et al., etc. April 21, 1919. See, also, 158 Pac. 629. Mr. C. B. Ames, of Oklahoma City, Okl., for appellant. Mr. S. P. Freeling, Atty. Gen., for State of Oklahoma. It is ordered that these cases be restored to the docket for reargument.

(249 U. S. 589)

No. 202. SOUTHERN OREGON COMPANY, appellant, v. The UNITED STATES. April 21, 1919. For opinion below, see 241 Fed. 16, 154 C. C. A. 16. See, also, 250 U. S. —, 39 Sup. Ct. 6, 63 L. Ed. —. Mr. John M. Gearin, of Portland, Or., for appellant. Mr. Attorney General, for the United States. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit considering the suggestion made to the court by the parties to the above-entitled cause, that all matters of difference between them arising out of the subject matter of this litigation have been satisfactorily adjusted and settled pursuant to the provisions of the act of Congress approved February 26, 1919, entitled "An act to accept from the Southern Oregon Company, a corporation organized under the laws of the State of Ore-

gon, a reconveyance of the lands granted to the State of Oregon by the act approved March 3, 1869, entitled 'An act granting lands to the State of Oregon to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in said state,' commonly known as the Coos Bay Wagon Road grant, to provide for the disposition of said lands, and for other purposes," and, further, considering the joint motion by the said parties to remand the cause. It is hereby ordered that this cause be, and the same is hereby, remanded to the district court, with authority in that court to modify the final decree in the cause so as to carry into effect the said act of Congress of February 26, 1919.

(249 U. S. 623)

No. 328. James A. MURRAY, plaintiff in error, v. KENTUCKY TRACTION & TERMINAL COMPANY. April 21, 1919. In error to the Circuit Court of Franklin County, State of Kentucky. For opinion in Court of Appeals, see 176 Ky. 593, 195 S. W. 1119. Mr. T. L. Edelen, of Frankfort, Ky., for plaintiff in error. Dismissed with costs, on motion of counsel for the plaintiff in error.

(249 U. S. 613)

No. 553. The CENTRAL TRUST COMPANY OF NEW YORK et al., petitioners, v. The TEXAS COMPANY. April 21, 1919. For opinion below, see 250 Fed. 742, 163 C. C. A. 74. Mr. H. M. Garwood, of Houston, Tex., for petitioners. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(249 U. S. 597)

No. 860. FIDELITY TITLE & TRUST COMPANY, ancillary administrator, etc., petitioner, v. The DUBOIS ELECTRIC COMPANY. April 21, 1919. For opinion below, see 253 Fed. 987. Messrs. James R. Sterrett, M. W. Acheson, Jr., and Charles Alvin Jones, all of Pittsburgh, Pa., for petitioner. The motion to reinstate the petition for certiorari, in accordance with the reservation to that effect in the order of March 24, 1919 (249 U. S. 606, 39 Sup. Ct. 290, 63 L. Ed. —) is allowed. It is ordered that the writ of certiorari be, and the same is hereby, granted.

(249 U. S. 613)

No. 868. Harry B. DUANE and Ginter Grocery Company, petitioners, v. The MERCHANTS LEGAL STAMP COMPANY et al.; and

No. 869. Harry B. DUANE, petitioner, v. The MERCHANTS LEGAL STAMP COMPANY et al. April 21, 1919. For opinion below, see 231 Mass. 113, 120 N. E. 370. Mr. Boyd B. Jones, of Boston, Mass., for petitioner. Mr. Anson M. Lyman, of Boston, Mass., for respondents. Petition for writs of certiorari to the Supreme Judicial Court of the State of Massachusetts denied.

(249 U. S. 613)

No. 893. The UNITED STATES of America on the relation of Verdine R. HALL, petitioner, v. Franklin K. LANE, Secretary of the Interior. April 21, 1919. Mr. Patrick H.

Loughran, of Washington, D. C., for petitioner. Mr. Alex. C. King, Sol. Gen., of Atlanta, Ga., for respondent. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(249 U. S. 613)

No. 908. E. A. LAUGHTER, petitioner, v. The UNITED STATES of America; and

No. 909. E. A. LAUGHTER and W. N. Fisher, petitioners, v. The UNITED STATES of America. April 21, 1919. Messrs. Frank S. Elgin and A. B. Galloway, both of Memphis, Tenn., for petitioner. Messrs. Alex. C. King, Sol. Gen., of Atlanta, Ga., and William L. Frierson, Asst. Atty. Gen., for the United States. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. For opinion below, see 259 Fed. 94.

(249 U. S. 614)

No. 927. Evalyn CHARLTON, administratrix, etc., petitioner, v. CHESAPEAKE & OHIO RAILWAY COMPANY. April 21, 1919. For opinion below, see 256 Fed. 988. Mr. John Winston Read, of Newport News, Va., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(249 U. S. 614)

No. 934. Eli G. FRANKENSTEIN, petitioner, v. Carl M. JACOBS, trustee, etc. April 21, 1919. Messrs. Bentley & Mente, of Cincinnati, Ohio, for petitioner. Messrs. De Camp & Sutphin, Walter A. De Camp, and George B. Moormann, all of Cincinnati, Ohio, for respondent Jacobs. Messrs. Sidney G. Stricker, of Cincinnati, Ohio, and Saul S. Myers, of New York City, for Gera Mills. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. For opinion below, see *In re Diamond's Estate*, 259 Fed. 70.

(249 U. S. 614)

No. 935. Charles McKNIGHT, petitioner, v. The UNITED STATES of America. April 21, 1919. For opinion below, see 252 Fed. 687. Messrs. Benjamin B. Blakeney and James H. Maxey, both of Tulsa, Okl., for petitioner. Messrs. Alex. C. King, Sol. Gen., of Atlanta, Ga., and William L. Frierson, Assist. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(249 U. S. 614)

No. 940. Edna M. RAWLS, petitioner, v. The PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA. April 21, 1919. For opinion below, see 253 Fed. 725. Messrs. John S. Maxwell and George C. Bedell, both of Jacksonville, Fla., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(249 U. S. 597)

No. 949. The UNITED STATES, petitioner, v. NORTHERN PACIFIC RAILWAY COMPANY. April 21, 1919. For opinion below, see 255 Fed. 655. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit granted.

(249 U. S. 614)

No. 954. **W. D. RENFRO**, petitioner, *v.* **Charles OLENTINE et al.** April 21, 1919. For opinion below, see 178 Pac. 119. Messrs. Napoleon B. Maxey and John B. Campbell, both of Muskogee, Okl., for petitioner. Messrs. William W. Noffsinger and Geo. S. Ramsey, both of Muskogee, Okl., for respondent. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied.

(249 U. S. 597)

No. 957. **Frederick J. MACLEOD** and **Everett E. Stone**, constituting The Public Service Commission of Massachusetts, petitioners, *v.* **NEW ENGLAND TELEPHONE & TELEGRAPH COMPANY.** April 21, 1919. For opinion below, see 122 N. E. 567. Petition for a writ of certiorari to the Supreme Judicial Court of the State of Massachusetts granted.

(249 U. S. 615)

No. 979. **Max MANSON**, petitioner, *v.* **Harry S. MESIROV**, trustee, etc., et al. April 21, 1919. For opinion below, see 254 Fed. 799. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

No. 2, original. **COMMONWEALTH OF VIRGINIA**, complainant, *v.* **STATE OF WEST VIRGINIA.** April 28, 1919. See, also, 246 U. S. 565, 38 Sup. Ct. 400, 62 L. Ed. 883. Messrs. Wm. A. Anderson of Lexington, Va., Holmes Conrad, of Winchester, Va., Randolph Harrison, of Lexington, Va., and Samuel W. Williams, of Roanoke, Va., for complainant. Messrs. W. Mollohan, G. W. McClintic, and C. W. May, all of Charleston, W. Va., Chas. E. Hogg, of Point Pleasant, W. Va., J. G. Carlisle, of Washington, D. C., and John C. Spooner, of New York City, for respondent. Motion for the appointment of receivers and of a special master. The motion for the appointment of receivers and of a special master is denied.

No. 202. **SOUTHERN OREGON COMPANY**, appellant, *v.* **The UNITED STATES.** April 28, 1919. See, also, 249 U. S. 589, 39 Sup. Ct. 387, 63 L. Ed. —. Mr. John M. Gearin, of Portland, Or., for complainant, Mr. Alex C. King, Sol. Gen., of Atlanta, Ga., for the United States. Mandate granted, on motion of Mr. Solicitor General King for the appellee.

(249 U. S. 590)

No. 277. **The PUBLIC UTILITIES COMMISSION FOR STATE OF KANSAS et al.**, appellants, *v.* **John M. LANDON**, as receiver of the Kansas Natural Gas Company et al.;

No. 329. **KANSAS CITY, MISSOURI**, et al., appellants, *v.* **John M. LANDON**, receiver, etc., et al.;

No. 330. **KANSAS CITY GAS COMPANY et al.**, appellants, *v.* **KANSAS NATURAL GAS COMPANY et al.**; and

No. 353. **The PUBLIC UTILITIES COMMISSION FOR STATE OF KANSAS et al.**, appellants, *v.* **John M. LANDON**, as receiver, etc., et al. April 28, 1919. Appeals from the District Court of the United States for the

District of Kansas. **Mr. J. W. Dana**, of Kansas City, Mo., for Kansas City Gas Co. and others. **Mr. Charles Blood Smith**, of Topeka, Kan., for Fidelity Title & Trust Co. **Mr. Floyd E. Harper**, of Leavenworth, Kan. (**Mr. Thomas F. Doran**, of Topeka, Kan., of counsel), for Leavenworth, Light, Heat & Power Co. Messrs. **John H. Atwood**, of Kansas City, Mo., **Robert Stone**, of Topeka, Kan., and **Chester I. Long**, of Wichita, Kan., for Landon. **Mr. John J. Jones**, of Chanute, Kan., for Sharritt. Messrs. **R. A. Brown**, of St. Joseph, Mo., and **T. S. Salathiel**, of Independence, Kan., for Kansas Natural Gas Co. **Mr. J. M. Chaliss**, of Atchison, Kan. (**Mr. W. P. Waggener**, of Atchison, Kan., of counsel), for Atchison Railway, Light & Power Co. **Mr. Charles A. Loomis**, of Kansas City, Mo., for petitioners and appellees. In these cases it is ordered that the decree entered March 17, 1919 (249 U. S. 236, 39 Sup. Ct. 268, 63 L. Ed. 577), be vacated and decree now entered as follows: The decrees below are reversed and the cause is remanded to the trial court with directions to hear it anew and determine all the issues involved, including those arising on the several bills, cross bills, and answers in the nature of cross bills, in conformity with the views expressed in the opinion of this court; and to take such further proceedings as may be appropriate and consistent with such opinion. All temporary injunctions in force at the time of the entry of the decrees from which appeals were taken here shall be continued in force until otherwise ordered. The costs in this court will be paid one-half by John M. Landon, receiver of the Kansas Natural Gas Company, and the remainder shall be paid, one-third by each of the three groups of appellants.

(249 U. S. 591)

No. 388. **Webb C. HAYES**, plaintiff in error, *v.* **The HOCKING VALLEY RAILWAY COMPANY.** April 28, 1919. In error to the Supreme Court of the State of Ohio. For opinion below, see 96 Ohio St. 598, 118 N. E. 1083. **Mr. Chas. A. Seiders**, of Toledo, Ohio, for plaintiff in error. Messrs. **John F. Wilson**, of Columbus, Ohio, and **Lloyd T. Williams**, of Toledo, Ohio (Messrs. **Wilson & Rector**, of Columbus, Ohio, and **Brown, Geddes, Schmettau & Williams**, of Toledo, Ohio, of counsel), for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Farrell v. O'Brien*, 199 U. S. 89, 100, 25 Sup. Ct. 727, 50 L. Ed. 101; *Empire State-Idaho Mining Co. v. Hanley*, 205 U. S. 225, 232, 27 Sup. Ct. 476, 51 L. Ed. 779; *Goodrich v. Ferris*, 214 U. S. 71, 79, 29 Sup. Ct. 580, 53 L. Ed. 914; *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544.

(249 U. S. 592)

No. 504. **FENTRESS COAL & COKE COMPANY**, plaintiff in error, *v.* **Beecher ELMORE.** April 28, 1919. In error to the District Court of the United States for the Middle District of Tennessee. **Mr. W. B. Miller**, of Chattanooga, Tenn., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 37,

14 Sup. Ct. 4, 37 L. Ed. 986; *Brown v. Alton Water Co.*, 222 U. S. 325, 32 Sup. Ct. 156, 56 L. Ed. 221; *Metropolitan Water Co. v. Kaw Valley District*, 223 U. S. 519, 32 Sup. Ct. 246, 56 L. Ed. 533; *Union Trust Co. v. Westhus*, 228 U. S. 519, 33 Sup. Ct. 593, 57 L. Ed. 947; *Shapiro v. United States*, 235 U. S. 412, 35 Sup. Ct. 122, 59 L. Ed. 291. See *Omaha Baum Iron Store Co. v. Moline Plow Co.*, 244 U. S. 650, 37 Sup. Ct. 743, 61 L. Ed. 1371.

(249 U. S. 592)

No. 644. *B. F. MEHARG*, plaintiff in error, v. *ALABAMA POWER COMPANY*. April 28, 1919. In error to the Supreme Court of the State of Alabama. For opinion below, see 78 South. 909. Messrs. Thomas W. Martin, of Montgomery, Ala., and O. R. Hood, of Gadsden, Ala. (Messrs. Knox, Acker, Dixon & Sims, of Talladega, Ala., and Percy, Benners & Burr, of Birmingham, Ala., of counsel), for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chap. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(249 U. S. 597)

No. 803. *Thomas P. KENNEY*, as administrator, etc., petitioner, v. *SUPREME LODGE OF THE WORLD, LOYAL ORDER OF MOOSE*. April 28, 1919. For opinion below, see 285 Ill. 188, 120 N. E. 631. Petition for a writ of certiorari to the Supreme Court of the State of Illinois granted.

(249 U. S. 615)

No. 900. *W. F. HALLOWELL*, petitioner, v. *The UNITED STATES of America*. April 28, 1919. For opinion below, see 253 Fed. 865. Messrs. Edwin E. Heckbert and William P. Richardson, both of Portland, Or., for petitioner. Mr. Claude R. Porter, of Centerville, Iowa, and Mr. Assistant Attorney General, for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(249 U. S. 615)

No. 933. *Walter L. ROSS*, as receiver of Toledo, St. Louis & Western Railroad Company, petitioner, v. *Pearl I. SCHOOLEY*, administratrix, etc. April 28, 1919. For opinion below, see 257 Fed. 290. Messrs. Charles A. Schmettau, of Toledo, Ohio, and C. E. Pope, of East St. Louis, Ill., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(249 U. S. 598)

No. 964. *BERLIN MILLS COMPANY*, petitioner, v. *PROCTER & GAMBLE COMPANY*. April 28, 1919. For opinion below, see 256 Fed. 23. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

No. 972. *ILLINOIS CENTRAL RAILROAD COMPANY*, petitioner, v. *FIRST TRUST COMPANY*;

No. 973. *CHICAGO & NORTH WESTERN RAILWAY COMPANY*, petitioner, v. *FIRST TRUST COMPANY*; and

No. 974. *NORTHERN PACIFIC RAILWAY COMPANY*, petitioner, v. *FIRST TRUST COMPANY*. April 28, 1919. For opinion below, see 252 Fed. 965. Messrs. Charles A. Helsell, of Fort Dodge, Iowa, and James C. Davis, of Chicago, Ill., for petitioners. Mr. Denis M. Kelleher, of Fort Dodge, Iowa, for respondent. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(249 U. S. 623)

No. 999. *Elizabeth A. PENDLETON*, administratrix of *William Bailey*, deceased, appellant, v. *The UNITED STATES*. April 28, 1919. Appeal from the Court of Claims. Mr. Alex C. King, Sol. Gen., of Atlanta, Ga., for the United States. Docketed and dismissed, on motion of Mr. Solicitor General King for the appellee.

No. 343. *Robert L. COLEMAN*, as administrator, et al., appellants, v. *The UNITED STATES*. April 29, 1919. Mr. H. T. Newcomb, of New York City, for appellants. Mr. Alex C. King, Sol. Gen., of Atlanta, Ga., for the United States. Death of *Robert L. Coleman* suggested, and ordered that cause proceed in the name of surviving appellant, on motion of Mr. H. T. Newcomb for the appellants.

(249 U. S. 623)

No. 366. *OCCIDENTAL CONSTRUCTION COMPANY*, plaintiff in error, v. *The UNITED STATES of America*. April 30, 1919. In error to the United States Circuit Court of Appeals for the Ninth Circuit. For opinion below, see 245 Fed. 817, 158 C. C. A. 157. Dismissed, on authority of counsel for the plaintiff in error.

(249 U. S. 594)

No. —. Original. Ex parte *In the matter of MECCANO, Limited*, petitioner. May 5, 1919. Motion for leave to file petition for a writ of mandamus or a writ of prohibition denied.

(249 U. S. 593)

No. 335. *Dan B. ZIMMERMAN*, plaintiff in error, v. *CORSON COUNTY, SOUTH DAKOTA*, et al. May 5, 1919. In error to the Supreme Court of the State of South Dakota. For opinion below, see 39 S. D. 167, 163 N. W. 711. Mr. William G. Porter, of Aberdeen, S. D., for plaintiff in error. Mr. Clarence C. Caldwell, of Sioux Falls, S. D., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) section 237 of the Judicial Code (Act March 3, 1911, c.

231, 36 Stat. 1156), as amended by the act of September 6, 1916 (ch. 448, § 2, 39 Stat. 726 [Comp. St. § 1214]); (2) Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co., 228 U. S. 326, 334, 33 Sup. Ct. 510, 57 L. Ed. 857; St. Louis & San Francisco R. R. Co. v. Shepherd, 240 U. S. 240, 241, 36 Sup. Ct. 274, 60 L. Ed. 622; Bilby et al. v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701.

(249 U. S. 593)

No. 359. LOUISIANA WESTERN RAILROAD COMPANY, plaintiff in error, v. The CITY OF CROWLEY. May 5, 1919. In error to the Supreme Court of the State of Louisiana. For opinion below, see 142 La. 640, 77 South. 486. Messrs. George Denegre and Victor Leovy, both of New Orleans, La., Philip S. Pugh, of Crowley, La., and Henry H. Chaffe, of New Orleans, La., for plaintiff in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co., 228 U. S. 596, 599, 33 Sup. Ct. 605, 57 L. Ed. 982; Municipal Securities Corporation v. Kansas City, 246 U. S. 63, 69, 38 Sup. Ct. 224, 62 L. Ed. 579; Bilby v. Stewart, 246 U. S. 255, 257, 38 Sup. Ct. 264, 62 L. Ed. 701; (2) Stearns v. Minnesota ex rel. Marr, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. Ed. 162; Board of Liquidation v. Louisiana ex rel. Wilder, 179 U. S. 622, 21 Sup. Ct. 263, 45 L. Ed. 347.

(249 U. S. 592)

No. 382. SOUTHERN PACIFIC COMPANY, plaintiff in error, v. J. V. TERRY. May 5, 1919. In error to the Supreme Court of the State of California; and

No. 383. SOUTHERN PACIFIC COMPANY, plaintiff in error, v. J. V. TERRY. In error to the District Court of Appeal, Second Appellate District, State of California. For opinion below, see 34 Cal. App. 330, 169 Pac. 86. See, also, 176 Cal. 584, 169 Pac. 354. Messrs. Henry T. Gage and William I. Gilbert, both of Los Angeles, Cal., for plaintiff in error. Mr. Frederick S. Tyler, of Washington, D. C., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by the act of September 6, 1916, chap. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

(249 U. S. 618)

No. 399. Enrique Flores MAGON and Ricardo Flores Magon, petitioners, v. The UNITED STATES of America. May 5, 1919. For opinion below, see 248 Fed. 201, 160 C. C. A. 279. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

No. 920. Frank C. THORNTON and The Cleveland Stamping and Tool Company, plaintiffs in error, v. Thomas J. DUFFY and Herbert L. Eliot, members of and composing the Industrial Commission of Ohio. May 5, 1919.

Interlocutory injunction granted upon the giving of bond in the sum of \$1,000, to be approved by the clerk of this court.

(249 U. S. 616)

No. 956. MISSISSIPPI CENTRAL RAILROAD COMPANY, petitioner, v. Laura LOTT, administratrix, etc. May 5, 1919. For opinion below, see 80 South. 277. Petition for a writ of certiorari to Supreme Court of the State of Mississippi denied.

(249 U. S. 616)

No. 958. James DORSEY, petitioner, v. The UNITED STATES of America. May 5, 1919. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(249 U. S. 616)

No. 959. Dennis KELLEY et al., petitioners, v. The UNITED STATES of America. May 5, 1919. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied. For opinion below, see 258 Fed. 392.

(249 U. S. 616)

No. 963. Helen K. KINNEY, petitioner, v. OAHU SUGAR COMPANY, Limited. May 5, 1919. For opinion below, see 255 Fed. 732. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(249 U. S. 617)

No. 984. Clarence H. VENNER, etc., petitioner, v. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY et al. May 5, 1919. For opinion below, see 177 App. Div. 296, 164 N. Y. Supp. 626. Petition for a writ of certiorari to the Supreme Court of the State of New York denied.

(249 U. S. 617)

No. 985. D. W. ENSLEN, petitioner, v. The MECHANICS & METALS NATIONAL BANK OF THE CITY OF NEW YORK. May 5, 1919. For opinion below, see 255 Fed. 527. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(249 U. S. 617)

No. 987. Edward THOMPSON and Albert Ingracia, petitioners, v. The UNITED STATES of America. May 5, 1919. For opinion below, see 256 Fed. 616. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(249 U. S. 617)

No. 992. Julius F. SMJETANKA, as collector of internal revenue, etc., petitioner, v. AMERICAN STEEL FOUNDRIES. May 5, 1919. Mr. Alex. C. King, Sol. Gen., of Atlanta, Ga., and William L. Frierson, Asst. Atty. Gen. Messrs. Max Pam and Harry Boyd Hurd, both of Chicago, Ill., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

(249 U. S. 613)

No. 993. UNION SULPHUR COMPANY, petitioner, v. FREEPORT TEXAS COMPANY. May 5, 1919. For opinion below, see 255 Fed. 961. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(249 U. S. 613)

No. 1000. Henry W. GORDON et al., petitioners, v. THE Steamship CUBADIST, Harry L. Michelson, claimant. May 5, 1919. For

opinion below, see 256 Fed. 203. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

No. 1006. Albert S. BURLESON, Postmaster General, appellant, v. Thomas E. DEMPCY et al. May 6, 1919. Motion to continue supersedeas and temporary injunction in force granted.

(250 U. S. 46)

BALL ENGINEERING CO. v. J. G. WHITE
& CO.(Argued March 13, 1919. Decided May 19,
1919.)

No. 227.

1. UNITED STATES ⇐75 — PUBLIC WORKS
CONTRACT—ABANDONMENT—RIGHT TO TAKE
OVER EQUIPMENT.

Provision of contract for public works that in case of its annulment the United States may, at a valuation to be fixed by the engineer, take over any equipment in use in the prosecution of the work, gives it no right to so take over the property of another engaged in the work.

2. UNITED STATES ⇐69—TORT—IMPLICATION
OF CONTRACT.

Implication of a contract that the United States would pay for B.'s implements, which must be the basis of its liability under the Fifth Amendment, is rebutted, and its liability, if any, is in tort, for which it has not consented to be sued, where on annulment of contract with H. for public works, and making of contract with W. for completion thereof, it at request of W., knowing of B.'s claim of ownership of implements on the grounds, but not conceding B.'s title, took them under a clause in its contract with H., and turned them over to W., crediting their value on its contract with H., and advising W. that the United States would not, under any circumstances, be held liable for the seizure.

3. UNITED STATES ⇐74—CONTRACTOR WITH
UNITED STATES—RIGHTS AND LIABILITIES.

W., with whom the United States contracted for completion of public works, after annulment of contract with H. for doing the work, having, with knowledge of the facts, procured the United States to take implements belonging to B. on the premises, and let it use them, is liable to B. therefor; the United States, while claiming the right to take them under the contract with H., crediting H. therewith, advising W. that the United States would not, under any circumstances, be held liable for the seizure.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Action by the Ball Engineering Company against J. G. White & Co. Judgment for defendant was affirmed by the Circuit Court of Appeals (241 Fed. 989, 154 C. C. A. 661), and plaintiff brings certiorari. Reversed.

Mr. William M. Parke, of New York City, and Messrs. Charles D. Lockwood and Homer S. Cummings, both of Stamford, Conn., for petitioner.

Messrs. Harry W. Reynolds, of Hartford, Conn., J. Kemp. Bartlett, of Baltimore, Md., and Lewis Sperry, of Hartford, Conn., for respondent.

*Mr. Justice DAY delivered the opinion of the Court.

The Ball Engineering Company, a Missouri corporation, brought this action against J. G. White & Co., Incorporated, a Connecticut corporation, in the United States District Court for the District of Connecticut, for damages for *the alleged conversion of a contractor's plant and equipment, which was prepared for use in prosecuting the work of constructing lock and dam No. 6, on the Trinity river, in the state of Texas, and all of which, including buildings, were located upon the site of the lock and dam at the time of the alleged conversion. The action was tried before a referee, designated under the Connecticut practice a committee. Two trials were had, the first resulting in a judgment in favor of the plaintiff for the value of the converted property. 212 Fed. 1009. That judgment was reversed by the Circuit Court of Appeals (J. G. White & Co. v. Ball Engineering Co., 223 Fed. 618, 139 C. C. A. 286), and a new trial ordered which took place before the same committee, and upon the same evidence and the same findings of fact, in order to conform to the decision of the Circuit Court of Appeals, judgment was rendered in favor of the defendant, and this was affirmed by the Circuit Court of Appeals on the authority of its prior decision. 241 Fed. 989, 154 C. C. A. 661. The case is here upon writ of certiorari.

The United States filed its brief *amicus curiæ*, contending that the decision of the Circuit Court of Appeals to the effect that the United States is liable under the Tucker Act (Act March 3, 1887, c. 359, 24 Stat. 505) when property of a third person is taken by one of its agents, under the circumstances disclosed, was erroneous.

The material facts are:

On July 10, 1906, the United States entered into a contract with the Hubbard Building & Realty Company to construct lock and dam No. 6 on the Trinity river, Texas.

A partnership composed of George A. Carden and P. D. C. Ball, known as the Ball-Carden Company, in the year 1908 placed a considerable amount of property, consisting of materials, machinery and tools, on the site of the lock and dam No. 6, and used them in constructing the lock and dam until the month of May, 1909.

This partnership was dissolved in April or May, 1909, *and discontinued the work therefore carried on by it in the construction of the lock and dam. Carden transferred all his interest to Ball, who, under the name of the Ball Engineering Company, continued the work until on or about September 8, 1909.

It does not appear under what circumstances the Ball-Carden Company or Ball operating as the Ball Engineering Company undertook the performance of the work.

On September 9, 1909, work upon said lock

and dam was abandoned; on October 22, 1909, the government annulled the contract with the Hubbard Company, pursuant to its provisions.

On April 2, 1910, the Ball Engineering Company was organized under the laws of Missouri, and P. D. C. Ball transferred to it all of the property mentioned in the complaint.

The United States entered into a contract with the defendant J. G. White & Co. on June 6, 1910, to complete the construction of the lock and dam. Prior to the making of the contract the defendant attempted, without success, to agree with the Ball Company for the purchase or rental of the personal property, etc., specified in the complaint. On June 22, 1910, the government notified the defendant that the Hubbard Company had been directed to move all property at lock and dam No. 6, except certain specified items, and determined the valuation of the same at \$11,578, and fixed a monthly rental of \$380 therefor from the government to the defendant, and also fixed a valuation upon the material, etc., at the lock site and notified the defendant to take such of it as it deemed proper, at such valuations respectively. The Ball Company refused to assent to either valuation. On July 18, 1910, the defendant receipted to the United States for the articles constituting the construction plant, and for such of the materials as it was willing to and did receive. The property which the government took from the Ball Engineering Company was valued by it at \$11,578, which amount was credited on account of the Hubbard Company; but the United States neither paid, nor credited the purchase price or rental of the property to the Ball Company.

The United States professed to act under section 33 of the contract with the Hubbard Company, which reads:

"Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and used by the engineering department of the army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same, prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the engineer officer in charge."

The government would not allow the Ball Company to take possession of any of the property used in the construction of the lock and dam. This property the United States leased to the defendant, who used the same in completing the work, and thereafter returned all of it to the government, except, of course, such material as had been used in construction.

The government inserted the following stipulation in its contract with the J. G. White & Co., Inc.:

"If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the engineer officer in charge, and the contractor for the completion of the work will be permitted to use such plant and material in the prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the engineer officer in charge. It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same, nor be responsible for nor assume any expenses or cost in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents."

[1] The Circuit Court of Appeals, under the circumstances here disclosed, rightly held that the government had no authority to take the property of the Ball Engineering Company by virtue of anything contained in its contract with the Hubbard Company. And further held that inasmuch as the government took the property with the knowledge that it was claimed by the Ball Company and used it in the construction of public work, it was obliged to make just compensation to the Ball Company by reason of the Fifth Amendment of the Constitution. "It," says the Court of Appeals, "made no proprietary claim, and therefore was bound to pay the real owner for the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbard Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto."

[2] The findings show that the government took possession by virtue of its contract with the Hubbard Company; that it definitely advised White & Co. that it would not be responsible for the seizure of the property, and that anything which might result therefrom could not be the basis for any claim against the United States, its officers or agents. Under the circumstances disclosed the Circuit Court of Appeals held the White Company not liable to the Ball Engineering Company—upon the theory that the government had appropriated the property unde circum-

stances giving rise to an implied contract to pay the Ball Engineering Company for it. This ruling was made upon the authority of *United States v. Buffalo Pitts Co.*, 193 Fed. 905, 114 C. C. A. 119, affirmed 234 U. S. 228, 34 Sup. Ct. 840, 58 L. Ed. 1290. In that case a suit was brought under the Tucker Act by the Buffalo Pitts Company against the United States to recover for the value of the use of a certain engine for which, it was alleged, the United States was under an implied contract to pay. The findings of fact showed that the Buffalo Pitts Company sold a traction engine to the Taylor-Moore Construction Company, and took a chattel mortgage to secure the payment of the purchase money. The mortgage was duly recorded, and no part of the purchase money was paid. The engine was put into service by the Taylor-Moore Company upon a reclamation project undertaken by the Interior Department, the work being prosecuted under a contract between the United States and the Taylor-Moore Construction Company. The Construction Company defaulted in its work, and assigned all of its interest in the contract to the United States, and it took possession of all material, supplies and equipment belonging to the Construction Company, including the engine in question. The Buffalo Pitts Company made demand upon the district engineer of the reclamation service for the possession of the engine and appurtenances. But the demand was refused, and the engine retained for use in the government work. The Buffalo Pitts Company notified the representative of the United States of the execution and filing of its mortgage, and claimed the property. It was expressly found that the government had at all times known of the existence of the mortgage, and did not dispute the validity thereof, but represented to the Buffalo Pitts Company that it was using and would continue to use the engine in its work, that any legal proceedings to recover possession would be resisted, and that if the property were left in the government's possession its attorney would recommend payment therefor. It was further found that the Buffalo Pitts Company relied upon these facts, and consented to the government retaining possession of its property—in the expectation of receiving compensation from it therefor. The claim was made that the United States was not liable for tortious acts. This court reviewed former cases, and said:

"In the present case, as we have said, there is nothing to show that the government expected to use the engine and appurtenances without compensation. It did not dispute the mortgage, and the findings of fact clearly show that if the government had the right to take the property, notwithstanding the mortgage interest which the plaintiff had in it, it made no claim of right to take and use it without compensation as against the prior outstanding mortgage, which distinctly reserved the right to take

and sell the property under the circumstances shown and which after the breach of condition vested the right of possession and the right to convert the property in the mortgagee."

It was further pointed out that the government had authority under an act of Congress to acquire any property necessary for the purpose stated, and, if need be, to appropriate it. We held that the facts found brought the case within the principles decided in former cases and made the United States liable, not for a tortious act, but upon implied contract.

The subject was again reviewed by this court in a case decided at this term, *Temple v. United States*, 248 U. S. *121, 39 Sup. Ct. *56, 63 L. Ed. 162, in which a suit was brought to recover the value of submerged lands in the Chicago river appropriated by the government without the owner's consent. Former decisions of this court were reviewed, and we said:

"If the plaintiff can recover, it must be upon an implied contract. For, under the Tucker Act, the consent of the United States to be sued is (so far as here material) limited to claims founded 'upon any contract, express or implied'; and a remedy for claims sounding in tort is expressly denied. *Bigby v. United States*, 188 U. S. 400, 23 Sup. Ct. 468, 47 L. Ed. 519. *Hijo v. United States*, 194 U. S. 315, 323, 24 Sup. Ct. 727, 48 L. Ed. 994. As stated in *United States v. Lynah*, 188 U. S. 445, 462, 465, 23 Sup. Ct. 349, 47 L. Ed. 539: 'The law will imply a promise to make the required compensation, where property to which the government asserts no title is taken, pursuant to an act of Congress, as private property to be applied for public uses'; or, in other words: 'Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor.' But in the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay. For the property applied to the public use is not and was not conceded to be in the plaintiff."

[3] In the case under consideration the United States did not concede title in the Ball Engineering Company, but took the property knowing of the claim of that company to its ownership, and credited its value upon the government contract with the Hubbard Company. The government took this action upon request of the White Company, and advised that it would not, under any circumstances, be held liable for the seizure of the property. Under these circumstances, the implication of a contract that the United States would pay, which must be the basis of its liability under the Fifth Amendment, is clearly rebutted. The liability of the government, if any, is in tort, for which it has not consented to be sued. As the findings show that *the White Company, with knowledge of the facts, procured and used the property of the Ball Company, it ought to have been held liable to that company. It follows that the judgment of the Circuit Court of Appeals must be

Reversed.

(250 U. S. 101)

PHILADELPHIA, B. & W. R. CO. v. SMITH.

(Argued April 15, 1919. Decided May 19, 1919.)

No. 472.

COMMERCE  27(5)—EMPLOYERS' LIABILITY—
ENGAGED IN "INTERSTATE COMMERCE."

Cook in a camp car, on siding near railroad bridge being repaired, who was employed to assist, and was assisting, bridge carpenters by keeping their bed and board close to their place of work, was employed, as they were, in "interstate commerce," within Employers' Liability Act April 22, 1908 (Comp. St. §§ 8657-8665), as amended by Act April 5, 1910.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

On Writ of Certiorari to the Court of Appeals of the State of Maryland.

Action by Alfred H. Smith against the Philadelphia, Baltimore & Washington Railroad Company. Judgment for plaintiff was affirmed by Court of Appeals of Maryland (132 Md. 345, 103 Atl. 945), and defendant brings certiorari. Affirmed.

Messrs. Frederic D. McKenney and John Spalding Flannery, both of Washington, D. C., for petitioner.

Mr. T. Alan Goldsborough, of Denton, Md., for respondent.

Mr. Justice PITNEY delivered the opinion of the Court.

Respondent brought his action in a state court of Maryland under the provisions of the federal Employers' Liability Act of April 22, 1908, as amended April 5, 1910 (35 Stat. 65, c. 149 [Comp. St. §§ 8657-8665]; 36 Stat. 291, c. 143), to recover damages for personal injuries sustained by him upon one of petitioner's lines of railroad in the state of Maryland over which petitioner was engaged in transporting interstate as well as intrastate commerce.

*Plaintiff was employed by defendant in connection with a gang of bridge carpenters, who were employed by defendant in the repair of the bridges and bridge abutments upon said line of railway. The gang, including plaintiff, worked over the entire line, and were moved from point to point as the repair work required in what was called a "camp car," furnished and moved by defendant, in which they ate, slept, and lived. Plaintiff's principal duties were to take care of this car, keep it clean, attend to the beds, and prepare and cook the meals for himself and the other members of the gang. On December 23, 1915, the bridge carpenters were engaged in repairing a bridge abutment on defendant's line near Easton, Maryland, and the camp car was on defendant's side track at Easton; and while plaintiff was in

the car, engaged in cooking a meal for the bridge carpenters and himself, the engineer of one of defendant's trains, without warning, ran the engine upon the side track and against a car to which the camp car was coupled with such force that plaintiff received injuries, to recover for which his action was brought.

A judgment in plaintiff's favor was affirmed by the Maryland Court of Appeals (132 Md. 345, 103 Atl. 945), and the case comes here on a writ of certiorari.

The only question we have to consider is whether plaintiff at the time he was injured was engaged in interstate commerce within the meaning of the statute. Petitioner, citing *Illinois Central R. R. v. Behrens*, 233 U. S. 473, 478, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, and *Erie R. R. Co. v. Welsh*, 242 U. S. 303, 306, 37 Sup. Ct. 116, 61 L. Ed. 319, as conclusive to the effect that the true test is the nature of the work being done by the employé at the time of the injury, and that what he had been doing before and expected to do afterwards is of no consequence, argues that since plaintiff at the time of the injury and for some weeks prior thereto was and had been working as mess cook and camp cleaner or attendant for a gang of bridge carpenters who were quartered "for their own convenience" *in a camp car belonging to petitioner, which was not being moved in interstate commerce, but was located and standing on a switch track in the neighborhood of the bridge upon which the carpenters then were and for some weeks prior thereto had been and for some time afterwards were working; and since plaintiff at the moment of the injury was engaged in cooking food which was the property of himself and the carpenters, he was not at the time engaged in interstate commerce.

As thus stated, the relation of plaintiff's work to the interstate commerce of his employer would seem to be rather remote. But upon a closer examination of the facts the contrary will appear. Taking it to be settled by the decision of this court in *Pedersen v. Delaware, Lack. & West. R. R. Co.*, 229 U. S. 146, 152, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, that the repair of bridges in use as instrumentalities of interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it, it of course is evident that the work of the bridge carpenters in the present case was so closely related to defendant's interstate commerce as to be in effect a part of it. The next question is, what was plaintiff's relation to the work of the bridge carpenters? It may be freely conceded that if he had been acting as cook and camp cleaner or attendant merely for the personal convenience of the bridge carpenters, and without regard to the con-

duct of their work, he could not properly have been deemed to be in any sense a participant in their work. But the fact was otherwise. He was employed in a camp car which belonged to the railroad company, and was moved about from place to place along its line according to the exigencies of the work of the bridge carpenters, no doubt with the object and certainly with the necessary effect of forwarding their work, by permitting them to conduct it conveniently at points remote from their homes and remote from towns where proper board and lodging were to be had. *The circumstance that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employes generally and of the bridge workers themselves when off duty, while not without significance, is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act.

Judgment affirmed.

(250 U. S. 14)

CALDWELL et al. v. UNITED STATES.

(Submitted April 23, 1919. Decided May 19, 1919.)

No. 325.

1. PUBLIC LANDS Ⓒ93—GRANT OF "TIMBER" FOR RAILROAD.

Act March 3, 1875 (Comp. St. §§ 4921-4926), granting to a railroad right to take from public lands adjacent to its right of way "timber" necessary for construction of road, must be construed strictly, and so gives no right to slashings for commercial use remaining from trees cut for ties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Timber.]

2. PUBLIC LANDS Ⓒ11—CUTTING TIMBER—STATUTE.

Act March 3, 1891, § 8 (Comp. St. § 5114), providing that in prosecutions for trespass on public timber lands, or to recover timber or lumber cut, it shall be a defense that timber

was cut or removed for use in the state by a resident for mining or manufacturing purposes under rules of the Interior Department, but that this shall not enlarge the rights of a railroad company to cut timber, gives no rights to one cutting timber from public lands for a railroad for construction of its road to remaining slashings which he cuts and sells for mining and manufacturing purposes.

3. PUBLIC LANDS Ⓒ96 — AUTHORITY OF LAND OFFICER.

An official of the General Land Office has no authority to enlarge the rights of a railroad company under Act March 3, 1875 (Comp. St. §§ 4921-4926), to necessary timber from public lands for construction of road, so as to give right to cut and sell timber from the remaining slashings.

Appeal from the Court of Claims.

Action by L. G. Caldwell and another, co-partners trading as Caldwell & Dunwody, against the United States. Petition dismissed (53 Ct. Cl. 33), and plaintiffs appeal. Affirmed.

Mr. William C. Prentiss, of Washington, D. C., for appellants.

Mr. Assistant Attorney General Frierson, for the United States.

* Mr. Justice McKENNA delivered the opinion of the Court.

This action was brought by appellants to recover the value of certain timber cut from the public lands of the *United States in the state of Colorado, called "tie slash" or "tie slashing," the term being used to describe the tops of trees the bodies of which have been used for making railroad ties.

The right of recovery is based upon contracts with the Denver, Northwestern & Pacific Railway Company which had been given the right to cut timber upon the public lands adjacent to the line of its road by the Act of Congress of March 3, 1875, c. 152, 18 Stat. 482 (Comp. St. §§ 4921-4926).

The Court of Claims sustained a demurrer to the petition and dismissed it. To review that action this appeal has been prosecuted.

Appellants were, in June, 1906, by due appointment of the railway company, its timber agents, to cut timber from the public lands for construction of the railroad under the act of Congress, and by agreement with the company they were given all of the "tie slash" of the trees cut down for the purpose. Pursuant to the contract, and prior to October, 1906, they manufactured and delivered to the company 88,797 ties, which left a large amount of "tie slash."

By a letter from one N. J. O'Brien, describing himself as "Chief, Field Division, G. L. O.," and expressed to be by instructions from the Commissioner of the General Land Office, there was granted to appellants au-

thority to cut timber under the act of Congress and "to sell and dispose of all tops and lops of trees that" they "might cut for construction" of the road which could not be used for road construction purposes. Inquiry first was to be made of the officers of the railway company if they would purchase the tops and lops appellants had on hand.

The letter contained a ruling of the Land Office that contractors should confine their cutting strictly to such timber as was needed by the railway company and that such "refuse" as resulted from such cutting might "be disposed of by the railroad company or by the contractors without violation of existing law." A violation of the law, it was stated, would require a notice to the company to nullify the contract and agency and would subject the contractors to be proceeded against "as in ordinary cases of timber trespass."

Thereafter appellants entered into another contract with the company under which they manufactured additional ties and delivered them to it, and a further amount of "tie slash" was left. A large amount of this appellants agreed to sell to the Fraser River Timber Company of Denver, Colorado, and to the Leyden Coal Company of the same place they sold 200 cars of mining props cut by them from the "tie slash," all to be used in the state of Colorado.

March 7, 1907, the land from which the ties had been cut was by presidential proclamation included in the Medicine Bow National Forest and the officers of the Forest Service permitted appellants to remove the poles already cut from the "tie slash" and also to have all of tops and refuse on the so-called "fireguard" 200 feet wide along the railway for a distance of two miles, but refused to allow them to have any of the remainder of the "tie slash," and took possession of and sold it; and the proceeds were covered into the Treasury of the United States. To recover the sum of the proceeds thus covered into the Treasury, or such other amount as might be found to have been received by the United States from such sale, this action was brought.

[1] The elements for consideration are not many. The first of these is the act of 1875, supra. It grants a right of way to the railway company [the grant is to railroad companies of a certain description—we make it particular for convenience] through the public lands of the United States to the extent of 200 feet on each side of its central line, and the right to take from the public lands "adjacent to its line" "timber necessary for the construction of said railroad." The right given is to take "timber," and this, it is argued, necessarily means "trees," and as there is no provision for disposition of what shall be left of them after using such portions for railroad purposes, it must be determined by "reason and

analogy," and from these appellants argue that the railway company was entitled to the "tie slash" as incident to its right to cut under the act of Congress. They adduce *United States v. Cook*, 19 Wall. 591, 22 L. Ed. 210; *Shiver v. United States*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231; *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127.

The instances of the cases, however, are not in analogy to that of the case at bar. In the first the right was given to Indians as a legitimate use of land reserved by them from the cession of a larger tract to the United States, the right of use and occupancy being unlimited. The second case involved the cutting and sale of timber by a homesteader and they were considered a use of the land, his privileges with respect to standing timber being analogous to those of a tenant for life; the third case was of like kind, and the other two cases were cited. Other cases referred to by appellants struggled with the problem without solving it and we need not review or comment upon their reasoning nor consider some state cases.

The contention of appellants encounters the rule that statutes granting privileges or relinquishing rights are to be strictly construed; or, to express the rule more directly, that such grants must be construed favorably to the government and that nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the government. *Wisconsin Central Railway v. United States*, 164 U. S. 190, 17 Sup. Ct. 45, 41 L. Ed. 399; *United States v. Oregon, etc., Railway*, 164 U. S. 526, 17 Sup. Ct. 165, 41 L. Ed. 541. And the government invokes the rule in the present case and cites in implied support of the invocation *United States v. Denver, etc., Railway*, 150 U. S. 1, 14 Sup. Ct. 11, 37 L. Ed. 975, and in express support of it *United States v. Denver, etc., Railway (C. C.)* 190 Fed. 825, 826. And these cases were cited by the Court of Claims for its judgment.

The rule, it seems to us, is particularly applicable. There was a grant of timber by the Act of March 3, 1875, not of trees, but of timber for purposes of railroad construction, not as a means of business or of profit; nor could it be made an element, as contended, of compensation to the agents employed to cut it.

[2] Appellants invoke the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099, in justification and as giving them a right independently of their asserted right derived through the railway company. Section 8 of that act (Comp. St. § 5114) provides that in criminal prosecutions for trespass on public timber lands in Colorado (and some other states) or to recover timber or lumber cut, it shall be a defense to show that the timber was cut or removed from the lands for use in the state by a resident thereof for agricultural,

mining, manufacturing or domestic purposes, under the rules of the Interior Department, and had not been transported out of the state. But it is provided that nothing in the act contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, and there are other provisions giving the Secretary of the Interior the power to designate the tracts from which the timber may be cut or to prescribe the rules and regulations for the cutting.

We think it is clear that appellants are not within the provisions of the act. They are not and were not in the designated classes nor contemplated the uses which the act protects. They were agents of the railway company for so much of the timber as was to be used in railroad construction; of what was left they were simply vendors for profit. To enable them to so use the act or to use it for any but the designated purposes would be a violation of that provision of the act which forbids its operation "to enlarge the rights of any railway company to cut timber on the public domain"; it would make the act available to a railroad as a means of profit or other purpose than road construction. And its value would be a temptation to do so. In this case it is alleged that the value of the "tie slash" that the officers of the Forest Service took possession of (it was only part of that which was cut) "was, and is, \$26,454.90."

[3] Finally, appellants rely upon the letter of the Chief, Field Division, General Land Office, supra. The immediate answer is that made by the Court of Claims: the want of power in the officer to enlarge the Act of March 3, 1875, and to give rights in the public lands not conferred by it.

Judgment affirmed.

Mr. Justice McREYNOLDS took no part in the decision.

(250 U. S. 1)

PORTSMOUTH HARBOR LAND & HOTEL CO. et al. v. UNITED STATES.

(Argued May 1, 1919. Decided May 19, 1919.)

No. 381.

EMINENT DOMAIN —(2)(1)—TAKING—FIRING CANNON ACROSS LAND.

Facts of case, in which recovery was sought on the ground of taking, because of cannon firing across land, *held* not to differentiate it from *Peabody v. United States*, 231 U. S. 530, 34 Sup. Ct. 159, 59 L. Ed. 351, where it was held that there was no taking.

Appeal from the Court of Claims.

Action by the Portsmouth Harbor Land & Hotel Company and others against the United

States. Petition dismissed (53 Ct. Cl. 210), and plaintiffs appeal. Affirmed.

Messrs. John Lowell, of Boston, Mass., and Frank W. Hackett, of Washington, D. C., for appellants.

Mr. Assistant Attorney General Brown, for the United States.

Memorandum opinion by the CHIEF JUSTICE.

Recovery was sought in the court below from the United States for property taken by it as the result of the alleged firing of guns in a fortification on the coast of Maine and the passing of the projectiles over and across "a portion of the land alleged to have been taken. The court, finding that a former case by it decided against the owners and here affirmed (*Peabody v. United States*, 231 U. S. 530, 34 Sup. Ct. 159, 59 L. Ed. 351), for taking of the same land resulting from instances of gun fire resulting from the same fort and guns, was identical with this except for some occasional subsequent acts of gun fire, held that case to be conclusive of this and rejected the claim on the merits.

Coming to consider this action of the court in the light of the findings by it made, we are constrained to the conclusion that it was right, and that no possible difference exists between this and the *Peabody Case*. Before applying this conclusion we say that we find that the record discloses no ground for the applications here made to remand and for additional findings.

Judgment affirmed.

(250 U. S. 111)

UNITED STATES FIDELITY & GUARANTY CO. v. STATE OF OKLAHOMA et al.

(Argued April 17, 1919. Decided May 19, 1919.)

No. 304.

1. COURTS —394(1)—ERROR TO STATE COURT —CONSTITUTIONAL QUESTION.

To give the Supreme Court jurisdiction of error to state court under Judicial Code, § 237, as amended by Act Sept. 6, 1916, § 2 (Comp. St. 1918, § 1214), mere assertion of a claim in respect of some constitutional right is not enough, but there must be a real and substantial controversy of the required character which deserves serious attention.

2. COURTS —394(9)—ERROR TO STATE COURT —CASE INVOLVING CONSTITUTIONALITY OF STATUTE.

Where opinion of state Supreme Court makes no reference to state statute in support of decision, but supports its conclusion by its opinions prior to such statute, relevant and tending to uphold the doctrine applied, the case is not one in which validity of the statute, claimed

to impair obligation of contract, is drawn in question, and decision is in favor of validity, so as to give National Supreme Court jurisdiction of error to state court, under Judicial Code, § 237, as amended by Act Sept. 6, 1916, § 2 (Comp. St. 1918, § 1214).

In Error to the Supreme Court of the State of Oklahoma.

Action by the State of Oklahoma and others against the United States Fidelity & Guaranty Company. Judgment for plaintiffs was affirmed by the Supreme Court of Oklahoma (168 Pac. 234), and defendant brings error. Dismissed.

Mr. C. B. Ames, of Oklahoma City, Okl., for plaintiff in error.

Messrs. H. L. Stuart, of Gainesville, Tex., and S. P. Freeling, of Oklahoma City, Okl., for defendants in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

May 18, 1909, plaintiff in error became surety upon a bond to secure repayment of funds to be deposited by *commissioners of the land office of Oklahoma with the Columbia Bank & Trust Company. After receiving more than \$50,000 the Trust Company became insolvent, and in September, 1909, refused to honor a proper demand therefor. The state sued the surety in one of its own courts, December 24, 1909, and judgment there for full amount of the bond was affirmed by the Supreme Court October 9, 1917. 168 Pac. 234.

[1,2] The cause is here on writ of error, and jurisdiction of this court is challenged upon the ground that the suit is not one "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity." Judicial Code (Act March 3, 1911, c. 231) § 237, 36 Stat. 1156, as amended by Act Sept. 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. 1918, § 1214). We think the point well taken, and the writ must be dismissed.

In support of our jurisdiction it is said:

"The case is properly here by writ of error because it involves the validity of legislation of

the state of Oklahoma alleged by the plaintiff in error to impair the obligation of its contract."

But we have often held that mere assertion of a claim in respect of some constitutional right is not sufficient; there must be a real and substantial controversy of the required character which deserves serious consideration. *Ennis Waterworks v. City of Ennis*, 233 U. S. 652, 658, 34 Sup. Ct. 767, 58 L. Ed. 1139.

Counsel for plaintiff in error further say:

"Our position is that under this bond and the statutes in force at the time it was executed a contract was created between the state, the Columbia Bank & Trust Company, and the United States Fidelity & Guaranty Company, pursuant to which the Guaranty Company was liable to the state *for such loss as it might sustain by reason of the failure of the Trust Company; that the Guaranty Company was entitled to exoneration from the Trust Company and to contribution from the guaranty fund; and that this contract was impaired by the Act of March 6, 1913." Section 9, c. 22, Session Laws 1913.

It provides:

"No deposit in a state bank, otherwise secured, shall be protected by, or paid out of, the depositors' guaranty fund created under the laws of the state of Oklahoma, nor included in the computation of average daily deposits as a basis for assessments. No deposit in any state bank, on which a greater rate of interest is allowed or paid, either directly or indirectly, than is permitted by the rules of the bank commissioner, shall participate in the benefits of the guaranty fund."

The opinion of the Supreme Court makes no reference to the Act of March 6, 1913, and we can discover no plausible basis for the argument that, notwithstanding such omission, force and effect was really given thereto—that it must have been the basis of the decision. The court approved, and undertook to support its conclusion by former opinions, commencing with *Columbia Bank & Trust Co. v. United States Fidelity & Guaranty Co.*, 33 Okl. 535, 126 Pac. 556, decided in 1912, which, it declared, show a consistent view contrary to the position maintained by plaintiff in error. And an examination of these opinions leaves no doubt that they are relevant and tend to uphold the doctrine applied in the present cause. We find nothing to indicate a purpose to give effect to the specified act.

Dismissed.

(250 U. S. 28)

JOSEPH SCHLITZ BREWING CO. v. HOUSTON ICE & BREWING CO. et al.

(Submitted April 24, 1919. Decided May 19, 1919.)

No. 326.

1. APPEAL AND ERROR ⇨1094(2)—REVIEW—FINDING OF TWO COURTS.

Both the lower courts having found for defendant in suit to restrain use of trade-mark as infringing plaintiff's or as used in a way calculated to deceive and unfairly to interfere with plaintiff's good will, the only question that the Supreme Court will consider is whether on inspection it can be said as matter of law that defendant's admitted acts are a wrong of which plaintiff can complain.

2. TRADE-MARKS AND TRADE-NAMES ⇨70(4) —UNFAIR COMPETITION—IMITATION—COLOR.

One first selling beer in brown bottles with brown labels has no exclusive right to such use, but another may use them without warning that the beer is not that of the first user.

3. TRADE-MARKS AND TRADE-NAMES ⇨70(4) —UNFAIR COMPETITION—IMITATION.

While to entitle plaintiff to relief the deception of the public must be from imitation of some feature of its label which is not common to the public, it is enough that it does so taken in connection with such common features, though it could not but for such special background lawfully used.

4. TRADE-MARKS AND TRADE-NAMES ⇨70(4) —UNFAIR COMPETITION—IMITATION.

Label on the beer bottles of the Houston Ice & Brewing Company held in view of difference in shape, in application, and in script, both as to meaning and picture, not to imitate that on those of the Joseph Schlitz Brewing Company so as to deceive the public.

Mr. Justice McKenna and Mr. Justice Pitney, dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Suit by the Joseph Schlitz Brewing Company, against the Houston Ice & Brewing Company and others. Decree for defendants was affirmed by the Circuit Court of Appeals (241 Fed. 817, 154 C. C. A. 519), and plaintiff brings certiorari. Affirmed.

Mr. Russell Jackson, of Milwaukee, Wis., for petitioner.

Mr. H. M. Garwood, of Houston, Tex., for respondents.

*Mr. Justice HOLMES delivered the opinion of the Court.

[1] This is a bill in equity brought to restrain the use of a trade-mark alleged to infringe the plaintiff's or at least to be used in a way that is calculated to deceive and unfairly to interfere with the plaintiff's good will. Both courts have found for the defendant (241 Fed. 817, 154 C. C. A. 519), so that

the only question that we shall consider is whether upon inspection it can be said as matter of law that the admitted acts of the defendant are a wrong of which the plaintiff can complain.

[2-4] Both parties sell beer in brown bottles with brown labels and the plaintiff conceded below and still with some unwillingness seems to concede that, although perhaps it first introduced them in this connection and this place, it cannot claim the brown bottle, the brown label, or the two combined. These could be used without a warning, such as sometimes is required, that the beer was not the plaintiff's. The only question is how the additional element, the form of the inscription, should be treated. It often is said that the plaintiff must show a deception arising from some feature of its own not common to the public. United States Tobacco Co. v. McGroenery (C. C.) 144 Fed. 531, 532, cited by the court below. But so stated the proposition may be misleading. It is not necessary that the imitation of the plaintiff's feature taken alone should be sufficient to deceive. It is a fallacy to break the fagot stick by stick. It would be enough if taken with the elements common to the public the inscription accomplished a result that neither would alone. New England Awl & Needle Co. v. Marlborough Awl & Needle Co., 168 Mass. 154, 156, 46 N. E. 386, 60 Am. St. Rep. 377.

But it is true that the unlawful imitation must be what achieves the deception, even though it could do so only on the special background lawfully used. The question again narrowed is whether that is the case here. The *shape of the defendant's label is different from the plaintiff's; the script upon it not only is wholly different from the other in meaning, to one who reads the two, but hardly can be said to resemble it as a picture. The two labels are attached to the bottles in quite unlike modes. The Schlitz is applied in a spiral around the length of the bottle so as to make the ends of the label parallel to the sides of the glass. The defendant's is pasted around the bottom of the bottle in the usual way. This diversity of itself renders mistake unlikely. If there were deception it seems to us that it would arise from beer and brown color and that it could not be said that the configuration appreciably helped. Coats v. Merrick Thread Co., 149 U. S. 562, 573, 13 Sup. Ct. 966, 37 L. Ed. 847. Beyond stating the principles to be applied there is little to be said except to compare the impression made by the two, or, if that form of statement is preferred, the memory of Schlitz with the presence of the defendant's bottles as marked.

Decree affirmed.

Mr. Justice McKENNA and Mr. Justice PITNEY dissent.

(250 U. S. 85)

NEW YORK CENT. R. CO. v. GOLDBERG.

(Argued March 20, 1919. Decided May 19, 1919.)

No. 256.

CARRIERS 110—LOSS OF GOODS—LIABILITY
—MISDESCRIPTION BY SHIPPER.

Innocent misdescription by shipper of furs shipped, as dry goods, and so copied into the bill of lading, resulting in the lower rate applicable to dry goods being charged, does not relieve the carrier from liability in case of their loss, the bill of lading providing merely that the owner or consignee shall pay the freight and all other lawful charges accruing on the property, and if on inspection it is ascertained that the articles shipped are not those described in the bill of lading, the freight charges must be paid on the articles actually shipped.

On Writ of Certiorari to the Supreme Court of the State of New York.

Action by Samuel Goldberg against the New York Central Railroad Company. Judgment for plaintiff in the Supreme Court, Trial Term, New York, was affirmed by the Appellate Division (164 App. Div. 389, 149 N. Y. Supp. 629), and by the Court of Appeals (221 N. Y. 539, 116 N. E. 1047), and defendant brings certiorari. Affirmed.

Messrs. William Mann and Charles C. Paulding, both of New York City, for petitioner.

Mr. Justice PITNEY delivered the opinion of the Court.

This was an action brought by respondent against petitioner in the Supreme Court of New York to recover damages equivalent to the value of certain goods shipped in interstate commerce and lost in transit. Plaintiff had judgment in the trial court, which was affirmed by the Appellate Division for the First Department (Goldberg v. New York Cent. R. Co., 164 App. ^{*253} Div. 389, 149 N. Y. Supp. 629), and affirmed by the Court of Appeals without opinion (221 N. Y. 539, 116 N. E. 1047).

The facts are as follows: On September 17, 1912, a firm of fur manufacturers in New York City caused to be delivered to defendant there for transportation to plaintiff at Cincinnati, Ohio, a case containing furs belonging to plaintiff of the value of \$693.75. When the case left the consignors' possession it was marked with the name and address of the consignee, and with the word "furs" conspicuously displayed. It was delivered to a local expressman, whose driver delivered it to defendant and made out a bill of lading which defendant signed and upon which the action depends. This bill of lading described the goods as "One case D. G.," which admittedly means "dry goods." The misdescription was the driver's mistake, not made

with any intent to fraudulently misrepresent the nature of the merchandise shipped. Defendant's clerk who signed the bill of lading relied wholly upon the representations of the driver as to the contents of the case, not seeing the case itself; and, so far as appears, no representative of defendant compared or had a convenient opportunity to compare the bill of lading with the marks on the case. At the time of the shipment the official freight classification filed with the Interstate Commerce Commission provided for a first-class rate for dry goods (65 cents per hundred pounds), and a double-first-class rate (\$1.30 per hundred) for furs. As a result of the misdescription in the bill of lading, freight was charged at the smaller rate applicable to dry goods, instead of the higher one applicable to furs. No valuation was placed upon the goods, and no question of limitation of liability to a stipulated value is presented.

Defendant admitted that it received the goods for transportation, and that they were stolen in transit and never delivered to the consignee.

Defendant insists that it is not liable in any amount ¹²² for loss of the goods, because they were misdescribed in the bill of lading. Reliance is placed upon a line of decisions in this court relating to the limitation of liability of an interstate rail carrier where goods are shipped at a declared value at a rate based upon value and under a contract conforming to the filed tariff. *Adams Express Co. v. Croninger*, 226 U. S. 491, 509, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Kansas City Southern Ry. v. Carl*, 227 U. S. 639, 650, et seq., 33 Sup. Ct. 391, 57 L. Ed. 683; *Missouri, Kans. & Texas Ry. v. Harriman*, 227 U. S. 657, 670, 33 Sup. Ct. 397, 57 L. Ed. 690; *Great Northern Ry. v. O'Connor*, 232 U. S. 508, 515, 34 Sup. Ct. 380, 58 L. Ed. 703; *Atchison, etc., Ry. Co. v. Robinson*, 233 U. S. 173, 180, 34 Sup. Ct. 556, 58 L. Ed. 901; *Southern Railway v. Prescott*, 240 U. S. 632, 638, 36 Sup. Ct. 469, 60 L. Ed. 836.

The Appellate Division held that these cases did not go to the extent of relieving the carrier from all liability in case of a non-fraudulent misrepresentation as to the nature of the merchandise shipped, and that since there was no clause in the bill of lading exempting the carrier or limiting its liability in case of such a misdescription the carrier was defenseless.

Defendant's contention is that there is no responsibility for loss of the furs that were shipped because they were goods, not of the same, but of a different, character than those described in the bill of lading, and were goods for the transportation of which a higher rate was established by its filed schedules. Were there otherwise any difficulty in answering this contention, it would be wholly relieved by the fact that the precise contingency was anticipated in the preparation of the form

of the bill of lading and provided for by one of its conditions, which reads as follows:

"The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Clearly, the effect of this is that a misdescription of the *character of the goods, not attributable to fraud, merely imposed upon the shipper or consignee an obligation to pay freight charges according to the character of the goods actually shipped, and did not affect the liability of the carrier for a failure to deliver the goods.

Judgment affirmed.

(250 U. S. 118)

CAREY v. STATE OF SOUTH DAKOTA.

(Submitted April 29, 1919. Decided May 19, 1919.)

No. 346.

1. GAME 4—SHIPPING—STATE AND FEDERAL LAWS.

Laws S. D. 1909, c. 240, § 29, prohibiting shipping by carrier of any wild ducks, is not inconsistent with the federal Migratory Bird Act, merely providing that such birds shall not be destroyed or taken contrary to regulations; the regulations merely prescribing the closed seasons.

2. STATUTES 64(2)—PARTIAL INVALIDITY.

As Laws S. D. 1909, c. 240, § 29, prohibiting shipping by carrier of any wild ducks, may clearly stand alone, it is immaterial, as regards its validity, that other provisions of such law may be inconsistent with the federal Migratory Bird Act.

3. GAME 4—FEDERAL STATUTE—SCOPE.

Provision of the federal Migratory Bird Act that the migratory birds "shall hereafter be deemed to be within the custody and protection of the * * * United States," when read with the words immediately following, which show that the custody and protection is limited to prohibiting their being "destroyed or taken contrary to regulations," which are to fix the closed seasons in the several zones, does not manifest intention of Congress to assume exclusive jurisdiction of the subject of such birds, with the result that its failure to make any provisions concerning shipping evidences its purpose that shipping of such birds shall not be prohibited.

4. STATES 4—FEDERAL STATUTES—CONSTRUCTION AS TO STATE POLICE POWER.

Intent to supersede the exercise by a state of its police powers is not to be implied, unless the act of Congress, fairly interpreted, is in actual conflict with the state law.

5. CONSTITUTIONAL LAW 48—STATUTES—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY.

A statute being reasonably susceptible of two interpretations, by one of which it would be clearly constitutional, and by the other of which its constitutionality would be doubtful, the former construction should be adopted.

In Error to the Supreme Court of the State of South Dakota.

W. E. Carey was prosecuted by the State of South Dakota for shipping game birds. Judgment of conviction was affirmed by the Supreme Court of the state (39 S. D. 524, 165 N. W. 539), and defendant brings error. Affirmed.

*Mr. Joe Kirby, of Sioux Falls, S. D., for plaintiff in error.

Messrs. Clarence C. Caldwell and Edwin R. Winans, both of Sioux Falls, S. D., for State of South Dakota.

Mr. Justice BRANDEIS delivered the opinion of the Court.

By the federal Migratory Bird Act (Act March 4, 1913, c. 145, 37 Stat. 828, 847 [Comp. St. § 8837]), Congress provided that:

"All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any state or territory, shall hereafter be deemed to be within the custody and protection of the government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor."

These regulations relate to the fixing of "closed seasons, having due regard to the zones of temperature, breeding habits, and times and line of migratory flight." The act further declared that:

"Noth*ing herein contained shall be deemed to affect or interfere with the local laws of the states and territories for the protection of non-migratory game or other birds resident and breeding within their borders, nor to prevent the states and territories from enacting laws and regulations to promote and render efficient the regulations of the Department of Agriculture provided under this statute."

Regulations were proclaimed October 1, 1913 (38 Stat. 1960), and were amended by the proclamation of August 31, 1914 (38 Stat. 2024), and the proclamation of October 1, 1914 (38 Stat. 2032).

Before the passage of the federal law the Legislature of South Dakota had provided (Laws 1909, c. 240, § 29) that:

"No person shall * * * ship, convey or cause to be shipped or transported by common or private carrier, to any person, either within

or without the state, * * * wild duck of any variety. * * *

For violation of this statute by shipping on November 19, 1915, by express, wild ducks from a point within the state to Chicago, Ill., Carey was prosecuted in a state court. He insisted that the state statute had been abrogated by the federal law. The contention was overruled, and he was convicted by the trial court. Its judgment was affirmed by the Supreme Court of the state (*State v. Carey*, 39 S. D. 524, 165 N. W. 539). The case comes here on writ of error under section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156 [Comp. St. § 1214]).

It is admitted that, in the absence of federal legislation on the subject, a state has exclusive power to control wild game within its borders and that the South Dakota law was valid when enacted, although it incidentally affected interstate commerce. *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; *Silz v. Hesterberg*, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75. The contention made by Carey is that Congress assumed exclusive jurisdiction over this class of migratory birds by the 1913 act; that then existing state laws on the subject were thereby abrogated or suspended; that the power of the states to legislate on the subject was limited to such subsequent enactments as were designed to render more effective regulations issued by the Department of Agriculture, and that the statute in question was obviously not of that character, both because it antedated the federal act and because the regulations issued under the federal act permitted the killing of wild ducks in South Dakota between September 7 and December 1, during which period the wild ducks shipped on November 19 had presumably been killed. On behalf of the state, it was contended that this provision of its statute is not inconsistent with the federal law; and that its statute is in any event valid, because the federal law is unconstitutional. *United States v. McCullagh* (D. C.) 221 Fed. 288. The Supreme Court of South Dakota did not pass upon the constitutional question, but upheld the state statute on the ground that it was not inconsistent with the federal law, since it did not appear that the ducks in question had been killed in violation of any regulation adopted under it.

[1, 2] The prohibition of the federal act is limited to the provision that the birds "shall not be destroyed or taken contrary to regulations." The regulations merely prescribe the closed seasons; that is, neither the federal law nor the regulations deal with shipping.¹ The prohibition of the state law here

in question is limited to forbidding persons to "ship * * * by common or private carrier." It applies alike whether the shipment is made in open or closed season, and it applies although the birds were lawfully killed or taken. This provision of the state law is obviously not inconsistent with the federal law. The fact that other provisions of this state statute may be so (which we do not consider) is immaterial, as the provision here in question may clearly stand alone. *Brazee v. Michigan*, 241 U. S. 340, 344, 36 Sup. Ct. 561, 60 L. Ed. 1034, Ann. Cas. 1917C, 522; *Guinn v. United States*, 238 U. S. 347, 366, 35 Sup. Ct. 926, 59 L. Ed. 1340, L. R. A. 1916A, 1124; *Louisville & Nashville Railroad Co. v. *Garrett*, 231 U. S. 298, 311, 34 Sup. Ct. 48, 58 L. Ed. 229; *Presser v. Illinois*, 116 U. S. 252, 263, 6 Sup. Ct. 580, 29 L. Ed. 615. *132

[3-5] It is, however, urged that Congress has manifested its intention to assume exclusive jurisdiction of the subject; and that the failure to make any provision in the federal act concerning shipping, evidences the purpose of Congress that the shipping of game birds shall not be prohibited. This argument rests upon the clause which declares that the migratory birds "shall hereafter be deemed to be within the custody and protection of the government of the United States." But that clause may not be read without its context; and the words immediately following show that the custody and protection is limited to prohibiting their being "destroyed or taken contrary to regulations" which are to fix the closed seasons in the several zones. If, reading the federal act as a whole, there were room for doubt, two established rules of construction would lead us to resolve the doubt in favor of sustaining the validity of the state law. First. The intent to supersede the exercise by a state of its police powers is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state. *Savage v. Jones*, 225 U. S. 501, 533, 32 Sup. Ct. 715, 56 L. Ed. 1183; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613, 623, 18 Sup. Ct. 488, 42 L. Ed. 878. Second. Where a statute is reasonably susceptible of two interpretations, by one of which it would be clearly constitutional and by the other of which its constitutionality would be doubtful, the former construction should be adopted. *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 422, 29 Sup. Ct. 115, 53 L. Ed. 253; *Knights Templars' Indemnity Co. v. Jarman*, 187 U. S. 197, 205, 23 Sup. Ct. 108, 47 L. Ed. 139.

The Supreme Court of South Dakota did not err in its judgment unholding the constitutionality of the provision of the state statute under which the plaintiff in error was convicted; and its judgment is affirmed.

¹ The Migratory Bird Treaty Act (Act July 3, 1918, c. 128, 40 Stat. 755 [Comp. St. 1918, § 8837d, Appendix]) deals in section 4 with shipments in interstate commerce.

(250 U. S. 66)

PARKER, Superintendent for Five Civilized Tribes, et al. v. RILEY et al.

(Submitted March 19, 1919. Decided May 19, 1919.)

No. 254.

INDIANS  18 — HOMESTEAD ALLOTMENT—
DEATH OF ALLOTTEE—LEASE BY HEIRS FOR
OIL—RIGHTS IN ROYALTIES.

Under Act May 27, 1908, § 1, declaring the homestead allotment of an Indian inalienable prior to April 26, 1931, unless restrictions be removed by Secretary of Interior, section 2, authorizing leases for oil and gas of restricted lands with the approval of the Secretary of the Interior, and section 9, declaring that death of an allottee shall remove restrictions on alienation, provided that, if an allottee die leaving issue born since March 4, 1906, deceased's homestead shall remain inalienable, unless restrictions are removed as proved in section 1, for the use and support of such issue, till April 26, 1931, unless such issue sooner die, the three heirs of such an intestate allottee having leased the homestead for oil and gas with approval of the Secretary of the Interior, but without any removal of restrictions on alienation being attempted or intended, the royalties take the place of the part of the homestead removed by mining, and that one who was issue born after March 4, 1906, is entitled to the interest or income therefrom until April 26, 1931, unless sooner dying, leaving the principal to go to the heirs in general on termination of her special right.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by Tootie Riley, a minor, and another against Gabe E. Parker, as Superintendent for the Five Civilized Tribes, and another. Decree for plaintiffs was affirmed by the Circuit Court of Appeals (243 Fed. 42, 155 C. C. A. 572), and defendants appeal. Reversed.

Mr. Assistant Attorney General Kearful, for appellants.

Mr. William J. Horton, of McAlester, Okl., for appellees.

*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a bill in equity to settle conflicting claims to royalties collected and accruing under an oil and gas lease of lands allotted to a full-blood Creek Indian as a homestead. The allottee died intestate in November, 1908, leaving a husband and two minor children as her only heirs. One of the children was born before and the other after March 4, 1906. Under the applicable law of descent each heir took an undivided one-third interest in the lands, subject to the estate specially given to the child born after March 4, 1906, by section 9 of the Act of May 27, 1908, c. 199, 35 Stat. 312. The lease was given in 1912 by the husband and children—the latter act-

ing through their respective guardians—in accordance with the rules and regulations prescribed by the Secretary of the Interior, and was approved by that officer.¹ The royalties have been and are being regularly paid to an officer of the Indian Bureau under a provision in the lease, and he receives and holds them in trust for the lessors according to their respective interests. The District Court held that each heir was entitled to one-third of the royalties and directed that they be distributed on that basis. *Riley v. Kelsey* (D. C.) 218 Fed. 391. In the Circuit Court of Appeals that decree was affirmed, one judge dissenting. 243 Fed. 42, 155 C. C. A. 572.

It is insisted here, as it was in the courts below, that under section 9 of the Act of May 27, 1908, the child born after March 4, 1906, is entitled to all the royalties accruing during her life, but not beyond April 26, 1931, or, if not to the royalties, to the income or interest therefrom during that period.

The lands were allotted under the Acts of March 1, 1901, c. 676, 31 Stat. 861, and June 30, 1902, c. 1323, 32 *Stat. 500, both of which provided that the homestead of each allottee should be inalienable for 21 years and on his death should remain for the use and support of his children, if any, born after the date which would entitle them to be enrolled and receive allotments of their own. By the Act of April 26, 1906, c. 1876, 34 Stat. 137, that date was changed to March 4, 1906, and as to certain allotments the restrictions on alienations were extended until April 26, 1931. With these matters in mind the provisions in the act of May 27, 1908, relied on here will be more readily understood.

By its first section that act relieves certain allotments from all restrictions, and then declares:

"All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full bloods, and enrolled mixed bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore."

By its second section it provides:

"That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the

Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

By its fifth section it declares that "any attempted alienation" of lands while *they are restricted and "also any lease of such restricted land made in violation of law * * * shall be absolutely null and void." And its ninth section contains the following:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, that if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the state of Oklahoma, free from all restrictions."

The allottee, as has been said, was an enrolled full-blood Creek Indian and died several months after the Act of May 27, 1908. The restrictions on the alienation of her homestead had not been removed, and among her heirs was a child—a daughter named Julia—born after March 4, 1906. In these circumstances a reading of section 9 makes it very plain that the restrictions did not terminate with the allottee's death, but remained in force, and also that the homestead was set apart for the "use and support" of Julia during her life, but not beyond April 26, 1931. We need not stop to consider whether, strictly speaking, the right thus specially given to Julia was an estate for life or for years; for it evidently was not the purpose to make any nice distinctions along that line. Nor need we consider what effect a removal of

the restrictions "in the manner provided by section one" after the death of the allottee would have had on the relative rights of Julia and the other heirs; for no such removal was attempted or intended by the Secretary of the Interior.

The oil and gas lease was to run for 10 years and as much longer as oil or gas was found in paying quantity. It was given and approved under the provision in section 2 dealing specially with the leasing of restricted lands and homesteads. All the heirs joined in the lease and it was designed to be for the benefit of all. Nothing in it or in the provision under which it was given suggests that the rights of the heirs, as among themselves, were to be altered or affected. The oil and gas were to be extracted and taken by the lessee, and for this royalties in money were to be paid. These minerals were part of the homestead, and the lease was to operate as a sale of them as and when they were extracted. In that sense the heirs were exchanging a part of the homestead for the money paid as royalties, but no heir was surrendering any right to the others. Thus the rights of all in the royalties were the same as in the homestead. Nothing in the Act of May 27, 1908, makes to the contrary. Under the provision in section nine specially providing for issue born after March 4, 1906, Julia was entitled for her support to the exclusive use of the entire homestead while she lived, but not beyond April 26, 1931, and those who took the fee took it subject to that right. The rights of all in the royalties must, as we think, be measured by that standard. In this view Julia is entitled to the use of the royalties, that is to say, the interest or income which may be obtained by properly investing them, during the same period, leaving the principal, like the homestead, to go to the heirs in general on the termination of her special right.

Our conclusion on this point is in accord with the general trend of decisions in the oil and gas mining regions in similar situations. *Blakley v. Marshall*, 174 Pa. 425, 429, 34 Atl. 564; *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292; *Eakin v. Hawkins*, 52 W. Va. 124, 43 S. E. 211; *Stewart v. Tenant*, 52 W. Va. 559, 44 S. E. 223; *Barnes v. Keys*, 36 Okl. 6, 127 Pac. 261, 45 L. R. A. (N. S.) 178, Ann. Cas. 1915A, 515.

Decrees below reversed.

(250 U. S. 122)

CHESAPEAKE & DELAWARE CANAL CO.
v. UNITED STATES.(Argued and Submitted April 17, 1919. De-
cided May 19, 1919.)

No. 192.

1. APPEAL AND ERROR ¶722(1)—ASSIGN-
MENTS OF ERROR—NUMBER.

The practice of unlimited assignments of error, involving but a few questions, condemned.

2. LIMITATION OF ACTIONS ¶11(1)—STATE
STATUTES—UNITED STATES.

The United States, when asserting sovereign or governmental rights, is not subject to state statutes of limitation.

3. EQUITY ¶85—LACHES—UNITED STATES.

Doctrine of laches is not applicable to the United States, when asserting sovereign or governmental rights.

4. APPEAL AND ERROR ¶501(1)—REVIEW—
NECESSITY OF EXCEPTIONS.

Correctness of ruling that presumption of payment from lapse of 20 years without suit to collect obtains against the United States, not being questioned by appropriate exceptions in record, will not be decided.

5. LIMITATION OF ACTIONS ¶11(1)—STATE
STATUTE—UNITED STATES.

The United States, when suing for dividends declared on stock owned by it, is acting in its governmental capacity as a creditor, and so not subject to state statute of limitations.

6. EVIDENCE ¶341 — PRINTED BOOKS OF
TREASURY DEPARTMENT—CERTIFICATION.

Books printed by public printer from written public records of the treasury department, and so printed by authority of law, and produced from the custody of such department, where they were used as original records in the transaction of the daily business thereof, do not require certification as copies under Rev. St. § 882, to be admissible in evidence.

7. EVIDENCE ¶333(7)—STOCK DIVIDENDS—
BOOKS OF TREASURY DEPARTMENT.

Printed books of the treasury department, constituting public records, kept pursuant to requirements of Constitution and state statute, presumptively containing a record of all payments made, are evidence that payments not shown of dividends on stocks owned by the United States were not made.

8. CORPORATIONS ¶155(5) — STOCK DIVI-
DENDS—EVIDENCE.

Evidence, in action by United States for dividends declared over 20 years before on stocks owned by it, held to carry clear conviction that they were not paid.

In Error to the United States Circuit Court of Appeals for the Third Circuit.

Action by the United States against the Chesapeake & Delaware Canal Company. Judgment for plaintiff was affirmed by the Circuit Court of Appeals (240 Fed. 903, 153

C. C. A. 589), and defendant brings error. Affirmed.

Mr. Charles J. Biddle, of Philadelphia, Pa., for plaintiff in error.

Messrs. Alexander C. King, Sol. Gen., of Atlanta, Ga., and G. Carroll Todd and Lincoln R. Clark, both of Washington, D. C., for the United States.

*Mr. Justice CLARKE delivered the opinion of the Court.

In 1912 the United States sued the Canal Company to recover the amount of three dividends which had been declared on shares of its capital stock owned by the government, in the years 1873, 1875, and 1876, payment of which, it was averred, had been refused when demand was made therefor in the year 1911.

After various vicissitudes the case went to trial on issue joined on the plea of payment by the company and it comes into this court on writ of error to the Circuit Court of Appeals for the Third Circuit.

[1] There are forty-one assignments of error in this court, which counsel in their brief compress into five questions, and these resolve themselves, at once, into three, viz.: (1) The applicability of the statute of limitations of the state of Delaware; (2) the admissibility in evidence of certain books of the Department of the Treasury; and (3) the propriety of a requested instruction in favor of the Canal Company.

Such a record constrains us to repeat the following:

"This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on." Phillips, etc., *Construction Co. v. Seymour*, 91 U. S. 646, 648 (23 L. Ed. 341), *Grayson v. Lynch*, 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. Ed. 230, and *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252.

The plea of the statute of limitations was rejected by both lower courts, and, although the specific assignment of this ruling as error in the Circuit Court of Appeals is *not repeated in this court, it will be considered because possibly embraced within some of the general assignments.

Both lower courts ruled that the government was not bound by the state statute of limitations and that the doctrine of laches was not applicable to it, but they agreed that a rebuttable presumption of payment arose after the lapse of more than twenty years from the date when the debt became due, without suit being instituted to collect it, and that, this appearing from the pleadings of the government, the burden was upon it of

overcoming the presumption by evidence that payment, as it averred, had not been made. The company, without introducing any testimony, relied wholly upon this presumption of payment.

Although the burden of the responsibility of proving nonpayment was accepted by the government, the Canal Company, nevertheless, argues that the state statute of limitations is also applicable.

[2, 3] It is settled beyond controversy that the United States when asserting "sovereign" or governmental rights is not subject to either state statutes of limitations or to laches.

That the doctrine of laches is not applicable to the government was announced by Mr. Justice Story on the circuit in 1821 and afterward in 1824 authoritatively, upon principle, in *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199.

This rule has been often approved and was applied so lately as *Utah Power & Light Co. v. United States*, 243 U. S. 389, 409, 37 Sup. Ct. 387, 61 L. Ed. 791.

That the United States is not bound by state statutes of limitations is settled with equal definiteness in *United States v. Nashville, etc., Ry. Co.*, 118 U. S. 120, 6 Sup. Ct. 1006, 30 L. Ed. 81; *United States v. Whited & Wheless*, 246 U. S. 552, 561, 38 Sup. Ct. 367, 62 L. Ed. 879.

[4] Whether this rule extends to and includes the presumption of payment arising from the lapse of twenty years *without suit to collect is not questioned by appropriate exceptions in the record before us, and it is, therefore, not decided. It is not intended, however, to approve the holding of the Circuit Court of Appeals on this subject. *United States v. Thompson*, 98 U. S. 486, 489, 25 L. Ed. 194, and cases hereinbefore cited.

[5] The contention of the Canal Company that the government by becoming a stockholder in a private corporation so abdicated its governmental character that, under the circumstances of this case, it was bound as a private person by statutes and rules of limitation, cannot be allowed.

If the government were asserting any rights with respect to the conduct of the corporation's affairs, its contracts or its torts, then its rights, duties and privileges would be no greater than those of any other stockholder. *Bank of the United States v. Planters' Bank*, 9 Wheat. 904, 907, 6 L. Ed. 244. But here the government is pursuing a right to recover, which is not affected by its relation to the corporation as a stockholder. The declaration of the dividends, which is admitted, gave it the status of a creditor of the company, and, thereafter, the right to recover was unaffected by any stockholder relation. To this must be added that the statutes and rules of limitation relate to the remedy to enforce the right, and not to the corporate relation from which the right springs, and that, since these dividends constituted

"public money" applicable to public purposes only, the government in collecting them was acting in its governmental capacity as much as if it were collecting taxes, such as those with which, no doubt, the stock which produced the dividends was purchased. The Circuit Court of Appeals answered this contention in a manner not to be improved upon, saying (223 Fed. 926, 928, 139 C. C. A. 406, 408 [L. R. A. 1916B, 734]):

"We may perhaps add a few words to say that the fallacy of the company's argument seems to lurk in the assumption that in this action the government is asserting a right *in its character as a stockholder. Undoubtedly the right came into being because the government owns the stock, but in no other respect has the suit anything to do with such ownership. The government is not suing as a stockholder; it is suing as a creditor, and in this character alone is it now to be considered."

The questions remain as to the admissibility of the books and the sufficiency of the evidence to carry the case to the jury.

The government produced a witness who testified that he, in conspiracy with another employé of the Canal Company, embezzled the amount of these dividends and that to conceal their crime they placed in the files of the Canal Company, from which they were produced in evidence, forged drafts purporting to have been drawn by Assistant Treasurers of the United States upon the treasurer of the Canal Company for payment of these dividends and also what purported to be receipts therefor. This witness testified that until 1886, when he left the employ of the Canal Company, no notice of the declaration of the three dividends in controversy had been sent to the government, as had been the practice when earlier dividends were declared; that until that time no payment of them had been made, and that the names signed to the drafts and receipts were fictitious.

The government also produced the notices by the Canal Company of the declaration of each of the fourteen earlier dividends and the record of the payment of them.

To supplement this evidence the books were produced in evidence, the admission of which is assigned as error.

Employés of the Department of the Treasury, who produced the books testified: That they were records of the department compiled by authority of law under the direction of the Secretary of the Treasury and were the volumes in daily use by officials and employés in the discharge of their duties; that part of them were printed *from the original records of miscellaneous revenues, in which such dividends would be classed, while others were printed compilations from books not of original entry, and the testimony was that the volumes produced were intended to, and the witnesses believed did, show all of the miscellaneous receipts and disbursements of the

government from 1848 to 1914. They showed the receipt by the government of fourteen dividends paid by the Canal Company prior to those in controversy, and the witnesses testified that a careful search made by them failed to discover any record in the books of the receipt of any of the three dividends sued for. There was an elaborate description of the method employed by the Department of the Treasury in keeping its accounts and of the necessarily contemporaneous character of the original entries, which it is not necessary to rehearse. The copies produced were printed by the Public Printer.

[6] The objection is that these are not books of original entry and that they are not certified as copies of public records are required to be by Rev. St. § 882 (Comp. St. § 1494).

It is enough to say of this last contention that although the books admitted were printed from written public records, they were so printed by authority of law and were produced from the custody of the Department of the Treasury, where they were used as original records in the transaction of the daily business of the department, and therefore they did not require certification.

[7] They were public records, kept pursuant to constitutional and statutory requirement. Constitution of the United States, Article 1, § 9, cl. 7; Act of Congress, approved September 2, 1789, c. 12, § 2 (1 Stat. 65); Rev. St. § 257 (Comp. St. § 386); Act of Congress, approved September 30, 1890 (26 Stat. 504, 511, c. 1126); Act approved July 31, 1894, (c. 174, § 15, 28 Stat. 210 [Comp. St. § 388]). Thus, their character as public records required by law to be kept, the official character of their contents entered under the sanction of public duty, *the obvious necessity for regular contemporaneous entries in them and the reduction to a minimum of motive on the part of public officials and employes to either make false entries or to omit proper ones, all unite to make these books admissible as unusually trustworthy sources of evidence. *Gaines v. Relf*, 12 How. 472, 570, 13 L. Ed. 1071; *Bryan et al. v. Forsyth*, 19 How. 334, 338, 15 L. Ed. 674; *Post v. Supervisors*, 105 U. S. 667, 670, 26 L. Ed. 1204; *Oakes v. United States*, 174 U. S. 778, 783, 796, 19 Sup. Ct. 864, 43 L. Ed. 1169; *Holt v. United States*, 218 U. S. 245, 253, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138. Obviously such books are not subject to the rules of restricted admissibility applicable to private account books. The considerations which we have found rendered the books admissible in evidence as tending to prove the truth of the statements of entries contained in them also make them admissible as evidence tending to show that because the receipt of the dividends was not entered in them they were not received and therefore were not paid. The evidence may not be as persuasive in the latter case as in the former, but that it was

proper evidence to be submitted to the jury for the determination of its value we cannot doubt. Such books so kept presumptively contained a record of all payments made, and the absence of any entry of payment, where it naturally would have been found if it had been made, was evidence of nonpayment proper for the consideration of the jury. *United States v. Teschmaker et al.*, 22 How. 392, 405, 16 L. Ed. 353; *State v. McCormick*, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341; *Bastrop State Bank v. Levy*, 106 La. 586, 31 South. 164; *Wigmore on Evidence*, § 1531, and section 1633, par. 6.

[8] We agree with the Circuit Court of Appeals that the evidence introduced carries clear conviction that the dividends were never paid, and that the request of the Canal Company for an instructed verdict in its favor was properly denied. The judgment of the Circuit Court of Appeals is

Affirmed.

(250 U. S. 104)

UNITED STATES v. REYNOLDS.

(Argued March 4 and 5, 1919. Decided May 19, 1919.)

No. 591.

1. INDIANS — 15(1)—LANDS—RESTRICTION ON ALIENATION.

Under Act Feb. 8, 1887, § 5 (Comp. St. § 4201), declaring that, on approval of Indian allotments thereby provided for, patents shall issue of the legal effect, and declaring that the United States does and will hold the land for 25 years in trust for the allottees, the trust period begins from date of trust patent, and not from approval of allotments.

2. INDIANS — 15(1)—LANDS — RESTRICTION ON ALIENATION.

Alienation of land allotted Indians being within the trust period of 25 years, extended 10 years by executive order, provided for and authorized by Act Feb. 8, 1887, § 5 (Comp. St. § 4201), was void by terms of the act.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by the United States against Suda Reynolds. Decree for complainant was reversed by the Circuit Court of Appeals (252 Fed. 65), and complainant brings certiorari. Reversed.

*Mr. Solicitor General Alex. C. King, of Atlanta, Ga., for petitioner.

Mr. Mark Goode, of Shawnee, Okl., for respondent.

*Mr. Justice PITNEY delivered the opinion of the court.

This was a suit brought by the United States in behalf of Claudius Tyner and ten

other persons, heirs at law of Stella Washington, deceased, who was a member of the Absentee Shawnee Tribe of Indians of Oklahoma; its object being to cancel a deed made by Tyner to Suda Reynolds on February 17, 1917, purporting to convey an undivided eleventh interest in a tract of land inherited by the 11 heirs from Stella Washington, who was the allottee thereof. The legal title to the tract was held by the United States under a certificate of allotment or "trust patent," dated February 6, 1892, containing a provision that the United States did and would hold the land in question in trust for the said Stella and in case of her death for her heirs, for a period of 25 years, at the expiration of which time the United States would convey the same by patent in fee, discharged of the trust, to said Indian or her heirs, unless the trust period had been extended by the President of the United States.

The allotment was made under the provisions of the Act of Congress approved February 8, 1887 (chapter 119, 24 Stat. 388), as amended by Act of March 3, 1891 (chapter 543, *26 Stat. 989, 1019). Section 5 of the Act of 1887 (Comp. St. § 4201) provided:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Stella Washington's allotment was approved by the Secretary September 16, 1891; the allotment certificate or trust patent was issued on February 6, 1892. On November 24, 1916, the President by executive order extended the trust period for 10 years. Thereafter, on February 17, 1917, Tyner executed the deed in question to Suda Reynolds.

[1] The first question presented by the record is whether the original trust period extended for 25 years from February 6, 1892, the date of the trust patent, or from September 16, 1891, the date of the approval of the allotment. If the former, there is no question that the executive order, being made within the original trust period, was valid (subject to an objection as to its form), and

had the effect of extending the trust, with resulting *restriction upon the right of alienation, for the further period of 10 years. If, on the other hand, the original trust period should be dated from the approval of the allotment, it still is insisted by the government that the right of the President to extend the trust period continued beyond the 25 years and until the United States surrendered its trust by conveying the absolute fee-simple title to the Indian allottee or his heirs.

The District Court sustained the contention of the United States and entered a decree canceling Tyner's deed as void and constituting a cloud upon its title. The Circuit Court of Appeals reversed this decree and directed a dismissal of the bill. 252 Fed. 65.

The latter decision rests upon the ground that under section 5 of the allotment act the right of the allottee to a preliminary or trust patent became absolute upon the approval of the allotment by the Secretary of the Interior; that her equitable title was then complete, and did not depend upon the delivery of the patent. *Ballinger v. Frost*, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464, was cited in support of this; but it is not entirely apposite. That case turned upon the effect of a certificate of allotment issued under the Choctaw and Chickasaw Agreement (Act of July 1, 1902, c. 1362, 32 Stat. 641, 644), the twenty-third section of which declared that such certificate should be "conclusive evidence of the right of any allottee to the tract of land described therein." The Indian, being a citizen and resident of the Choctaw Nation duly enrolled and entitled to an allotment, selected as such the land in controversy, upon which were her buildings and improvements; this was received by the Commission to the Five Civilized Tribes, and, after the expiration of 9 months, the time prescribed by statute for contest, no contest of her right to the designated allotment having been made, a certificate was issued and delivered to her. This court held the allottee's rights had become fixed, the Secretary of the Interior thereafter having nothing but the ministerial duty to perform of seeing that a patent was duly executed and delivered, and upon this ground sustained a judgment awarding a writ of mandamus, citing *Barney v. Dolph*, 97 U. S. 652, 656, 24 L. Ed. 1063; *Simmons v. Wagner*, 101 U. S. 260, 261, 25 L. Ed. 910; *Cornelius v. Kessel*, 128 U. S. 456, 461, 9 Sup. Ct. 122, 32 L. Ed. 482; *Orchard v. Alexander*, 157 U. S. 372, 383, 15 Sup. Ct. 635, 39 L. Ed. 737; and other cases.

The rule established by these cases is familiar. But we do not think it can be applied so as to give finality to the act of the Secretary in approving the allotment under section 5 of the act of 1887. Nor does that act contain any such declaration of conclusive effect as is found in section 23 of the Choctaw-Chickasaw Agreement. While the

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matter is not free from doubt, we have reached the conclusion that by the better construction the trust period begins and dates from the issuance of the trust patent, and not from the approval of the allotment. The Department distinctly so ruled in Klamath Allotments, 38 Land Dec. 559, 561, where it was said, after quoting the pertinent language of section 5 of the act of 1887:

"Clearly no trust is declared until actual issuance of patent, and the use of a word of the present tense, 'does,' shows that the trust period begins to run only upon such issuance."

This ruling was made in the year 1910, and may be inconsistent with some previous rulings of the Department, as counsel for respondent insists that it is. Nevertheless it is entitled to weight as an administrative interpretation of the act; it comports with our impression of the natural meaning of the language employed by Congress; and it very probably was relied upon by the President when promulgating the order of November 24, 1916, extending the trust period. This order might as well have been made a few months earlier, had it been supposed that the 25-year period was to expire in September.

This construction of the act of 1887 puts it in agreement with other acts for the allotment of Indian lands,¹ which, while subsequently passed and perhaps not strictly to be regarded as a legislative interpretation, nevertheless seem to us to indicate the effect that Congress attributed to the act of 1887.

Some criticism is made by counsel for respondent upon the form of the executive order of November 24, 1916, as being indefinite and not in accordance with the act of Congress. We deem this criticism unfounded, and need spend no time upon it.

¹ Act of March 2, 1889 (chapter 422, 25 Stat. 1013, 1014), providing for allotments to Peorias and Miamis, contains this provision: "The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor."

Act of March 2, 1895 (chapter 188, 28 Stat. 876, 907, the Quapaw Act), contains this: "Provided, that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents."

Act of July 1, 1902 (chapter 1362, 32 Stat. 641, 642, Choctaw-Chickasaw Act), contains the following: Section 12, relating to homesteads: "Shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

Section 13: "The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

Section 16: "All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent."

Cherokee Allotment Act of July 1, 1902 (chapter 1375, 32 Stat. 716), contains similar language in sections 13 and 15.

[2] Calculating the 25-year period from February 6, 1892, the date of trust patent for the Stella Washington allotment, it expired on February 5, 1917; but the trust was extended for a further term of ten years, and hence the deed made by Claudius Tyner to Suda Reynolds February *17, 1917, was null and void by the terms of section 5 of the act of 1887.

As the President's order was made within the original 25-year period, it is unnecessary to consider whether he might have acted with like effect at a later time.

The decree of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

(250 U. S. 114)

BERKMAN et al. v. UNITED STATES.

(Argued April 16, 1919. Decided May 19, 1919.)

No. 865.

COURTS ~~vs~~ 385(5) — SUPREME COURT — ERROR TO DISTRICT COURT — UNSUBSTANTIAL CONSTITUTIONAL QUESTIONS.

The suggested constitutional questions that Rev. St. § 828 (Comp. St. § 1383), giving 1 per cent. of the amount to a District Court clerk as compensation for receiving, keeping, and paying out money, construed as applicable where cash is deposited in lieu of bail for appearance of persons charged with crime, deprives them of property without due process, or takes private property for public use without compensation, or deprives them of privileges or immunities enjoyed by citizens of other states, are wholly wanting in merit, and too insubstantial to support jurisdiction of the Supreme Court of error to the District Court by the Supreme Court under Judicial Code, § 238 (Comp. St. § 1215).

Mr. Justice Holmes and Mr. Justice Brandeis dissenting.

In Error to the District Court of the United States for the Southern District of New York.

Alexander Berkman and Emma Goldman were prosecuted by the United States. The District Court refused to direct return of the 1 per cent. of defendants' cash bail, retained by the clerk as compensation, and they bring error. Dismissed.

Mr. Harry Weinberger, of New York City, for plaintiff in error.

Mr. Assistant Attorney General Porter, for the United States.

*Mr. Justice McREYNOLDS delivered the opinion of the Court.

Section 828, U. S. Revised Statutes (Comp. St. § 1383), which specifies the compensation to be taxed and allowed to clerks of District Courts, among other things provides:

"For receiving, keeping, and paying out money, in pursuance *of any statute or order of court, one per centum on the amount so received, kept, and paid."

In each of the criminal causes entitled *The United States v. Emma Goldman* and *The United States v. Alexander Berkman*, some days subsequent to defendants' arrest (June, 1917), evidently upon applications in their behalf consented to by the District Attorney, the court below directed:

"That the sum of \$25,000 cash, be deposited in the registry of this court in lieu and place of bail for the appearance of the above-named defendant before the United States District Court for the Southern District of New York, in accordance with the provisions of the recognizance to be given by said defendant."

Defendants were afterwards convicted and sentenced to imprisonment.

Upon motions duly presented the clerk was afterwards directed to pay to defendants' counsel funds deposited under the above orders, less costs. He retained 1 per centum as compensation, and the court refused to declare this sum unlawfully withheld and direct its return. The matter is here by writ of error to the District Court.

It is now maintained that section 828 does not apply to criminal cases. Further, that if construed to be applicable where cash is deposited in lieu of bail for appearance of one charged with crime, it conflicts with the federal Constitution, Fifth Amendment, "No person shall * * * be deprived of * * * liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation;" also with article 4, § 2, cl. 1, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" and with the Eighth Amendment, "Excessive bail shall not be required."

Our jurisdiction depends upon whether the case really and substantially involves the constitutionality of the section in question as construed and applied. Judicial *Code, § 238 (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. § 1215]); *Rakes v. United States*, 212 U. S. 55, 58, 29 Sup. Ct. 244, 53 L. Ed. 401; *Lamar v. United States*, 240 U. S. 60, 65, 36 Sup. Ct. 255, 60 L. Ed. 526. And we deem it too clear for serious discussion that, as enforced below, the statute deprived plaintiffs in error of no right guaranteed by any of the constitutional provisions relied upon. With full knowledge they voluntarily asked to deposit money with the clerk, and later requested that he be required to pay it out. Having thus obtained his services, they now deny his claim for compensation. Obviously, nothing was taken from them without due process of law; their property was not taken for public use; they were not deprived of any

privilege or immunity enjoyed by citizens of other states; and the record reveals no relation between the contested charge and any excessive bail. We think the suggested constitutional questions are wholly wanting in merit and too insubstantial to support our jurisdiction. *Brolan v. United States*, 236 U. S. 216, 218, 35 Sup. Ct. 285, 59 L. Ed. 544. The writ of error must be

Dismissed.

Mr. Justice HOLMES and Mr. Justice BRANDEIS dissent.

(250 U. S. 130)

KINZELL v. CHICAGO, M. & ST. P. RY. CO.

(Argued April 15, 1919. Decided May 19, 1919.)

No. 485.

COMMERCE $\Leftrightarrow$ 27(5)—EMPLOYERS' LIABILITY—EMPLOYMENT IN "INTERSTATE COMMERCE."

The filling with earth, by a railroad company, engaged in interstate commerce, of a wooden trestle, by which its track was carried across a gulch, the purpose being to continue the track on the solid embankment when completed, having progressed to the extent where it required the work of men and machinery to keep such interstate track clear of such earth during further construction, such work was not only concerned with, but was an intimate and integral part of, the conducting of interstate transportation over the bridge, so that a railroad employé injured while so working was then employed in "interstate commerce" within the federal Employers' Liability Act (Comp. St. §§ 8657-8665).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

On Writ of Certiorari to the Supreme Court of the State of Idaho.

Action by William Kinzell against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff was reversed by the Supreme Court of Idaho (171 Pac. 1136), and plaintiff brings certiorari. Reversed and remanded.

Messrs. James A. Wayne, of Wallace, Idaho, and John P. Gray, of Cœur D'Alene, Idaho, for petitioner.

Mr. George W. Korte, of Seattle, Wash., for respondent.

Mr. Justice CLARKE delivered the opinion of the Court.

This case comes into this court on writ of certiorari to the Supreme Court of the state of Idaho and all of the facts essential to its decision are admitted or are not controverted, and are as follows:

When the accident complained of in the case occurred, the railway company, respondent, was engaged in filling with earth a wooden trestle-work bridge, 1,200 feet in length, by which its track was carried across a dry gulch *or coulee, the purpose being to continue the track upon the solid embankment when it should be completed.

It was admitted that the railway company was engaged in interstate commerce, and that during the progress of the filling the bridge was used for interstate trains. Pursuant to an order of court, the petitioner, an employé of the respondent, elected to rely on the federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. §§ 8657-8665) for his right to recover.

Several weeks prior to the accident to the petitioner Kinzell, the work of filling the bridge had progressed to such a stage that when earth was dumped from cars it would be heaped up beside the track higher than the tops of the ties and rails so that it became necessary to spread it by pushing it away from the track toward the edge of the fill, in order to prevent its falling back upon the rails and to widen the embankment. To thus spread the earth an appliance called in the record a "dozer," and sometimes a "bull dozer," was used. It consisted substantially of a flat car body with adjustable wings or scrapers, so designed as to remove any earth which might fall upon the rails and also to press or push that heaped up at the side of the track out to the edge of the embankment.

When a trainload of earth would arrive at the bridge the practice was to couple the "dozer" to the forward end of the cars and then they and the "dozer" would be pushed to the place at which it was desired to unload the earth. After the cars were dumped the pulling of the "dozer" back with them would scrape the earth from the tops of the rails and would push it away from the track, thus contributing to keep the track clear and to widen the embankment.

For several weeks prior to the accident complained of, Kinzell, with an assistant, had been in charge of this "dozer," using it as described, and in addition to this they were required to remove, with shovels, earth or stones which fell upon the track, so, the superintendent of the *railway testified, as to make it safe for the operation of trains. The rails and ties had not been transferred to the embankment, but were still sustained by the bridge substructure when the accident occurred.

Kinzell was injured by what he claimed was negligence of the company in the manner of coupling a train of cars to the "dozer" as an immediate preliminary to such an unloading and cleaning movement as we have described.

Much is made in argument of the contention that the fill in progress was not the repairing of, nor the furnishing of support to,

the bridge, which, by the testimony of the engineer in charge of bridges, had about a year "of life" remaining when the accident occurred. For this reason it is contended that the principles of the Pedersen decision, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, do not apply. But in the view we take of the case this is not important.

With these facts before it, the Supreme Court of Idaho, in its judgment which we are reviewing, reversed the judgment of the lower court in Kinzell's favor, solely upon the ground that he was not employed in interstate commerce at the time he was injured, and gave this as the reason for its conclusion:

"We are of the opinion that constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction, and that the fill does not become a part of the railroad until it is completed and the track is placed upon it instead of upon the trestle."

Such conclusion, of course, is not derived from any construction of the act of Congress, but rests wholly upon the interpretation which the court placed upon the undisputed facts, as we have stated them.

The federal Employers' Liability Act provides that:

"Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while *he is employed by such carrier in such commerce." 35 Stat. 65, c. 149.

It being admitted that the railway company was engaged in interstate commerce, the only question for decision is whether the petitioner was employed in such commerce, within the meaning of the act as construed by this court.

In *Pedersen v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, it is stated that a guide to a decision of such a case as we have here may be found in the questions: Was the work being done independently of the interstate commerce in which the company was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? And in other cases it is said, in substance, that in such inquiries may be found the true test of employment in such commerce in the sense intended by the act. *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; *New York Central R. R. Co. v. White*, 243 U. S. 188, 192, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1 Ann. Cas.

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1917D, 629. It is also settled that the doing of work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce within the meaning of the act. *New York Central, etc., R. R. Co. v. Carr*, 238 U. S. 260, 35 Sup. Ct. 780, 59 L. Ed. 1298; *Louisville & Nashville R. R. Co. v. Parker*, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119; *Pecos & Northern Texas Ry. Co. v. Rosenbloom*, 240 U. S. 439, 36 Sup. Ct. 390, 60 L. Ed. 730; *Southern Railway Co. v. Puckett*, 244 U. S. 571, 573, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69.

It is in evidence in this case, indeed, it is obvious, that the "dozer" was not called into use until the fill had reached the level of the tops of the ties and had become of such width that the earth when dumped would pile up near the track so as to fall back upon it, if not removed, and that it was used for the double purpose of keeping the rails clear for the interstate commerce passing over them and *for pushing the material to the edge of the embankment to widen it. When to this it is added that a part of Kinzell's duty was, with a shovel, to keep the track between the rails clear of earth and stones, which might fall upon it in the progress of the work, clearly it cannot be soundly said that when he was in the act of preparing to make the required use of the "dozer" he was acting independently of the interstate commerce in which the railway company was engaged, or that the performance of his duties was a matter of indifference to the conduct of that commerce. He was "employed" in keeping the interstate track, which was in daily use, clear and safe for interstate trains, or, as the superintendent of the railway company stated it, he was engaged with the "dozer" and shovel in making the track safe for the operation of trains and in avoiding delay to the commerce passing over it. Thus the case falls plainly within the scope of the decisions which we have cited, supra, and, regardless of what might have been said of the fill before, it had clearly become a part of the interstate railway when the petitioner was injured, for it had reached the stage where it required the work of men and machinery to keep the interstate tracks clear during further construction, and the work of such men was thereafter not only concerned with, it was an intimate and integral part of, the conducting of interstate transportation over the bridge.

We cannot doubt that the Supreme Court of Idaho fell into error in regarding the fill as new construction so unrelated to the conduct of interstate commerce over the bridge at the time the accident to the petitioner occurred that the work being done by him should be regarded as not related to or necessary to the safe conduct of that commerce, and the judgment of that court is therefore

reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

(250 U. S. 30)

COLEMAN v. UNITED STATES.

(Argued April 29, 1919. Decided May 19, 1919.)

No. 343.

INTERNAL REVENUE §36 — REFUNDING TAX — LIMITATION FOR CLAIM — TAX "ERRONEOUSLY COLLECTED."

A succession tax under Act June 13, 1898, § 29, collected after passage, and so contrary to terms, of Act June 27, 1902, § 3, directing refunding of such taxes collected on contingent beneficial interests which shall not have vested prior to July 1, 1902, and forbidding a tax to be imposed on such an interest, is erroneously collected, within Act July 27, 1912, limiting time for presentment of claims for refunding internal tax.

Appeal from the Court of Claims.

Action by Louise L. Coleman, as surviving administratrix of Walter H. Coleman, deceased, against the United States. Petition dismissed (53 Ct. Cl. 628), and plaintiff appeals. Affirmed.

See, also, 250 U. S. 30, 39 Sup. Ct. 415, 63 L. Ed. —.

*Mr. H. T. Newcomb, of New York City, for appellant.

Mr. Solicitor General Alex. C. King, of Atlanta, Ga., for the United States.

Mr. Justice HOLMES delivered the opinion of the Court.

This is a suit to recover \$6,721.71 paid for a tax upon the distributive shares of the children of Walter H. Coleman in his personal property. The tax was demanded and paid under the Act of June 13, 1898, c. 448, § 29, 30 Stat. 448, 464, 465. The later Act of June 27, 1902, c. 1160, § 3, 32 Stat. 406, directed the refunding of so much of such taxes "as may have been collected on contingent beneficial interests which shall not have been vested prior to July first," 1902, and forbade a tax to be imposed upon such an interest. On July 1, 1902, Coleman was dead but his debts had not been paid, the year allowed for the proof of claims against his estate had not expired, and the expenses of administration had not been ascertained. Therefore, it is said, the interest of his children still was contingent. *United States v. Jones*, 236 U. S. 106, 35 Sup. Ct. 261, 59 L. Ed. 488, Ann. Cas. 1916A, 316; *McCoach v. Pratt*, 236 U. S. 562, 35 Sup. Ct. 421, 59 L. Ed. 720. The tax was collected on May 29, 1903. On March 17, 1914, the claimants applied to the Collector of Internal Revenue and through him to the

Commissioner of Internal Revenue to refund it. The application was rejected and on March 9, 1916, the claimant began this suit. The Court of Claims held that it was barred by the Act of July 27, 1912, c. 256, 37 Stat. 240.

* * That statute provides that "all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected" under the above-mentioned § 29 of the Act of June 13, 1898, "or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said Act may be presented to the Commissioner of Internal Revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter." By § 2 payment of claims so presented is directed. The act is entitled "An Act extending the time for the repayment of certain war revenue taxes erroneously collected," and the claimant contends that the present claim is not of that sort, that this tax having been paid without protest or any reservation of rights, the claim is only for a bounty conferred by the Act of 1902 and that the benevolence of that act never has been withdrawn. But, bounty or not, the direction in the Act of 1902 was on the footing that the sums ordered to be repaid were collected erroneously, *Vanderbilt v. Eldman*, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563, and was an order for the refunding of a tax alleged to have been erroneously collected. The present tax had not been collected when the Act of June 27, 1902, was passed, but was collected afterwards contrary to its terms. There was little bounty in its application to such a case. No argument can make it plainer than do the words themselves that the Act of 1912 applies to the present claim, and that it was presented too late.

Judgment affirmed.

(250 U. S. 33)

SAGE et al. v. UNITED STATES.

(Argued April 29, 1919. Decided May 19, 1919.)

No. 344.

1. JUDGMENT ⚡702—RES JUDICATA—IDENTITY OF PARTIES.

Judgment for part only of the amount claimed in action against the collector of internal revenue to recover back taxes paid, not being a judgment for or against the United States, is not a bar to subsequent action against it for the balance.

2. INTERNAL REVENUE ⚡36 — REFUNDING TAX—EFFECT OF STATUTE ON PRIOR JUDGMENT.

Were judgment for part only of the amount claimed, in action against the collector of internal revenue to recover back taxes erroneously collected under Act June 13, 1898, § 29, otherwise a bar to action against the United States to recover the balance, the bar would be

removed by the subsequent enactment of Act July 27, 1912, directing repayment of such taxes to claimants presenting their claims as prescribed.

3. INTERNAL REVENUE ⚡36 — REFUNDING TAX—PRESENTMENT OF CLAIM.

Under Act July 27, 1912, §§ 1, 2, providing that claims for refunding of internal tax erroneously or illegally assessed or collected under Act June 13, 1898, § 29, may be presented to the commissioner of Internal Revenue on or before January 1, 1914, and that the Secretary of the Treasury shall pay to such claimants "as have presented or shall hereafter so present their claims," and shall establish such erroneous or illegal assessment and collection, prior presentation of such a claim, under Act June 27, 1902, c. 1160, § 3, 32 Stat. 406, though as a prerequisite to a prior suit against the collector, is sufficient.

4. COURTS ⚡461—COURT OF CLAIMS—ACCRUAL OF CAUSE — REFUNDING INTERNAL REVENUE TAX.

Rights being created where they had not existed before, by Act July 27, 1912, authorizing presentment, on or before January 1, 1914, of claims for refunding of internal tax erroneously or illegally assessed or collected under Act June 13, 1898, § 29, and providing for repayment to such claimants "as have presented or shall hereafter so present their claims," and shall establish such assessment and collection suit thereon in 1917, is within the six years after the claim first accrued limited by Rev. St. § 1069 (Comp. St. § 1147) for suit in the Court of Claims, though the claim was presented before enactment of the act of 1912.

Appeal from the Court of Claims.

Action by William H. Sage and others, executors of Dean Sage, deceased, against the United States. Petition dismissed (53 Ct. Cl. 628), and plaintiffs appeal. Reversed.

Mr. H. T. Newcomb, of New York City, for appellants.

Mr. Solicitor General Alex. C. King, of Atlanta, Ga., for the United States.

* Mr. Justice HOLMES delivered the opinion of the Court.

This is a claim under the Acts of June 27, 1902, c. 1160, § 3, 32 Stat. 406, and of July 27, 1912, c. 256, 37 Stat. 240, to have refunded a tax collected under the Act of June 13, 1898, c. 448, § 29, 30 Stat. 448, 464, 465, upon legacies to the wife and children of the testator Dean Sage. The petition was dismissed by the Court of Claims on demurrer. The testator died domiciled in New York on June 23, 1902, so that the debts of the estate were not ascertained and, as decided in *McCoach v. Pratt*, 236 U. S. 562, 35 Sup. Ct. 421, 59 L. Ed. 720; the legacies were not "absolutely vested in possession or enjoyment" before July 1, 1902, and therefore by the terms of the Act of 1902 were not subject to the tax under the above mentioned § 29. A tax of \$63,940.88 was collected, however, in June, 1903. On August 24, 1903, an application to

have it refunded on the ground that the legacies were not subject to taxation under § 29 was made to the Commissioner of Internal Revenue, but was denied in the following month. Two years later the petitioners sued the Collector and in May, 1912, got judgment for \$30,275.49, with interest and costs, which was satisfied by the United States. *McCoach v. Pratt*, supra, and *United States v. Jones*, 236 U. S. 106, 35 Sup. Ct. 261, 59 L. Ed. 488, Ann. Cas. 1916A, 316, had not been decided at that time and it was held that some of the interests were vested in enjoyment. *Ward v. Sage*, 185 Fed. 7, 108 C. C. A. 413. This suit is for the unrepaid residue and was begun on January 23, 1917. The Government contends that the judgment and also the Act of July 27, 1912, c. 256, § 1, 37 Stat. 240, are bars to the present claim.

[1, 2] The former judgment is not a bar. It is true that the statutes modify the common law liability for money wrongfully collected by duress so far as to require a preliminary appeal to the Commissioner of Internal Revenue before bringing a suit. Rev. St. § 3226 (Comp. St. § 5949). It is true also that it is the duty of the District Attorney to appear for the collector in such suits, Rev. St. § 771 (Comp. St. § 1296); that the judgment is to be paid by the United States and the collector is exempted from execution if a certificate is granted by the Court that there was probable cause for his act, Rev. St. § 989 (Comp. St. § 1635); and that there was a permanent appropriation for the refunding of taxes illegally collected. Rev. St. § 3689 (17) (Comp. St. § 6799). No doubt too, if it appeared in a suit against a collector who had acted with probable cause and had turned over his money to the United States, that a part of the tax properly was due to the United States, unnecessary formalities might be omitted and the sum properly due might be retained. Of course, the United States in such a case could not require a second payment of that sum. *Crocker v. Malley*, March 17, 1919. 249 U. S. 223, 39 Sup. Ct. 270, 63 L. Ed. 573. But no one could contend that technically a judgment of a District Court in a suit against a collector was a judgment against or in favor of the United States. It is hard to say that the United States is privy to such a judgment or that it would be bound by it if a suit were brought in the Court of Claims. The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different. It does not concern property in which the United States asserts an interest on its own behalf or as trustee, as in *Minnesota v. Hitchcock*, 185 U. S. 373, 388, 22 Sup. Ct. 650, 46 L. Ed. 954. At the time the judgment is entered the United States is a stranger. Subsequently the discretionary action of officials may, or it may not, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise

from the subsequent official act, not from the judgment itself. *United States v. Frerichs*, 124 U. S. 315, 8 Sup. Ct. 514, 31 L. Ed. 471. But perhaps it would be enough to say that if the judgment otherwise were a bar the bar would be removed by the subsequent enactment of the Act of July 27, 1912, c. 256, 37 Stat. 240, upon which, as well as the Act of 1902, this claim is based.

[3] The Act of July 27, 1912, after providing in § 1 for the presentation of claims for taxes erroneously collected under the above mentioned § 29, as stated in the preceding case of *Coleman v. United States*, 250 U. S. 30, 39 Sup. Ct. 414, 63 L. Ed. —, directs repayment in § 2 to "such claimants as have presented or shall hereafter so present their claims," and establish them. The claimants had presented their claim, and so had complied with the letter of the Act. But it is said that they filed it simply as a prerequisite to their suit against the collector and that its effect was extinguished by the judgment in that suit. This argument reads into the words of the statute what is not there and reads what was there out of the claim. The claim was presented to the Commissioner of Internal Revenue to get the money. The suit was only the undesired alternative in case the Commissioner rejected the claim. It plays no part in the question that we now are considering. Suppose that no suit had been brought we can see no ground for denying that the claim would have been presented within the meaning of the Act. It did not have to be a claim under the act as the statute in terms contemplated that it might have been presented before the statute was passed. But if the presenting was sufficient before the suit was brought it is sufficient now. The statute of course does not confine its act of justice to unrejected claims.

[4] The Act of 1912 applied in terms to "all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed and collected" under the above mentioned § 29. The only condition was that it should have been presented not later than January 1, 1914. Until that time no statute of limitations could begin to run. After the Act was passed an application was made on September 7, 1916, to the Secretary of the Treasury for repayment of the residue of the erroneously collected tax. It was rejected on October 30, 1916, on the mistaken ground that the judgment against the collector finished the matter. This suit was brought on January 23, 1917, and so was within the six years allowed by Rev. St. § 1069 (Comp. St. § 1147), for suits in the Court of Claims. The Act of 1912, like that of 1902 created rights where they had not existed before, *United States v. Hvoslef*, 237 U. S. 1, 12, 13, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286, and the claimant's rights are not barred. See further *James v. Hicks*, 110 U. S. 272, 4 Sup. Ct. 6, 28 L. Ed. 144.

Judgment reversed.

(250 U. S. 58)

KENNY v. MILES et al.

(Argued Jan. 24, 1919. Decided May 19, 1919.)
No. 179.1. INDIANS ⇐15(2)—"RESTRICTED LANDS"—
PARTITION OR SALE AFTER ALLOTTEE'S
DEATH.

"Restricted lands" within Act April 18, 1912, § 6, supplementary to and amendatory of Act June 28, 1906, and declaring invalid partition or sale of such lands of a deceased Osage allottee, till approved by the Secretary of Interior, means, as is shown by a later sentence in that section and by various provisions of the act of 1906, lands the alienation of which is subject to restrictions imposed by Congress to protect the Indians from their own incompetency.

2. INDIANS ⇐15(2)—ALLOTTED LANDS—RE-
STRICTION ON ALIENATION.

Lands allotted in the name of an Osage Indian under Act June 28, 1906, whether allotted before or after her death, *held*, in view of sections 1, 2, 6, 7, and 8 thereof, restricted lands, so that, under Act April 18, 1912, § 6, they cannot be sold or partitioned after her death without approval of the Secretary of the Interior; neither she nor her heirs, who are of Osage blood and members of the tribe, having received a certificate of competency.

3. INDIANS ⇐15(2)—PARTITION OF INDIAN
LANDS—INOPERATIVE JUDGMENT.

Judgment ordering a partition or sale in suit under Act April 18, 1912, § 6, for partition of lands of a deceased Osage allottee, is inoperative and binding on no one, the lands being restricted, and there being no approval by the Secretary of the Interior, without which the section provides no partition or sale of such lands shall be valid; and so is not conclusive on the question of heirship in proceedings for settlement of deceased's estate.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Proceeding for settlement of the estate of Lah-tah-sah, a deceased Osage allottee. Judgment holding that John Kenny and Laban Miles were equal heirs was affirmed by the Supreme Court of Oklahoma (162 Pac. 775), and Kenny brings certiorari. Reversed.

*Messrs. Solicitor General King, and Charles J. Kappler, of Washington, D. C., for petitioner.

Mr. H. P. White, of Pawhuska, Okl., for respondents.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

In concluding a proceeding in the county court of Osage county, Oklahoma, for the settlement of the estate of Lah-tah-sah, a deceased Indian woman, it became necessary to determine who were her heirs. Two claimants appeared and sought to establish such

a relation. One, John Kenny, claimed to be a son and the sole heir; and the other, Laban Miles, claimed to be the surviving husband and an equal heir with Kenny. It was conceded that Kenny was a son, but it was disputed that Miles ever was the deceased's husband. If he was such when she died, he and Kenny were equal heirs; otherwise Kenny was the sole heir.

At the hearing in that proceeding Miles produced and relied on a judgment in a partition suit, which he had brought against Kenny in the district court of the same county, wherein it was found that he and the deceased were married about a year before her death, and that he remained her husband until she died. Over Kenny's protest, based on congressional enactments presently to be noticed, the county court treated that judgment as a conclusive determination of the matters so found, and rejected evidence produced by Kenny to show that there had been no such marriage. It was accordingly adjudged that Miles and Kenny were equal heirs, and that decision was affirmed by the Supreme Court of the state. 162 Pac. 775. The case is here on writ of certiorari.

*Whether, consistently with the congressional enactments on which Kenny's protest was based, the judgment in the partition suit could be treated as conclusive of the matters therein found is the ultimate federal question in the case.

Lah-tah-sah was an Indian of the Osage Tribe, duly enrolled as such. This entitled her to share in the division and allotment of the lands and funds of the tribe under the Act of June 28, 1906, c. 3572, 34 Stat. 539. She died intestate August 19, 1908. Thereafter two tribal deeds naming her as grantee,¹ and approved by the Secretary of the Interior, were issued under that act. The deeds were for lands allotted to her or in her right out of the tribal lands. One was for 160 acres designated as a homestead, and the other was for 500.12 acres designated as surplus lands. Both purported to pass a title in fee simple, subject to the conditions, limitations, and provisions of the act. It was to these lands that the judgment in the partition suit related. That judgment treated the lands as inherited from Lah-tah-sah, and ordered that they be partitioned equally between Miles and Kenny as her heirs, or if not susceptible of partition in kind, that they be sold with a view to an equal division of the proceeds.

By section 6 of the Act of April 18, 1912, c. 83, 37 Stat. 86, which is supplementary to

¹ As to the legal effect of the deeds issued to her after her death, see besides section 6 of the Act of 1906, Rev. Stat. § 2448 (Comp. St. § 5098); *Crews v. Burcham*, 1 Black, 352, 356, 17 L. Ed. 91; *United States v. Chase*, 245 U. S. 89, 101, 38 Sup. Ct. 24, 62 L. Ed. 168.

and amendatory of the Act of 1906, it is provided that—

"The lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the state of Oklahoma: Provided, that no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior."

*61 It was after this enactment that the partition suit was begun, and there was here no approval by the Secretary of the Interior.

Kenny's protest was based on the Acts of 1906 and 1912, and was to the effect that the lands to which the partition suit related were restricted lands, and that in consequence the judgment for their partition or sale was of no effect in the absence of the prescribed approval by the Secretary of the Interior.

[1] The term "restricted lands" in section 6 of the Act of 1912 means lands the alienation of which is subject to restrictions imposed by Congress to protect the Indians from their own incompetency. This is shown by a later sentence in the same section and by various provisions in the Act of 1906.

[2] To determine whether the lands ordered to be partitioned or sold were restricted requires some consideration of the Act of 1906, for it was under that act that they were allotted and the tribal deeds issued. By its first section the act makes the tribal roll as existing January 1, 1906, with eliminations and additions not material here, the authentic roll of the members for the purposes of the act. By its second section it provides that the tribal lands, with stated exceptions, shall be divided among the members in such way as to give each a fair share in acres; that every member "shown by the roll" shall be permitted to select three tracts of 160 acres each; that after all have made the three selections the remaining lands, with some exceptions, shall be divided as equally as practicable by a designated commission, and that—

*62 "Fourth. * * * Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead,² and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided."

The second section further provides (paragraph 7) that when any adult member is found fully competent to care for his own

affairs the Secretary of the Interior may issue to him a certificate of competency, authorizing him to sell and convey any of the lands deeded to him under the act other than his homestead, which where the certificate issues³ is to remain inalienable for twenty-five years, or during the life of the homestead allottee. Other sections reserve to the tribe for twenty-five years the oil, gas, coal and other minerals in the allotted lands and provide that the tribal funds and moneys, with specified exceptions, shall be placed to the credit of the several members "shown by the authorized roll" or their heirs, on the basis of a pro rata division and shall be held in trust by the United States for twenty-five years. The sixth section is as follows:

"Sec. 6. That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the territory of Oklahoma, or of the state in which said reservation may be hereafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally."

The seventh section shows that the allotted lands are for the sole use of the individual members, or their heirs, and that the same may be leased, subject to the restriction that to be effective "all leases," whether for the benefit of the individual members or their heirs, must have the approval of the Secretary of the Interior; and the eighth section provides that the deeds to allottees shall be executed by the principal chief of the tribe, but shall not be valid until the Secretary of the Interior approves them. *63

The Act of 1912, in its sixth section, treats the restraints applicable to living allottees as also applicable to such of the heirs of deceased allottees as are members of the tribe, and expressly provides that—

"When the heirs of such deceased allottees have certificates of competency * * * the restrictions on alienation are hereby removed."

Lah-tah-sah died without receiving a certificate of competency. Kenny and Miles, who claim to be her heirs, are of Osage blood and members of the tribe, and neither has received such a certificate. Thus the case differs materially from *Levindale Lead, etc., Co. v. Coleman*, 241 U. S. 432, 36 Sup. Ct. 644, 60 L. Ed. 1080, where it was held to be obvious from an examination of the entire Act of 1906 that the restrictions on alienation were imposed to secure the welfare of Indians—wards of the United States—and were not intended to apply to lands, or undivided interests therein inherited by white men who were not members of the tribe. There a white man, who as heir of a de-

² A subsequent joint resolution permitted the homestead to be designated from lands in any one or more of the three selections. No. 19, 35 Stat. 1167.

³ See *Aaron v. United States*, 204 Fed. 943, 945, 946, 123 C. C. A. 265.

ceased Osage wife and child took an undivided interest in lands allotted in their behalf after their death, was held to have an unrestricted right to alienate his interest; but the court was careful to indicate that it was not dealing with the interests of Indian heirs.

The Act of 1906 makes it plain that all whose names were on the authentic roll were to share in the division of the tribal property. They were the "members" among whom the lands were to be allotted in stated portions. Lah-tah-sah, being one of them, was entitled to such an allotment. It was made in her name, but whether before or after her death is left uncertain by the record. The court below treated it as made after her death and held that the lands were not restricted, its decision being put *on the ground that the restrictions on alienation are not applicable to lands allotted in the right of deceased members, but only to such as are allotted to members living at that time. We cannot assent to that conclusion.

Under the Act of 1906 the death of a member entitled to an allotment does not extinguish his right. According to the implication of the act and the administrative rulings, the allotment still may be made in his name. Where this is done he is regarded as the allottee and his heirs as taking by descent from him. Such allotments and all others are made under one comprehensive provision, in which there is no distinctive mention of either living or deceased members. The restrictions are imposed by another provision equally comprehensive, and it makes no distinction between lands allotted to living members and those allotted in the right of deceased members. Nor is any such distinction made in the section dealing with descent. The heirs are generally Indians, and seldom white men. When they are Indians they are equally within the occasion for the restrictions, whether the allotment be to a living member or in the right of one deceased, *Talley v. Burgess*, 246 U. S. 104, 108, 38 Sup. Ct. 287, 62 L. Ed. 600; and in either case some may be without any allotment of their own, because born after the time for closing the roll. Thus those who take under allotments made in the right of deceased members are no less within the letter and spirit of the restrictions than are other heirs. That all are intended to be protected is shown by the leasing provision, which requires that "all

leases" on the part of heirs shall have the approval of the Secretary of the Interior.

We, therefore, are of opinion that the lands allotted in the Lah-tah-sah's name were restricted lands, whether allotted before or after her death.

The Act of 1906 is quite unlike the earlier acts considered in the cases of *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834, and *Skelton v. Dill*, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. Ed. 198, which are cited *in support of the conclusion below. * Those acts, as was pointed out in our opinions, contained separate provisions for two classes of allotments—one to members living at the time, and the other in the right of deceased members. In the provisions dealing with the first class there were express restrictions on the right of alienation, and in those dealing with the second class there was an entire absence of such restrictions. Because of this difference in terms, we held that Congress intended that allotments of the second class should be unrestricted. The differences between those earlier acts and that of 1906 are pronounced and reasonably can be explained on no other theory than that Congress intended that all allotments under the Act of 1906 should be restricted, subject of course to the issue of certificates of competency. And that this is what was intended becomes even more manifest when it is considered that in the meantime Congress had imposed other restrictions in respect of allotments under the earlier acts and in doing so had discarded the distinction before made between the two classes of allotments so far as full-blood Indian heirs were concerned. *Talley v. Burgess*, supra.

[3] We have seen that the provision in the act of 1912 under which the partition suit was brought and entertained declares that where the lands are restricted, as was the case here, no partition or sale shall be valid until approved by the Secretary of the Interior. No approval was given in this instance. In consequence the judgment ordering a partition or sale—it had no other purpose—was inoperative. It could not be executed and was not binding on any one. The findings were part of it and were of no force apart from it.

It results that Kenny's protest against the use made of that judgment was well grounded.

Judgment reversed.

(250 U. S. 22)

TAYABAS LAND CO. v. MANILA R. CO.

(Argued April 25, 1919. Decided May 19, 1919.)

No. 331.

1. COURTS 366(5) — FEDERAL SUPREME COURT—RULING OF PHILIPPINE COURT ON LOCAL STATUTE.

The national Supreme Court cannot reverse the Supreme Court of the Philippines on its construction of local statutes.

2. COURTS 387(4) — FEDERAL SUPREME COURT — ERROR TO PHILIPPINE COURT—QUESTION OF FACT.

The national Supreme Court on writ of error to the Supreme Court of the Philippines cannot examine questions of fact.

In Error to the Supreme Court of the Philippine Islands.

Condemnation proceedings by the Manila Railroad Company against the Tayabas Land Company, assignee and successor of Romana Velasquez and others. Judgment was modified by the Supreme Court of the Philippine Islands, by reduction of award of compensation, and the Land Company brings error. Affirmed.

*Messrs. David A. Baer, of Washington, D. C., and C. W. O'Brien, of Manila, P. I., for plaintiff in error.

Messrs. Edward S. Bailey, of Washington, D. C., and C. A. De Witt, of New York City, for defendant in error.

Mr. Justice McKENNA delivered the opinion of the Court.

A case of eminent domain exercised by the railroad company to condemn twelve small parcels of land in Lucena, Province of Tayabas, Philippine Islands, in accordance with the petition of the railroad company.

In accordance with the statutory provisions three commissioners were appointed to hear the parties and inspect the properties. They subsequently reported that the parties had been heard and that they, the commissioners, had inspected the properties and examined the same "inch by inch."

They made further detail of their proceedings, set forth certain causes for the increase in value of the properties in the four or five years preceding the hearing, even before the coming of the railroad to the town "so that the value of land near Cotta was quoted at P2.00 up per square meter, according to the importance and situation of the land," but that the railroad had "undoubtedly greatly influenced the rise in the prices of the same lands." They reported, however, that, taking into consideration all the circumstances, benefits to the railroad and others, they unanimously fixed the values of the pieces of property belonging to the parties

who were first impleaded in the cause. These values it is not necessary to give nor to designate the properties to which they were attached, for the reason that the ownership of the properties, part before and part after the rendition of the commissioners' report, had become vested in the Tayabas Land Company.

In accordance with the report judgment was rendered in favor of the land company for P81,412.75 with interest at the rate of 6 per cent. from the date of taking possession of the land.

Motions for new trials were denied, and the case was taken to the Supreme Court of the Islands by the railroad company, and that court modified the judgment by reducing the award for one of the parcels, containing 16,094 square meters, to the sum of P6,500 and the damages for the remaining parcels were fixed at the same proportionate amount.

The company says, however, that—

"The prime question involved in this entire case is in the last analysis one of value, that is, what is a fair value of the land taken by the railroad company for its railroad station at Lucena?"

That, indeed, is the ultimate inquiry but it depends, according to other contentions, upon the power of the Supreme Court over the report of the commissioners and to review and consider the evidence. In other words, the weight that was to be given to the report of the commissioners as a matter of fact and law under section 246 of the Code of Civil Procedure of the Islands and to the findings of the Court of First Instance under sections 273 and 497 of the same Code.

Section 273 describes the elements that must be considered in determining in a case where "the preponderance or superior weight of the evidence on the issues involved lies," and section 497 provides for the extent of the power of the Supreme Court to review and dispose of the case on appeal, and it is contended that the Supreme Court was bound, as the Court of First Instance was, to decide by the preponderance of the evidence determined in the same way. This may be conceded, and to what extent the Supreme Court satisfied the requirement of the section we shall presently consider after we have given attention to the more insistent contention based on section 246, which reads as follows:

"Upon the filing of such report in court, the court shall, upon hearing, accept the same and render judgment in accordance therewith; or, for cause shown, it may recommit the report to the commissioners for further report of facts; or it may set aside the report and appoint new commissioners; or it may accept the report in part and reject it in part, and may make such final order and judgment as shall secure to the plaintiff the property essential

to the exercise of his rights under the law, and to the defendant just compensation for the land so taken; and the judgment shall require payment of the sum awarded as provided in the next section, before the plaintiff can enter upon the ground and appropriate it to the public use."

It will be observed that an alternative power is presented, either to accept the report and render judgment in accordance therewith or to make other dispositions of it or upon it; the latter, however, in a very general way. And the absence of detail encourages and gives some plausibility to controversy, but it is resolved, we think, against the contention of the land company by the analysis of the Supreme Court of the section. The court points out, quoting the section, that "it may accept the report in part and reject it in part;" and it observed that that situation alone might limit its, the court's, power if it were not "also empowered to make such final order as shall secure to the plaintiff the property essential to the exercise of his rights under the law, and *to the defendant just compensation for the land so taken." A comprehensive power, we may instantly say, and one required to be exercised and adequate when exercised to pass upon and finally adjudge the designated rights. And it gives facility to the statute, substitutes for circumlocution and delay directness and expedition, qualities that a statute of eminent domain should possess.

The court further pointed out that the "final 'order and judgment' were reviewable by it by means of a bill of exceptions in the same way as any other 'action,'" and decided besides that section 496 of the Code was applicable. That section gives power in the exercise of appellate discretion to "affirm, reverse, or modify any final judgment, order, or decree of the Court of First Instance." And this discretion, the Supreme Court in the present case decided, extends to cases of eminent domain, and, where section 497 of the Code providing for motions for new trial had been complied with, it, the court, might "examine the testimony and decide the case by a preponderance of the evidence; or, in other words, retry the case on the merits and render such order or judgment as justice and equity may require." The final conclusion of the court was, rejecting the contention of appellants, that it had power "to change or modify the report of the commissioners by increasing or decreasing the amount of the award" if the facts of the case justified. And it was the conclusion of the court that the facts so justified; and, after a review of prior cases, it rejected the contention that its conclusion was in conflict with them.

It will be observed, therefore, that the court considered that it was under the same obligation to determine the case by the preponderance of the evidence as was the Court of First Instance, and discharging its obli-

gation, that is, in determining upon the weight of the evidence, its estimate of the values of the properties taken by the railroad was different from that of the Court of First Instance. *We are brought back, therefore, to the consideration of section 246 and the contention of appellants that under it the Supreme Court had transcended its powers in reducing the values found and reported by the commissioners, and "erred in holding as a matter of law that appellants were not entitled to recover the amount fixed by the commissioners," they being the tribunal to hear the evidence and view the premises, and that under section 246, their report being filed, the court was required "upon hearing to accept the same and render judgment in accordance therewith," there being no cause shown, it is contended, for recommitting the report or exercising any of the other alternatives permitted by the section.

[1, 2] But, as we have seen, as to its power of action upon the report of the commissioners the court differed radically with the land company, and if we should, in deference to the land company's contention, admit there is ambiguity in section 246, we should be unable nevertheless to reverse the ruling of the Supreme Court of the Islands upon the local statutes, and we must assume the court gave consideration to all of the testimony and estimated the weight to be assigned to the report and to the declaration of the commissioners that they had examined "inch by inch" the properties involved. We say this only in passing. The case is here on writ of error, and we cannot examine questions of fact. *Santos v. Roman Catholic Church*, 212 U. S. 463, 29 Sup. Ct. 338, 53 L. Ed. 599; *Ling Su Fan v. United States*, 218 U. S. 302, 308, 31 Sup. Ct. 21, 54 L. Ed. 1049, 30 L. R. A. (N. S.) 1176; *Harty v. Victoria*, 226 U. S. 12, 33 Sup. Ct. 4, 57 L. Ed. 103; *Gauzon v. Campania General, etc.*, 245 U. S. 86, 38 Sup. Ct. 46, 62 L. Ed. 165.

Errors of law besides those stated above are asserted. For instance the company contends that the court used the evidence that had been introduced to prove title as evidence of value, and, further, assigned too much strength to it. Both propositions are too intimately associated with and dependent upon the whole case to be estimated in separation. The court's consideration, therefore, or its *judgment upon them, we cannot disturb. Indeed, the contention of the land company is but an instance of its broader contention of want of power in the Supreme Court to review the findings of the Court of First Instance or to disregard the report of the commissioners. Accepting the decision of the court upon those propositions, we necessarily affirm its judgment.

Judgment affirmed.

Mr. Justice BRANDEIS concurs in the result.

(250 U. S. 39)

STATE OF ARKANSAS v. STATE OF MISSISSIPPI.

(Argued March 3 and 4, 1919. Decided May 19, 1919.)

No. 7, Original.

1. COURTS 347—FEDERAL COURT—PLEADING—REPLICATION.

Under new equity rule 31 (33 Sup. Ct. xxvii), no replication is required to make the issues, so absence thereof does not require allegations of answer to be taken as true.

2. STATES 12(2) — BOUNDARIES — NAVIGABLE STREAMS.

Where boundary on a navigable river of two states on opposite sides of and separated by it is fixed in the case of the one first admitted "up the same," and in case of the other as "the middle of the main channel," it is the middle of the main navigable channel, and not along the line equidistant between the banks.

3. STATES 13—BOUNDARIES—STATE DECISIONS AND CONSTITUTIONS.

Provisions of Constitutions of Mississippi and Arkansas, and decisions of courts thereof, relative to part of Mississippi river constituting boundary between those states, *held*, in suit between those states to determine such boundary, not to affect the question on the theory of acquiescence.

4. STATES 12(2)—BOUNDARIES—STREAMS—AVULSION.

After change by avulsion of course of stream, the middle of the channel of navigation, as it existed just before the avulsion, continues to be as it was theretofore, the boundary between states.

In Equity.

Original suit by the State of Arkansas against the State of Mississippi. Interlocutory decree appointing commission to fix boundary in accordance with the opinion.

* Messrs. Herbert Pope, of Chicago, Ill., Walter P. Armstrong, of Sardis, Miss., and J. M. Moore, of Little Rock, Ark., for complainant.

Messrs. Garner W. Green, of Jackson, Miss., and Gerald Fitz Gerald, of Clarksdale, Miss., for defendant.

Mr. Justice DAY delivered the opinion of the Court.

[1] This is a suit brought to determine a portion of the boundary line between the states of Arkansas and Mississippi. It appears that at the place in dispute the Mississippi river formerly had its course from Friar's Point in a southwesterly direction, then made a turn to the south, flowing in a southerly direction, then a turn towards the west in the shape of a half moon, then a sharp turn to the north and flowing northerly, and thence westerly, making a bend in

the river in the shape of a horseshoe, which was known as Horseshoe Bend. It is averred in the bill, that in 1848 the river suddenly left its course and ran westerly across the points of the bend, cutting off a tract of land which has become known as Horseshoe Island. The amended answer avers that this avulsion occurred in 1842; but the exact date is immaterial. That it did occur is clearly established, and it is generally spoken of in the testimony as happening in 1848. We may say preliminarily that we find no substance in the contention of the respondent that the allegations of the answer must be taken as true for want of replication. Under new equity rule 31 (33 Sup. Ct. xxvii) in a case of this character no replication is required in order to make the issues.

[2] The state of Arkansas contends that the old course of the river before the avulsion was within a body of water now known as Horseshoe Lake or Old river, a body of water of considerable length and depth. The state of Mississippi contends that the Old river ran through a body of water still remaining, but considerably further to the north, and known as Dustin Pond, and that before the avulsion the course of the river on the upper side of the Bend was considerably to the westward of the course claimed by Arkansas, and ran where now there is a slough not far from the middle of Horseshoe Island. These diverse claims are illustrated by an examination of the map, Exhibit A, attached to the bill.

As we view the case it is practically controlled by the decision of this court in *Arkansas v. Tennessee*, 246 U. S. 158, 38 Sup. Ct. 301, 62 L. Ed. 638, L. R. A. 1918D, 258. In view of that decision we are relieved of the necessity of a discussion in detail of much that is urged upon our attention now. Arkansas was admitted to the Union June 15, 1836 (5 Stat. 50, 51, c. 100) by an act of Congress which as to its boundaries provided:

* "Beginning in the middle of the main channel of the Mississippi river, on the parallel of thirty-six degrees north latitude, running from thence west, with the said parallel of latitude to the St. Francis river; thence up the middle of the main channel of said river to the parallel of thirty-six degrees thirty minutes north; from thence west to the southwest corner of the state of Missouri, and from thence to be bounded on the west, to the north bank of Red river, by the lines described in the first article of the treaty between the United States and the Cherokee Nation of Indians west of the Mississippi, made and concluded at the city of Washington on the 26th day of May, in the year of our Lord one thousand eight hundred and twenty-eight; and to be bounded on the south side of Red river by the Mexican boundary line, to the northwest corner of the state of Louisiana; thence east, with the Louisiana state line, to the middle of the main channel of the Missis-

issippi river; thence up the middle of the main channel of the said river, to the thirty-sixth degree of north latitude, the point of beginning."

Mississippi had previously been admitted to the Union by an act of Congress of March 1, 1817 (3 Stat. 348, c. 23), which provided:

"Beginning on the river Mississippi at the point where the southern boundary line of the state of Tennessee strikes the same, thence east along the said boundary line to the Tennessee river, thence up the same to the mouth of Bear creek; thence by a direct line to the northwest corner of the county of Washington [Alabama]; thence due south to the Gulf of Mexico; thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl river with Lake Borgne; thence up said river to the thirty-first degree of north latitude; thence west along the said degree of latitude to the Mississippi river; thence up the same to the beginning."

*It will be observed that the language of the Mississippi act, so far as now important to consider, fixes the boundary upon the Mississippi river as "up the same to the beginning," and the language of the Arkansas act is, "Beginning in the middle of the main channel of the Mississippi river; * * * thence east, with the Louisiana state line, to the middle of the main channel of the Mississippi river; thence up the middle of the main channel of the said river, to the 36th degree of north latitude, the point of beginning."

The state of Arkansas contends that these acts of Congress fix the middle of the channel of navigation as it existed before the avulsion as the boundary line between the states. By the state of Mississippi it is contended that the boundary line is a line equidistant from the well defined banks of the river. Language to the same effect as that contained in the acts of admission now before us was before this court in the case of *Arkansas v. Tennessee*, supra, and in that case the subject was considered, and the meaning of the Arkansas act, and similar language in the act admitting the state of Tennessee was interpreted. The rule laid down in *Iowa v. Illinois*, 147 U. S. 1, 13 Sup. Ct. 239, 37 L. Ed. 55, was followed, and it was held that where the states of the Union are separated by boundary lines described as "a line drawn along the middle of the river," or as "the middle of the main channel of the river," the boundary must be fixed at the middle of the main navigable channel, and not along the line equidistant between the banks. We regard that decision as settling the law, and see no reason to depart from it in this instance.

[3] It is urgently insisted that the laws and decisions of Arkansas and Mississippi are to the contrary, and our attention is called to Joint Resolution of Congress of 1909, 35 Stat. 1161, No. 5, which provides:

"That the consent of the Congress of the United States is hereby given to the states of Mississippi and Arkansas *to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States, or any law thereof, to fix the boundary line between said States, where the Mississippi river now, or formerly, formed the said boundary line, and to cede respectively each to the other such tracts or parcels of the territory of each state as may have become separated from the main body thereof by changes in the course or channel of the Mississippi river and also to adjudge and settle the jurisdiction to be exercised by said states, respectively, over offenses arising out of the violation of the laws of said states upon the waters of the Mississippi river." Approved January 26, 1909.

No specific agreement appears to have been entered into under this act; but it is insisted that Arkansas and Mississippi by their respective Constitutions have fixed the boundary line, as it is now claimed to be by the state of Mississippi, and that such boundary line has become the true boundary of the states, irrespective of the decision of this court in *Iowa v. Illinois*, supra, followed in *Arkansas v. Tennessee*, supra. We have examined the Constitutions and decisions of the respective states, and find nothing in them to change the conclusions reached by this court in determining the question of boundary between states. A similar contention was made in *Arkansas v. Tennessee* as to the effect of the Arkansas and Tennessee legislation and decisions, and the contention that the local law and decisions controlled in a case where the interstate boundary was required to be fixed, under circumstances very similar to those here presented, was rejected. In that case the Arkansas cases, which are now insisted upon as authority for the respondent's contention, were fully reviewed. The Mississippi cases called to our attention, of which the leading one seems to be *Magnolia v. Marshall*, 39 Miss. 109, as well as the legislation of the state, seem to sustain the claim that local jurisdiction and right of soil to the middle of the river, is fixed by a line equidistant from the banks. But whatever may be the effect of these decisions upon local rights of property or the administration of the criminal laws of the state, when the question becomes one of fixing the boundary between states separated by a navigable stream, it was specifically held in *Iowa v. Illinois*, supra, followed in later cases, that the controlling consideration is that which preserves to each state equality in the navigation of the river, and that in such instances the boundary line is the middle of the main navigable channel of the river. In *Arkansas v. Tennessee*, supra, 246 U. S. page 171, 38 Sup. Ct. page 304 (62 L. Ed. 638, L. R. A. 1918D, 258), we said:

"The rule thus adopted [that declared in *Iowa v. Illinois*] known as the rule of the 'thalweg,'

has been treated as set at rest by that decision. *Louisiana v. Mississippi*, 202 U. S. 1, 49 [26 Sup. Ct. 408, 50 L. Ed. 913]; *Washington v. Oregon*, 211 U. S. 127, 134 [29 Sup. Ct. 47, 53 L. Ed. 118]; 214 U. S. 205, 215 [29 Sup. Ct. 631, 53 L. Ed. 969]. The argument submitted in behalf of the defendant state in the case at bar, including a reference to the notable recent decision of its Supreme Court in *State v. Muncie Pulp Co.* (1907) 119 Tennessee, 47 [104 S. W. 437], has failed to convince us that this rule ought now, after the lapse of 25 years, to be departed from."

We are unable to find occasion to depart from this rule because of long acquiescence in enactments and decisions, and the practices of the inhabitants of the disputed territory in recognition of a boundary, which have been given weight in a number of our cases where the true boundary line was difficult to ascertain. See *Arkansas v. Tennessee*, supra, and the cases cited at page 172 of 246 U. S. (38 Sup. Ct. 301, 62 L. Ed. 638, L. R. A. 1918D, 258).

[4] This record presents a clear case of a change in the course of the river by avulsion, and the applicable rule established in this court, and repeatedly enforced, requires the boundary line to be fixed at the middle of the channel of navigation as it existed just previous to the avulsion. The location and determination of such bound*ary is a matter which we shall leave in the first instance to a commission of three competent persons to be named by the court upon suggestion of counsel, as was done in *Arkansas v. Tennessee*. See 247 U. S. 461, 38 Sup. Ct. 557, 62 L. Ed. 1213. This commission will have before it the record in this case, and such further proofs as it may be authorized to receive by an interlocutory decree to be entered in the case. Counsel may prepare and submit the form of such decree.

(250 U. S. 71)

RUST LAND & LUMBER CO. v. JACKSON
et al.

(Argued March 4, 1919. Decided May 19, 1919.)

No. 171.

1. COURTS ⇨391(1)—SUPREME COURT—REVIEW OF STATE COURT.

Judgment of state Supreme Court, rendered after taking effect of Act Sept. 6, 1916, is reviewable by national Supreme Court, if at all, only by virtue of that act and in accordance with its provisions.

2. COURTS ⇨394(25)—SUPREME COURT—ERROR TO STATE COURT—STATE BOUNDARIES.

Though in the state court the issue involving the location of the boundary lines between states was submitted to the jury by instructions based on a wrong principle, and thereby de-

fendant was deprived of a right, privilege, or immunity under the Constitution of the United States and treaties made thereunder, properly set up and claimed, such a federal question would not, under Judicial Code, § 237, as amended by Act Sept. 6, 1916, § 2 (Comp. St. § 1214), give the national Supreme Court jurisdiction to review by writ of error the resulting judgment.

3. COURTS ⇨394(8)—SUPREME COURT—ERROR TO STATE COURT—VALIDITY OF AUTHORITY EXERCISED UNDER UNITED STATES.

Ruling of state Supreme Court, setting aside continuance till decision of original suit between states in national Supreme Court to determine state boundary, of cause between individuals involving the state boundary pending in state court on appeal, is not an adverse decision on an authority exercised under the United States, giving the national Supreme Court jurisdiction by writ of error under Judicial Code, § 237, as amended by Act Sept. 6, 1916, § 2 (Comp. St. § 1214), but at most affords ground for application for review of the resulting judgment by certiorari, as deciding against an asserted title, right, privilege, or immunity under the federal Constitution; the ruling not involving the authority of the national Supreme Court to render a conclusive decision in the suit between the states, but merely the consequences that were to flow from exercise of such admitted authority.

4. CERTIORARI ⇨40—SUPREME COURT—CERTIORARI TO STATE COURT—TIME OF APPLICATION.

Application to national Supreme Court for writ of certiorari to state court, being after expiration of the three months limited by Act Sept. 6, 1916, § 6 (Comp. St. § 1228a), cannot be entertained.

In Error to the Supreme Court of the State of Mississippi.

Replevin by Ed Jackson and others against the Rust Land & Lumber Company. Judgment for plaintiffs was affirmed by the Supreme Court of Mississippi (73 South. 345), and defendant brings error, and applies for writ of certiorari. Dismissed and denied.

*Messrs. Albert M. Kales, Herbert Pope, Stephen A. Foster, and Harry Eugene Kelly, all of Chicago, Ill., for plaintiff in error.

Messrs. Garner W. Green and Marcellus Green, both of Jackson, Miss., and Gerald Fitz Gerald, of Clarksdale, Miss., for defendants in error.

Mr. Justice PITNEY delivered the opinion of the Court.

This case was brought on for argument immediately following *Arkansas v. Mississippi*, No. 7, Original, 250 U. S. 39, 39 Sup. Ct. 422, 63 L. Ed. —, this day disposed of.

It was a replevin suit, brought in the circuit court of one of the counties of Mississippi by defendants in error to recover certain timber taken by plaintiff in error from their possession under a claim of ownership.

They recovered a verdict and judgment in the circuit court, and the judgment was affirmed by the Supreme Court of the state, without opinion (73 South. 345). Ownership of the timber was deemed to depend upon the ownership of the land from which it had been cut; and this was in dispute, and according to the theory of plaintiff in error was dependent upon the location of the state boundary. The land lay in the Mississippi river bottom, in the vicinity of Horseshoe Bend, where a portion of the former channel had been abandoned as the result of a sudden change that occurred in the year *1848; the river having broken through the neck of the Bend and formed a new channel there, with the result that in the course of time the former channel around the Bend was abandoned and in large part filled up, and its location as it was prior to the avulsion has become, after the lapse of so many years, difficult of ascertainment. The adjoining states whose common boundary is marked by the river at this point are in dispute as to its former location, and also as to whether the boundary ought to follow the middle of the former main channel of navigation or rather a line equidistant from the banks of the river at ordinary stage of water. To determine this controversy, the suit between the states was brought in this court, and it is still pending.

[1] It is the contention of plaintiff in error that the judgment in the present case was based upon the determination of an issue which necessarily involved the location of the interstate boundary; and our first inquiry must be whether the judgment of the Supreme Court of Mississippi herein is reviewable in this court by writ of error. The judgment was rendered December 23, 1916, after the taking effect of the Act of September 6, 1916 (chapter 448, § 2, 39 Stat. 726), amendatory of section 237, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156 [Comp. St. § 1214]), and hence is reviewable here, if at all, only by virtue of that act and in accordance with its provisions.

[2] It is asserted that the issue involving the location of the boundary line between the states was submitted to the jury under instructions from the trial judge based upon a theory inconsistent with the true principle of decision as laid down by this court in *Iowa v. Illinois*, 147 U. S. 1, 13 Sup. Ct. 239, 37 L. Ed. 55, *Arkansas v. Tennessee*, 246 U. S. 158, 38 Sup. Ct. 301, 62 L. Ed. 638, *L. R. A.* 1918D, 258, and *Cissna v. Tennessee*, 246 U. S. 289, 38 Sup. Ct. 306, 62 L. Ed. 720, and that thereby plaintiff in error was deprived of a right, privilege, or immunity claimed under the Constitution of the United States and treaties made thereunder. Even if the record showed that such a right, privilege, or immunity was properly set up *and claimed in the state court, it of course is not maintain-

ed, nor could it be, that under section 237, Judicial Code, as amended, a federal question of this character would give us jurisdiction to review the resulting judgment by writ of error. Were that the only federal question, clearly it would at most furnish ground for a review by certiorari.

[3] But it is insisted that the Supreme Court of the state, in the course of its review of the judgment of the circuit court, rendered an adverse decision upon the question of the validity of an authority exercised under the United States, and for this reason we have jurisdiction by writ of error under the amended section 237.

The question arose as follows: Plaintiff in error moved the Supreme Court to continue the cause until the decision by this court of the original action then and still pending between the states of Arkansas and Mississippi, in which the location of the disputed boundary at or near the land in question is involved. This motion at first was sustained; but afterwards the defendants in error moved to set aside the continuance upon these grounds: (1) That the decision of this court in the suit between the states would not be controlling in the present case because it would not be rendered upon the same testimony; (2) that the Supreme Court of Mississippi was an appellate tribunal without original jurisdiction, empowered only to affirm or reverse a decision of the circuit court, depending upon whether that court upon the evidence before it had reached a correct conclusion, and that there was no way in which the judgment of this court in the suit between the states could be introduced before the Supreme Court of Mississippi; and (3) because the latter court was not in any way subject to the final jurisdiction of this court. This motion was sustained, the continuance was set aside, and the cause was placed upon the docket and afterwards disposed of in its regular order, with the result, as is maintained, that final judgment was rendered upon an *erroneous theory respecting the location of the interstate boundary line.

It is the contention of plaintiff in error that by the last-mentioned motion the validity of the authority of this court to determine the issues involved in the suit between the states was drawn in question, and that the decision of the Supreme Court of Mississippi was against its validity.

We do not, however, regard the ruling of the state court as having involved the authority or jurisdiction of this court to render a conclusive decision in the suit between the states respecting the location of the boundary line, and hence do not consider that there was any question concerning the validity of "an authority exercised under the United States" within the meaning of section 237. The question raised involved merely

the consequences that were to flow from the exercise of an admittedly valid authority under the United States; that is to say, the effect upon the rights of third parties of a particular exercise by this court of its constitutional jurisdiction over a controversy between two states—the concrete questions being (a) whether, in the event that our decision should be adverse to the state of Mississippi, and therefore, according to the theory of plaintiff in error, inconsistent with the title of its opponents, plaintiff in error would be entitled to set up that decision and judgment as conclusive against defendants in error; and (b) whether, in aid of such right, plaintiff in error was entitled to have the suit against it in the state court stayed to await our decision in the suit between the states. In effect, the contention was that the original jurisdiction conferred by the Constitution upon this court in controversies between states was of such a nature as to render our decree made in a suit of that kind binding upon private parties asserting opposing claims to lands in the disputed territory, and to prevent such private parties from prosecuting their litigation in a state court pending our determination of the suit between states. In setting up this contention plaintiff in error did no more than assert a title, right, privilege, or immunity under the Constitution of the United States. This, at most, afforded ground for an application to this court for a review of the resulting judgment by certiorari, but not for a writ of error. The case of *Cissna v. Tennessee*, 242 U. S. 195, 37 Sup. Ct. 108, 61 L. Ed. 243; 246 U. S. 289, 293, 38 Sup. Ct. 306, 62 L. Ed. 720, in which a similar question was raised but not passed upon was brought to this court by writ of error, but before section 237, Judicial Code was amended by the act of 1916. The present writ of error must be dismissed.

[4] On the eve of the argument a writ of certiorari was applied for; but as this was long after the expiration of the three months limited by section 6 of the Act of September 6, 1916 (Comp. St. § 122Sa), the application cannot be entertained, irrespective of whether the record shows a proper case for the allowance of that writ.

Writ of error dismissed.

Application for writ of certiorari denied.

(250 U. S. 88)

BROTHERS v. UNITED STATES.

(Argued and Submitted March 28, 1919. Decided May 19, 1919.)

No. 309.

1. UNITED STATES ⇨111—CLAIM AGAINST—ASSIGNMENT.

In view of Rev. St. § 3477 (Comp. St. § 6383), as to assignment of claims against the

United States, assignee of letters patent has no claim, under Act June 25, 1910, c. 423, 36 Stat. 851 (Comp. St. § 9465), for any unlicensed use of the patented invention by the United States prior to such assignment.

2. COURTS ⇨389—APPEAL—FROM COURT OF CLAIMS—FINDINGS OF FACT.

For purpose of review on appeal from Court of Claims its findings are to be treated like a verdict, and the evidence cannot be referred to for purpose of eking out, controlling, or modifying their scope.

3. PATENTS ⇨328 — INFRINGEMENT — CABLE CRANE WITH GRAVITY ANCHOR.

The Brothers patent, No. 551,614, for a cable crane with a gravity anchor, the essential feature of which is a nonyielding support or anchor at one end of the cable, and a yielding, tilting, or rocking support at the opposite end, held not infringed by cableways used by the United States, tightening of which caused an incidental yielding inward of the two rigid towers.

Appeal from the Court of Claims.

Action by William F. Brothers against the United States. Petition was dismissed by Court of Claims (52 Ct. Cl. 462), and plaintiff appeals. Affirmed.

* Mr. William F. Brothers, pro se.

Mr. Assistant Attorney General Frierson, for the United States.

Mr. Justice PITNEY delivered the opinion of the Court.

Appellant brought this action in the Court of Claims under the Act of June 25, 1910 (chapter 423, 36 Stat. 851 [Comp. St. § 9465]), to recover compensation for the unlicensed use by the United States in the Panama Canal work of his patented invention for "improvements in cable cranes with gravity anchors." That court made findings of fact upon which it concluded as matter of law that there was no infringement of claimant's patent, and thereupon dismissed his petition. 52 Ct. Cl. 462.

[1] From the findings it appears that claimant filed application for his patent July 18, 1895, and, upon such application, letters patent No. 551,614 were granted and issued, under date December 17, 1895, to his assignees, Sarah E. Brothers and Maria A. Brown, to whom he had made assignment pending the application. Subsequently the letters patent were assigned to claimant, under date October 2, 1912, 2½ months prior to their expiration by limitation on December 17, 1912. His claim to compensation is necessarily limited to this brief period, since there could be no assignment to him of any unliquidated claim against the government arising prior to the time he became the owner of the patent. Rev. St. § 3477 (Comp. St. § 6383).

No question is made but that plaintiff's invention was broadly new, a pioneer in its line, and the patent entitled to a broad construction and the claims to a liberal application of the doctrine of equivalents. See *Brothers v. Lidgerwood Mfg. Co.*, 223 Fed. 359, 138 C. C. A. 460. It relates to the method of erecting and operating a suspension *cable adapted to carrying a traveling crane or the like. Roughly speaking, the prior art consisted in supporting such cables upon rigid and unyielding towers at each end, so as to prevent an undue sagging of the cable under the strain of its load. Claimant's invention consisted in employing a rigid support or abutment at one end of the cable and what is called a "gravity anchor" at the opposite end, consisting of outwardly inclined shears with the cable attached thereto and a weight hung permanently from the shears on the opposite side, which weight, together with the weight of the shears, puts a tension upon the cable varying according to the weight of the structure and counterweight, combined with the degree of inclination of the structure; the operation of the tension device being automatically to take up the slack of the suspended cable when the load approaches the supports, with the result of permitting the load to be moved closer to the supports, with a given exertion of power, than before. There are other advantages not necessary to be specified. The essential feature of the patent is a nonyielding support or anchor at one end of the cable, and a yielding, tilting, or rocking support at the opposite end, consisting of outwardly inclined shears or some equivalent structure held movably at the base, and a counterweight on the outer side. It is to be observed that rigidity of the head tower is a sine qua non, necessary to produce tension of the cable; yielding supports at both ends would be a contradiction of terms, since with such an arrangement there would be no support, and the entire structure would collapse under its own weight. The importance of this will appear.

In the construction of the Panama Canal the government installed in the year 1909, and maintained and used continuously thereafter until the expiration of the Brothers patent, one single cableway and six duplex or double cableways which are complained of in this case *as infringements. As to the mode of construction, maintenance, and operation of these cableways, the findings of the Court of Claims are as follows:

"The single and the duplex cableways were similar in general design and construction except that the towers of the former supported a single cable, while those of the latter supported two cables, parallel to each other, at a distance of 18 feet apart, and each operated independently of the other, the length of the towers longitudinally of the canal cut being of proportionate dimension for the accommodation of the two

cables. The towers were of structural steel construction; and taking the duplex cableways for illustration, each tower in vertical cross section from front to rear was in the shape of a right-angle triangle, with a base of approximately 50 feet, a perpendicular or vertical height of about 85 feet, and a hypotenuse of about 98 feet, with a length of about 38 feet longitudinally of the canal. The two towers of the cableway stood facing each other, on opposite banks of the canal cut, with their hypotenuse faces toward the cut. The cable span across the cut between the tops of the towers was approximately 800 feet. The cables used were 2¼-inch steel wire cables having a rated breaking stress of 200 tons. The cables were supported by headblocks or saddles at the tops of the towers, and their ends were carried down and firmly anchored to the counterweighted bases of the towers.

"Rigidity of the towers was desired; and in order to secure this and hold the towers rigid against any tendency to tip, tilt, or yield under the stress of the suspended cables and their loads, the platform base at the rear side of each tower—that is, the side farthest from the canal cut—was counterweighted by a block of cement concrete of over 150 tons weight, cast about the structural steel members of the base of the tower and extending along practically the entire length of the base. The entire *weight of each tower, including the tower proper, the trucks upon which it was mounted, and the concrete counterweight, was upward of 500 tons.

"To facilitate the shifting or moving of the cableways along the canal cut as the work progressed each tower was mounted upon sets of trucks, similar to the trucks of railway cars, on the front and rear sides of the base of the tower, and the whole structure was mounted upon two standard-gauge railway tracks located on the bank of the canal cut at the proper distance from each other and from the similar tower tracks on the opposite bank of the cut.

"The cableways were operated by electrical power from the machinery stations in the head tower of each cableway.

"Subsequent to the construction and installation of said cableways they were maintained and operated without change in structural form or method of operation other than that as the height of the walls and other work of the canal increased, beginning about August, 1910, it became necessary, in order to admit of the loads being carried to pass clear of the works and men engaged thereon as the height of the work increased, to take up the slack or decrease the deflection of the cable. The cables were accordingly drawn up for said purpose. This tightening up of the cables or reduction of their deflection increased the effect of the load and weight of the cables upon the towers as regards their tendency to yield or tilt.

"It was the intent and purpose of the engineer officers of the Canal Commission, by and under whom said cableways were designed, constructed, and operated, that the towers thereof should be rigid and nonyielding to the full extent that rigidity in cable towers was possible; and there was no tilting or yielding of said towers other than such as resulted from a yielding of the roadbed of the tracks supporting them, portions of which roadbed consisted of 'fills' of excavated materials upon swampy ground. There is no satisfactory evidence that the towers either

yielded or tilted at any time during the period of claimant's ownership of said letters patent."

[2] Upon the argument here, appellant quoted somewhat amply from the evidence taken before the Court of Claims. For the purposes of our review the findings of that court are to be treated like the verdict of a jury, and we are not at liberty to refer to the evidence, any more than to the opinion, for the purpose of eking out, controlling, or modifying their scope. *United States v. Smith*, 94 U. S. 214, 218, 24 L. Ed. 115; *Stone v. United States*, 164 U. S. 380, 382, 17 Sup. Ct. 71, 41 L. Ed. 477; *District of Columbia v. Barnes*, 197 U. S. 146, 150, 25 Sup. Ct. 401, 49 L. Ed. 699; *Crocker v. United States*, 240 U. S. 74, 78, 36 Sup. Ct. 245, 60 L. Ed. 533; and cases cited.

[3] We concur in the opinion of the Court of Claims that no infringement of claimant's patent is shown. In the Act of June 25, 1910, under which this suit is brought and under which alone it could be brought, it is expressly provided that there shall be no such suit "based on the use by the United States of any article heretofore owned, leased, used by, or in the possession of the United States." In view of this and of the fact that the cableways complained of were theretofore in the possession of and used by the United States, claimant insists that after the passage of the act the government materially altered the cableways in such a manner as to make them infringe his patent. The contention is that the cables were tightened up in order to decrease their deflection, and that this tightening, in view of the loads carried by the cables, caused the supporting towers to yield or tilt, and thus to become in essence movable towers like the gravity anchors covered by the claimant's patent. But, as pointed out by the Court of Claims, it is beyond question that, as constructed and used generally, and as intended to be used, the government cableways did not infringe claimant's device. The subsequent tightening of the cables was done in the orderly conduct of the work for the purpose of carrying the loads over and free from the work that was being constructed. So far as this caused a yielding of the tower under the stress of the load, it was an incidental result, affecting or tending to affect the towers on both sides, and not upon one side to the exclusion of the other. It did not amount to a mechanical equivalent of the claimant's structure; there is no semblance of an outward inclination of a yielding tower or yielding support, but rather a tendency on the part of rigid towers to break down or collapse inwardly under an undue stress. And, as we have shown, the rigidity of one support is as essential to claimant's structure as is the movability of the other.

Inasmuch as the findings fully support the judgment of the court below, its judgment must be and it is
Affirmed.

(250 U. S. 94)

MACKAY TELEGRAPH & CABLE CO. v. CITY OF LITTLE ROCK.

(Submitted, on Motion to Dismiss or Affirm, March 3, 1919. Decided May 19, 1919.)

No. 374.

1. COURTS ⇨394(9)—SUPREME COURT—ERROR TO STATE COURT—CONSTRUCTION OF ORDINANCE.

No question under the contract clause of the Constitution being raised, the national Supreme Court cannot revise the decision of the state court on the question of construction of an ordinance as to the poles of a telegraph company on which it imposes a tax.

2. COMMERCE ⇨69—LICENSES—TAX ON TELEGRAPH POLES IN CITY.

A reasonable tax on the maintenance of poles and wires erected and maintained by a telegraph company within a city under authority of ordinance is not an unwarranted burden on interstate or foreign commerce, or on the functions of the company as an agency of the government, and does not infringe rights conferred by Act July 24, 1866 (Comp. St. § 10072 et seq.).

3. LICENSES ⇨6(9)—POWER TO TAX—TELEGRAPH POLES IN CITY.

A city, so authorized by the state, may impose taxes not merely with respect to special and exclusive occupancy of streets and other public places by poles and other equipment of telegraph company, but by way of compensation for special cost of supervising and regulating the poles and equipment and of issuing the necessary permits; so the fact that a tax is imposed on poles on a railroad right of way, as well as those on streets, cannot be said to be enough to condemn the ordinance, especially where it was found that the telegraph line, as laid along the right of way, crossed a street car line and several turnpikes coming into the city, and that it is necessary that there shall be local governmental supervision of the lines crossing these highways for protection of travelers thereon.

4. CONSTITUTIONAL LAW ⇨230(3)—LICENSES ⇨7(1)—EQUAL PROTECTION—DISCRIMINATION IN TAXING POLES OF TELEGRAPH COMPANIES.

It cannot be said that a telegraph company is subjected to unreasonable discrimination in taxation of its poles by a city, in contravention of the equal protection clause of Fourteenth Amendment, its franchise ordinance imposing the same tax applied by a general ordinance to other companies, though testimony was offered that the other companies were not required to pay tax on poles on railroad right of way; this going no further than to show that the general ordinance had not yet been enforced as it was proposed to enforce the franchise ordinance, and there being no offer to show an arbitrary and

intentional unfair discrimination, nor likeness in the circumstances of the companies and their lines.

In Error to the Supreme Court of the State of Arkansas.

Action by the City of Little Rock against the Mackay Telegraph & Cable Company. Judgment for plaintiff was affirmed by the Supreme Court of Arkansas (131 Ark. 306, 199 S. W. 90), and defendant brings error. Affirmed.

* Mr. James W. Mehaffy, of Little Rock, Ark., in support of motion.

Mr. J. C. Marshall, of Little Rock, Ark., in opposition to motion.

Mr. Justice PITNEY delivered the opinion of the Court.

The case was submitted on a motion to dismiss or affirm. The facts are as follows: On March 11, 1912, the city council of Little Rock passed an ordinance granting to the telegraph company the right to construct and maintain telegraph poles, wires, and fixtures and to install underground ducts and manholes along and over certain streets in the city particularly mentioned, including the following:

"Also a line of poles and fixtures and the right to string wires or cables thereon, beginning at the intersection of East Second street and Rector avenue and running thence on the west side of Rector avenue to East *Sixth; thence east on the north side of Sixth to the Chicago, Rock Island & Pacific Railway tracks. From this point the pole line will follow on and along the right of way of said railway to the south city limits."

Among other things the ordinance provided that the company should pay to the city immediately upon the completion of the line, and annually thereafter, "a license or tax of fifty cents for each pole erected or set up and a license or tax on all conduits constructed to an amount equal to four poles to each block. And said company shall comply with all ordinances hereafter passed in regard to the license or tax on poles, conduits, or wires, either decreasing or increasing the same, that are general and applicable to all telegraph or telephone companies in said city." Other provisions made the location and maintenance of wires, poles, and conduits subject to the approval of the city officials; required the poles to be kept painted, and the wires, poles, conduits, and manholes to be maintained in a first-class condition and so as not to endanger life or limb; permitted the city to use the upper cross-arm of the poles for its fire alarm and police telegraph or telephone wires; and required written acceptance by the company before the ordinance should take effect. The company duly filed its written acceptance, and thereafter constructed its line, placing 66 poles upon city streets, 104 poles upon the right of way

of the railway within the limits of the city as they existed at the acceptance of the ordinance, and 35 poles upon an adjacent portion of the right of way which at the acceptance of the ordinance was without the city limits but was brought within them a few days thereafter.

In the year 1917 the city sued the company in a state court, setting up the above-mentioned ordinance, averring that it was duly accepted by the company and was a contract between the parties, and alleging that pursuant to it the defendant had erected and maintained in the *city 205 poles upon which there were due the license taxes or fees at fifty cents per pole for four and a half years, amounting to \$461.25. The company by its answer admitted the passage and acceptance of the ordinance but denied that it was a contract; alleged that the provision as to license fees did not include the poles placed upon the right of way of the railway company, especially not those that were without the limits of the city at the time of the acceptance of the ordinance; that fifty cents per pole per year was unreasonable and excessive and sought to be imposed not for inspection and regulation of the poles but for revenue purposes only; that said license fee or tax deprived defendant of its property without due process of law and denied to it the equal protection of the laws in violation of the Fourteenth Amendment; that defendant had accepted the restrictions and obligations of the Act of Congress approved July 24, 1866 (chapter 230, 14 Stat. 221; Rev. Stat. § 5263 et seq. [Comp. St. § 10072 et seq.]); that its poles and wires were in use for the transmission of messages for the United States and various departments of the government; and further that defendant was engaged principally in the transmission of telegraphic messages between points in Arkansas and points in other states and in foreign countries, and that the imposition of a fee or tax upon its poles was a burden upon and illegal interference with interstate and foreign commerce and the regulatory power of Congress over the same.

At the trial the company offered to pay the license tax upon the 66 poles that were placed upon the city streets, but disputed liability for those placed upon the railroad right of way. It proved acceptance of the act of Congress of 1866, showed that the corporate limits had been extended after acceptance of the ordinance in such manner as to include 35 additional poles along the right of way, showed that the line on the right of way ran through a thinly populated part of the city as compared with the *streets covered by the franchise, being crossed, however, by two important streets and by two turnpikes that lead into the city, and offered to prove that two other telegraph companies maintaining poles and wires in the city were required to pay the tax only upon poles maintained upon

the streets and not upon those maintained on railroad rights of way. General ordinances of the city were introduced in evidence, one of them antedating the franchise ordinance and providing as follows:

"Each telegraph, telephone, electric light or power company shall pay annually a sum equal to fifty cents for each pole used by them whether such poles are leased, rented, or owned by them."

The trial court overruled the contentions of defendant and rendered a judgment against it for the entire amount claimed. This was affirmed by the Supreme Court of the state (131 Ark. 306, 199 S. W. 90), and the case is brought here upon the contention that the taxing provision of the franchise ordinance, as construed and applied, has the effect of depriving the defendant of rights secured to it by the Constitution and laws of the United States.

We are unable to see ground for dismissal of the writ of error, and will pass at once to the merits.

Notwithstanding that some of the provisions of the ordinance are contractual in form and by its own terms it was to take effect only after written acceptance by the company and such acceptance was in fact formally given, the Supreme Court of the state, as we read its opinion, dealt with the pole fees not as an agreed compensation for the franchise but as a license tax. Consequently we will—indeed must, for present purposes—so regard it.

[1] Plaintiff in error contends that the court erred in construing the ordinance as imposing the tax with respect to the poles standing upon the railroad right of way, and especially as to the 35 poles which at the time of acceptance of the ordinance were without the limits of the city. *But as no question is raised here under the contract clause of the Constitution (article 1, § 10, cl. 1), we are not at liberty to revise the decision of the state court upon the question of construction, and can only determine whether as construed and applied the ordinance deprives plaintiff in error of rights secured by other provisions of the Constitution and laws of the United States.

[2] That a reasonable tax upon the maintenance of poles and wires erected and maintained by a telegraph company within the limits of a city pursuant to authority granted by its ordinances is not an unwarranted burden upon interstate or foreign commerce or upon the functions of the company as an agency of the government, and does not infringe rights conferred by the Act of Congress, is so thoroughly settled by previous decisions of this court that no further discussion is called for. *St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92, 100, 13 Sup. Ct. 485, 37 L. Ed. 380; *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419,

425, 23 Sup. Ct. 204, 47 L. Ed. 240; *Atlantic, etc., Telegraph Co. v. Philadelphia*, 190 U. S. 160, 164, 23 Sup. Ct. 817, 47 L. Ed. 995; *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. Ed. 710; *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 39 Sup. Ct. 265, 63 L. Ed. 590.

[3] These cases establish that a city (supposing, of course, it acts under the authority of the state) may impose such taxes not merely with respect to the special and exclusive occupancy of streets and other public places by poles and other equipment, but by way of compensation for the special cost of supervising and regulating the poles, wires and other fixtures and of issuing the necessary permits. Hence, in the present case, we cannot hold that the fact that a tax is imposed upon the poles that stand upon the railway right of way, as well as on those that stand upon the streets, is sufficient to condemn the ordinance, especially in view of the finding of the Supreme Court of Arkansas that the telegraph line as laid along the right of way crosses a street car line and several turnpikes coming into the city, and that it is necessary there shall be local *governmental supervision of the lines crossing these highways for the protection of travelers upon them.

There is no support in the record for the contention that a tax of fifty cents per pole per year is unreasonable in amount, even though it be made to apply to poles standing on private property or upon a railroad right of way as well as to poles erected in the streets.

[4] Nor is there ground for holding that plaintiff in error is subjected to unreasonable discrimination, in contravention of the equal protection clause of the Fourteenth Amendment. The case shows that its franchise ordinance imposes the same and no greater tax than that which is applied by a general ordinance to other companies maintaining poles in the city. The offer of testimony to prove that the two other companies were not in fact required to pay the tax upon so many of their poles as stood upon railroad rights of way went no further than to show that the general ordinance had not been enforced against them in the same manner that it was proposed to enforce the franchise ordinance against plaintiff in error. There was no offer to show an arbitrary and intentionally unfair discrimination in the administration of the ordinance as in *Yick Wo v. Hopkins*, 118 U. S. 356, 374, 6 Sup. Ct. 1064, 30 L. Ed. 220. Peradventure the present action was a test case to determine whether the license fees were applicable to poles standing elsewhere than on the streets, with the intent, in case of an affirmative answer, to enforce the general ordinance against the other companies in the same sense. Nor was there any offer to show that the circumstances of the several companies and their telegraph lines were so much alike as to render

any discrimination in the application of the pole tax equivalent to a denial of the equal protection of the laws.

None of the contentions of plaintiff in error being well founded, the judgment is affirmed.

(250 U. S. 2)

AMERICAN FIRE INS. CO. v. KING LUMBER & MFG. CO.

(Argued April 22, 1919. Decided May 19, 1919.)

No. 308.

1. CONSTITUTIONAL LAW §205(6), 240(2), 296(1) — COURTS §8 — FULL FAITH AND CREDIT—PRIVILEGES AND IMMUNITIES—DUE PROCESS—EQUAL PROTECTION.

There is no foundation for contention that full faith was not given to a law of another state, or that there was a violation of the privileges and immunities clause, or the due process and equal protection clauses, by Gen. St. Fla. 1906, §§ 2765, 2777, making the person who solicits insurance and procures applications agent of the party issuing the policy, notwithstanding anything in the policy to the contrary, and the person who receives or receipts for money from insured to be transmitted to insurer agent of the latter, where when such statute was in existence a company of another state, having its permission to underwrite policies on property outside of the state, exercised that right in Florida.

2. CONSTITUTIONAL LAW §205(6) — PRIVILEGES AND IMMUNITIES—"CITIZEN."

A corporation is not a "citizen," within the provision of the Constitution which secures the privilege and immunities of citizens against state legislation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citizen.]

3. COURTS §8 — EXTRATERRITORIAL OPERATION OF STATUTE.

Gen. St. Fla. 1906, §§ 2765, 2777, declaring a person doing certain things relative to insurance agent of the insurer, does not attempt to extend the authority of the state beyond its limits, but merely regulates the insurance company when it comes to the state to do business with the citizens thereof and their property.

4. INSURANCE §378(3)—WAIVER — POWER OF AGENT.

The nonapplicability of Gen. St. Fla. 1906, §§ 2765, 2777, making insurance brokers insurer's agents, to cases where the statute is invoked to make such an agent's knowledge of insured's fraud and misrepresentation the knowledge of the company, does not affect the applicability of the statute to give full authority to such agents to waive warranty of concurrent insurance in a certain other company, where they were not derelict, but substituted policies in equally responsible companies for such concurrent insurance, and insured was an innocent party.

5. INSURANCE §372—WARRANTY IN POLICY —WAIVER.

Warranty of insurance policy for concurrent insurance in a certain company can be subsequently waived.

6. COURTS §396(7) — FEDERAL QUESTION—QUESTIONS PASSED ON BY STATE COURT.

Motion to dismiss error to state court, on the ground that the federal questions raised were not passed on by courts of state, but that they rested their decision on a certain fact, denied; that being a disputed proposition, and the motion so far involving the merits that justice will better be served by going into them.

In Error to the Supreme Court of the State of Florida.

Action by the King Lumber & Manufacturing Company against the American Fire Insurance Company. Judgment for plaintiff was affirmed by the Supreme Court of Florida (77 South. 168), and defendant brings error. Affirmed.

Messrs. Gustavus Remak, Jr., of Philadelphia, Pa., and James F. Glen, of Tampa, Fla., for plaintiff in error.

Mr. Benjamin Micou, of Washington, D. C., for defendant in error.

* Mr. Justice McKENNA delivered the opinion of the Court.

Action on two fire insurance policies issued by plaintiff in error, to which we shall refer as the insurance company, to defendant in error, to which we shall refer as the lumber company. Each policy was for the sum of \$2,500. There was total insurance on the property described in the policies of \$45,750, and it was provided that the insurance company should only be liable for its pro rata share of any loss caused by fire under the provisions of the policies. The loss to the lumber company was \$21,028.17 and the insurance company's pro rata share was on each policy \$1,149.08.

There is not much dispute about the facts. There *is considerable dispute about the inferences from them, and facts and inferences were presented in a maze of pleadings which terminated in a demurrer to a rejoinder by the insurance company to replications of the lumber company to the pleas of the insurance company to the declaration in the case.

The court, in passing upon the demurrer, being of the view that section 2765 of the General Statutes of Florida (infra) was applicable, rendered judgment accordingly for the lumber company on the policies for the sum of \$2,298.16, with interest at 8 per cent. from February 16, 1913, and the sum of \$300 as a reasonable attorney's fee. The Supreme Court of the state affirmed the judgment.

The controversy is not especially complicated of itself, but it is made somewhat so

by the manner of its presentation. The form and issue of the policies and the fact of fire and loss by it are not in dispute. The controversy centers in the relation of a particular firm of insurance brokers, residing at Tampa, Florida, to the insurance company and the lumber company, whether they were the agents of the former or of the latter under section 2765 of the Statutes of Florida and whether they could dispense with the requirement of a clause in the policies called the warranty clause. That clause, therefore, and section 2765 (and, we may say, also section 2777, the Supreme Court of the state taking it into account), become essential elements of decision, and we exhibit them immediately.

Section 2765 is as follows:

"Any person or firm in this state, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

Section 2777 is as follows:

"Any person who solicits insurance and procures applications therefor shall be held to be agent of the party issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding."

The warranty clause reads:

"Warranted same gross rate terms and conditions as and to follow the American Central Ins. Co. of St. Louis, Mo., and that said company has, throughout the whole time of this policy, at least \$5,000 on the identical subject matter and risk and in identically the same proportion on each separate part thereof; otherwise, this policy shall be null and void."

The clause was not complied with. The lumber company carried concurrent insurance, but not in the Missouri company. The omission and substitution, it is alleged, were at the suggestion of Lowry & Prince of Tampa, Florida, who were the agents of the insurance company and who, as such agents, caused and procured the lumber company to renew its policies from time to time, and finally the company, at the suggestion of Lowry & Prince, substituted other policies for policies in the Missouri company, with the knowledge of the insurance company, such other companies being equal in credit and responsibility to the Missouri company.

To these assertions the insurance company opposed contentions of law and fact, not, however, by any one pleading. The following are the facts it alleged, stated ⁱⁿ narrative: The insurance company is a Pennsylvania corporation authorized to write and issue policies on property outside of Pennsylvania. Lowry & Prince, as brokers of the lumber company, applied for it (the lumber company) to the insurance company for insurance upon the lumber company's property. Policies were issued, and upon subsequent application policies were continued to be issued, including those in suit. They were executed in Philadelphia and delivered to Lowry & Prince by mail. They each contained a warranty such as has been set out as to the existence of concurrent insurance with an approved and designated company doing business in Florida, the names of the companies being changed from time to time at Lowry & Prince's request, and finally the name of the American Central Insurance Company of St. Louis, Missouri, being inserted, the ground of the request being that they were the agents of that company and would know of any cancellations by it. Lowry & Prince were not agents of the insurance company nor authorized "to represent it in any manner, shape or form," but as agents of the lumber company transmitted to the insurance company at its main office in Philadelphia the original and subsequent applications for policies, and as such agents received by mail the policies and transmitted the amount of premiums to the company less the usual brokers' commissions.

Besides statement of the above facts the rejoinder contained the following denials: That by issuing the policies to the lumber company it, the insurance company, was engaged in the transaction of business in the state of Florida; that the lumber company paid Lowry & Prince, for it, the insurance company, any premiums on the policies; that Lowry & Prince were its agents; that prior to the furnishing of the proofs of loss by the lumber company it, the insurance company, had any notice or knowledge that the Missouri company had canceled its policies on the property insured and did not carry \$5,000 on the identical subject-matter and risk; or that it advised or consulted with Lowry & Prince as to the advisability of the risk or otherwise, except to the extent that it did request information from them as to the subject-matter insured and as to the companies carrying insurance thereon.

It will be observed that the rejoinder raised no question under the Constitution of the United States. That was done by a demurrer to the replications of the lumber company and was expressed, in effect, as follows:

"The legal predicate for the conclusion that Lowry & Prince were the agents of the defendant [the insurance company] rests upon section 2765 of the General Statutes of Florida."

And, further, if the section be so construed it violates (a) the full faith and credit clause of the Constitution of the United States in that the state of Florida would thereby deny full faith and credit to the laws of the state of Pennsylvania, and, so construed, it violates (b) the privilege and immunities clause, the due process clause and the equal protection clause of the Fourteenth Amendment.

Some other matters were set forth in the demurrer which we think are not material to mention. They only express what is expressed in other places, that Lowry & Prince were not the agents of the insurance company, but were and must be considered as agents of the lumber company, and alleged that the policies were Pennsylvania contracts, complied with the Pennsylvania law, and that to construe them as the lumber company contends they should be construed would be to deny that law full faith and credit.

The ultimate question, then, is the relation in which the insurance brokers stood to the respective companies. The case would seem, therefore, not to be of broad compass, nor to justify the elaborateness of argument that *has been addressed to it. We certainly do not consider a review of the many cases cited by the insurance company necessary to be made.

[1, 2] The Florida law first demands attention. It is explicit in its declaration. It was in existence when the policies were executed, and when the policies of which they are the successors were executed. There was, therefore, a course of conduct and transactions through a succession of years—not a single instance or an isolated one, as the insurance company contends, but a number of instances and all in relation. Nor does the case present an attempt of the Florida law to intrude itself into the state of Pennsylvania and control transactions there; it presents simply a Pennsylvania corporation having the permission of that state to underwrite policies on property outside of the state and the exercise of the right in Florida. And necessarily it had to be exercised in accordance with the laws of Florida. There was no law of Pennsylvania to the contrary—no law of Pennsylvania, would have power to the contrary. There is no foundation, therefore, for the contention that full faith was not given to a law of Pennsylvania, nor of a denial of a right to a citizen¹ of Pennsylvania, nor of

a denial of due process or the equal protection of the law.

The law of Florida, it is true, puts an element into the transactions of the parties to insurance and makes the person who solicits insurance and procures applications the agent of the party issuing the policy, and this against any provision in the policy to the contrary; and, even farther, the law makes the person who receives or receipts for money from the insured to be transmitted to the insurer the agent of the latter.

*There is nothing unreasonable in the conditions; they regulate the transactions, do not prevent them, or even embarrass them by ambiguity. A company is informed what it may incur by underwriting insurance in the state, and it cannot assert surprise or ignorance—certainly the insurance company in the present case cannot do so. It had knowledge or must be charged with knowledge of the law. It dealt through Lowry & Prince during a succession of years, permitted them to receive and receipt for premiums and transmit them to it, and consulted with them about the subject-matter and with what companies the risk was divided. It accepted the benefit of their action while premiums were being received and new policies were being issued. It is rather late to reject the consequence. Indeed, the attempt at rejection suggests the possibility of the occurrence of examples of like kind and may indicate the reason for the enactment of the law—suggests that its purpose was to preclude confusion and dispute as to the relation of the broker to the parties respectively, and to preclude an underwriter, after using the agency, from denying responsibility.

[3] These deductions are not contravened by the cases cited by the insurance company. Its basic proposition is that a state has no jurisdiction of persons or property beyond its borders or of contracts executed beyond its borders, and it invokes the proposition by the assertion that the policies were Pennsylvania contracts and being such were immune from regulation by Florida, and New York Ins. Co. v. Head, 234 U. S. 149, 34 Sup. Ct. 879, 58 L. Ed. 1259, is adduced as typical. In that case the principle was expressed that the laws of a state could not be extended beyond its confines, and it was concretely applied in the case to deny to the state of Missouri the right to extend its authority into the state of New York and there forbid a citizen of New Mexico and a citizen of New York from *making a loan agreement in New York simply because it modified a contract originally made in Missouri. The difference between that case and this is manifest, and the other cases relied on are not nearer in point. The Florida statute does not attempt to invade Pennsylvania and exercise control there.

¹ A corporation is not a citizen within the meaning of the provision of the Constitution which secures the privileges and immunities of citizens against state legislation. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 561, 19 Sup. Ct. 281, 43 L. Ed. 552.

It stays strictly at home in this record and regulates the insurance company when it comes to the state to do business with the citizens of the state and their property.

It is true the insurance company contends that its transactions were all isolated ones, not such as to constitute doing business in the state, and, besides, that it had no permission to be in the state and could not be presumed to be there against its laws; and, besides, again, its policies declared that they were to be effective in Pennsylvania. Cases are cited which are assumed to support these contentions. A review of them is unnecessary. The contentions confuse a simple situation and would withdraw from the jurisdiction of Florida transactions there and give them another theater and another control. In other words, would displace the law by the very things it precludes from such operation.

[4] The challenging response of the insurance company is that to give the law that effect is to bring it under the condemnation of *Mutual Life Ins. Co. v. Hilton-Green*, 241 U. S. 613, 36 Sup. Ct. 676, 60 L. Ed. 1202. That case considered the Florida law, but did not deny its legality nor decide that the state could not make the local broker, if the designated conditions existed, the agent of an underwriter. It only decided that the knowledge of the agent of misrepresentation and fraud by the insured could not be imputed to the underwriter. It was naturally held that such imputation was a perversion of the rule which imputes an agent's knowledge to his principal and its underlying reason "that an innocent third party may properly presume the agent will perform his duty and report all facts which affect *the principal's interest." To so extend the law would be a perversion of it, not a use to it—make it not a regulation but an oppression. The present case is not open to that condemnation. The lumber company was an "innocent third party" and could properly presume that Lowry & Prince would and did perform their duty and report to the insurance company their knowledge of the concurrent insurance that was carried on the property, and that the provision requiring it was equivalently complied with. And there was no dereliction in the agents; the substituted security was not insufficient. If the power that was exercised had no binding effect on the insurance company it would be difficult to imagine what would have under the Florida statute. Nor can we yield

to the contention that to so construe it is "to raise special agents with limited authority into general agents."

[5] The insurance company, however, insists that the policies constituted the contracts between it and the lumber company and that they were not subject to subsequent variation, and *Lumber Underwriters v. Rife*, 237 U. S. 605, 35 Sup. Ct. 717, 59 L. Ed. 1140, is cited. The case is not apposite. There was an attempt, in that case, to vary the written words of a contract by a concurrent parol agreement; in other words, and to quote those of the case, to establish "by parol proof that at the very moment the policy was delivered" one of its provisions was waived. It was not decided that there could not be a subsequent waiver of a provision of a policy nor that the convention of the parties could not be made subject to a law of the state.

Finally the insurance company contends that the Florida law as aided by the decision of the Supreme Court of the state, gives "the agent of the insured unlimited authority to bind the insurer, and forbids inquiry into the facts, in violation of section 1 of the Fourteenth Amendment." Phases of the contention are covered by what we have said, and its main foundation that inquiry into the facts is forbidden *is not tenable. The facts were exhibited in the pleadings and they showed that the conditions for the application of the law existed. They showed insurance effected through the brokers, Lowry & Prince, their communication with the insurance company, their transmission of money to it, the payment of their commission by the company, and the consultation of the company with them as to the "subject-matter insured, and the companies carrying insurance thereon," to use the language of the rejoinder.

[6] A motion to dismiss is made on the ground that the federal questions raised were not passed upon by the courts of the state, but that the courts rested their decision on the fact that the contracts were made in Florida rather than in Pennsylvania. That, however, was a disputed proposition and the motion so far involved the merits of the case that we have considered, under such circumstances, justice would be better served by going into the merits. *Beaumont v. Prieto*, 249 U. S. 554, 39 Sup. Ct. 383, 63 L. Ed. 770.

Judgment affirmed.

(250 U. S. 76)

FILLIPPON v. ALBION VEIN SLATE CO.

(Argued March 18, 1919. Decided May 19, 1919.)

No. 241.

1. TRIAL $\hookrightarrow$ 312(3)—INSTRUCTIONS AFTER RETIREMENT OF JURY.

Giving of supplementary instruction to the jury, after their retirement, in the absence of the parties and without affording them opportunity to be present or to make timely objection to the instruction, is error, notwithstanding opportunity afterwards given to except.

2. APPEAL AND ERROR $\hookrightarrow$ 1031(6)—HARMLESS ERROR—PRESUMPTION.

Erroneous rulings, especially in instructions in jury trials, are presumptively injurious, and furnish ground for reversal unless it affirmatively appears that they were harmless.

3. COURTS $\hookrightarrow$ 371(5) — FEDERAL COURTS — STATE LAWS AS RULES OF DECISION.

Under Rev. St. § 721 (Comp. St. § 1538), a servant's injury case in federal court is governed by the law of the state where the injury occurred and the trial takes place, as it stood when the cause of action arose.

4. MASTER AND SERVANT $\hookrightarrow$ 296(14)—INJURY—OBEYING ORDERS—INSTRUCTIONS.

Instruction in case of a servant injured in pushing with his hand a wedge under a block of stone that he was guilty of contributory negligence if he, though ordered by the foreman to do so, did so appreciating the danger and having time to consider, when he was face to face with a situation that would make a reasonably prudent man disobey the order, and, in spite of the dangers known to him and apparent, omits a material element, under the Pennsylvania decisions, that the servant given positive orders to go on with the work, under perilous circumstances, may recover for injuries if the work was not inevitably and imminently dangerous.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Action by Donatto Fillippon against the Albion Vein Slate Company. Judgment for defendant was affirmed by the Circuit Court of Appeals (242 Fed. 258, 155 C. C. A. 98), and plaintiff brings certiorari. Reversed and remanded.

*Messrs. Calvin F. Smith and J. Willard Paff, both of Easton, Pa., for petitioner.

Messrs. Ralph B. Evans and Frank P. Prichard, both of Philadelphia, Pa., for respondent.

Mr. Justice PITNEY delivered the opinion of the Court.

This case involves an important question of trial practice. It was an action brought by Fillippon, a citizen of Italy and a subject of the King of Italy, against the Slate Com-

pany, a Pennsylvania corporation doing business in that state, to recover damages for personal injuries sustained by plaintiff while in the employ of defendant, due as alleged to the negligence of defendant's foreman or superintendent under whom plaintiff was working. The grounds of negligence alleged were the failure to furnish a reasonably safe place for the work, failure to warn plaintiff of latent dangers of the work and the dangerous method of doing it, and specifically that plaintiff was directed to do the work in a particular manner under orders and *instructions of defendant's foreman, to which plaintiff was bound to conform. There was a general plea of not guilty and a trial by jury. The evidence showed that the occurrence took place July 31, 1914, while plaintiff was at work in an open quarry under the direction of a foreman or superintendent and as one of a gang consisting of four quarrymen or blockmen besides plaintiff who assisted them as an ordinary laborer or "rubbish hand." It appeared that by the usual method of work, with which plaintiff was familiar, after a block of slate has been blasted out it is raised by crowbars and by wedges of wood or iron placed beneath it, in order that chains may be placed about it to which the hoisting tackle is made fast. In case the block is small the wedges are placed by the workman's hand; it not being necessary to insert them beyond the edge of the block. In case of large blocks, the wedges are put in by hand so far as this can be done without placing the hand beneath the block, and then a stick or the handle of a tool is employed in order to push the wedge farther in, the workman being thus protected from injury in case the stone should happen to slip or drop. Plaintiff's duty as rubbish hand was that of a general utility man, expected to do whatever the foreman or superintendent might direct. On the occasion in question a large block had been blasted out and was being raised in order that chains might be put about it. Plaintiff was assisting, and had inserted a wedge as far as he could push it without putting his hand beneath the stone, but it was necessary that the wedge should be pushed further in, and he, being afraid that if he did this with his hand the block might fall upon his arm, told the foreman or superintendent that he wanted to get something with which to push the wedge. Instead of consenting, the foreman ordered him to "go ahead, go ahead," and in obedience to this he put his right hand beneath the block, when with a sudden movement the block came down on *his arm and crushed it so that amputation was necessary.

The trial judge submitted the question of defendant's negligence and of plaintiff's contributory negligence to the jury, saying in his principal charge, among other things:

"When a man accepts employment, he assumes with it the ordinary risk incident to such employment, and if you find the circumstances or situation in which the plaintiff found himself at the time of the accident, or that his performance leading up to the injury was of ordinary occurrence, then you may conclude that he had assumed the risk of the accident that has befallen him, and he cannot recover; but on his part it is contended that the situation in which he found himself at the time when the slate block was suspended or lifted by the men was of an extraordinary character, that the plaintiff when about to place the iron wedge found the stone or block large, and threatening danger, as he believed, whereupon he was suddenly and hastily summoned and directed to act by the foreman, whereupon he had but little or no time to judge of his own safety, and yielding to the judgment of his superior he acted. Now, if you find the facts as contended for by the plaintiff, I will ask you to say whether he was guilty of contributory negligence under the circumstances. Could he have protected or saved himself by the use or exercise of ordinary care? If he is to blame in part, or has in any manner contributed to his injury, he is not entitled to your verdict. The rule in negligence cases is that, while the defendant is held to exercise due and reasonable care under the circumstances, the plaintiff is also held to exercise the same degree of care, and if he does not do so, he cannot recover. Of course, if the master gives positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably or imminently dangerous. If the danger was *imminent that faced the plaintiff, and he in the face of it did the thing that he knew, as a reasonably careful man, under the circumstances, was dangerous, he is guilty of contributory negligence and cannot recover."

The bill of exceptions shows that after the trial judge had completed his instructions and the jury had retired for deliberation, and while they were deliberating, the jury sent to the judge the following written inquiry:

"Whether the plaintiff in pushing the wedge beneath the block of slate with his hand, having full knowledge of the risk involved, thereby became guilty of contributory negligence, even though told by Foreman Davis to 'push it under.'"

To which the trial judge replied by sending the following written instruction to the jury room, in the absence of the parties and their counsel, without their consent, and without calling the jury in open court:

"If he was told to put it under as stated by the plaintiff and he did so, fully appreciating at the time the danger attending and having sufficient time to consider, when he was face to face with a situation that would have made a reasonably prudent man to disobey the orders of the foreman, notwithstanding, and he went ahead in spite of the dangers known to him and apparent, he is guilty of contributory negligence."

To this action of the court plaintiff excepted at the first opportunity upon grounds that raise two questions: (a) Whether it was erroneous to give this supplementary instruction in the absence of the parties and without calling the jury in open court; and (b) whether the instruction so given was erroneous.

The jury having returned a verdict in favor of defendant, and a motion for a new trial having been denied, the resulting judgment was brought under the review of the Circuit Court of Appeals and there affirmed. *Fillipon v. Albion Vein Slate Co.*, 242 Fed. 258, 155 C. C. A. 98. Thereupon this writ of certiorari was allowed.

[1] *We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict. Where a jury has retired to consider of their verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the courtroom, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction. See *Stewart v. Wyoming Ranch Co.*, 128 U. S. 389, 390, 9 Sup. Ct. 101, 32 L. Ed. 439; *Aerheart v. St. Louis, I. M. & S. Ry. Co.*, 99 Fed. 907, 910, 40 C. C. A. 171; *Yates v. Wharf Coke Co.*, 221 Fed. 603, 608, 137 C. C. A. 327; and many decisions of the state courts collated in 17 L. R. A. (N. S.) 609; note to *State of North Dakota v. Murphy*, 17 N. D. 48, 115 N. W. 84, 16 Ann. Cas. 1133.

The Circuit Court of Appeals considered that the jury had asked a plain question in writing concerning a matter of law, and the judge had answered it in writing plainly and accurately, and were of the opinion that since nothing else had occurred—the question and answer having been preserved of record and counsel having been promptly notified of what had taken place and given the opportunity of excepting to the substance of the instruction and to the manner of giving it—no harm had been done, and none *was probable to arise under like circumstances, and hence affirmed the judgment.

It is not correct, however, to regard the

opportunity of afterwards excepting to the instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings. To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. *United States v. U. S. Fidelity Co.*, 236 U. S. 512, 529, 35 Sup. Ct. 298, 59 L. Ed. 696; *Guerini Stone Co. v. Carlin Construction Co.*, 248 U. S. 334, 348, 39 Sup. Ct. 102, 63 L. Ed. 275.

[2] And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless.

[3, 4] In this case, so far from the supplementary instruction being harmless, in our opinion it was erroneous and calculated to mislead the jury in that it excluded a material element that needed to be considered in determining whether plaintiff should be held guilty of contributory negligence under the particular hypothesis referred to in the jury's question.

The case was governed by the law of Pennsylvania, where the injury was received and the trial took place. *Rev. Stat. § 721 (Comp. St. § 1538)*. The law of that state, as it stood when the cause of action arose,¹ is expressed in repeated decisions of its court of last resort to the following effect:

"Where the servant, in obedience to the requirement of the master, incurs the risk of machinery, which though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely *used by extraordinary caution or skill, the rule is different. In such case the master is liable for a resulting accident."

And with reference to the particular circumstances of the case there under consideration:

"If the defect was so great that obviously, with the use of the utmost skill and care, the danger was imminent, so much so that none but a reckless man would incur it, the employer would not be liable." *Patterson v. Pittsburg & Connellsville R. R. Co.*, 76 Pa. 389, 394 (18 Am. Rep. 412).

"If the master gives the servant to understand that he does not consider the risk one which a prudent person should refuse to undertake, the servant has a right to rely upon his master's judgment, unless his own is so clearly opposed thereto that, in fact, he does not rely upon his master's opinion. A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their

advice and still more upon their orders, notwithstanding many misgivings of his own. The servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably and imminently dangerous." *Williams v. Clark*, 204 Pa. 416, 418, 54 Atl. 315, 316.

To the same effect, *Glew v. Railways Co.*, 234 Pa. 238, 242, 243, 83 Atl. 101; *Moleskey v. South Fork Coal Mining Co.*, 247 Pa. 434, 437, 438, 93 Atl. 485.

In the present case the trial judge recognized this to be the applicable rule of law when originally instructing the jury, for he said:

"Of course, if the master gives positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably or imminently dangerous."

But this was neutralized, and the jury probably led astray, when in the supplementary instruction they were told, in effect, that if, when plaintiff obeyed the foreman's order by putting the wedge beneath the heavy *block of slate with his hand, he fully appreciated the attendant danger and had sufficient time to consider, and if the situation was such as would have made a reasonably prudent man disobey the order, and he went ahead in spite of the dangers known to him and apparent, he was guilty of contributory negligence. The effect of this was to bar a recovery if the plaintiff knew of the attendant danger, although he did not know or have reason to suppose that the danger was inevitable or imminent, that is, immediately threatening. We suppose it hardly could have been a point in dispute that plaintiff knew that the operation of pushing the wedge beneath a large block of slate with his hand was dangerous, for he was familiar with the work, knew what safeguard was customarily taken against this danger, expressed a fear of it upon the particular occasion, and requested time to get an implement to be used for his safety according to the custom. It was at this precise moment, according to the testimony, that the foreman or superintendent told him to "go ahead, go ahead"; and under the Pennsylvania decisions he was entitled to rely upon the judgment and order of his superior if the work was not inevitably and imminently dangerous; that is, threatening immediate injury upon the particular occasion. The jury very reasonably might conclude that neither plaintiff nor the foreman believed or had reason to believe that the work was inevitably and imminently dangerous; but if it was not, he was entitled, under the Pennsylvania decisions, to hold his employer responsible for the consequences of what he did under peremptory orders of the foreman, although he (the plaintiff) fully ap-

¹ See *Workmen's Compensation Act of 1915*, Pa. Laws 1915, p. 736.

preciated the general dangers, had time to consider, and went ahead notwithstanding.

The judgment under review will be reversed, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

(250 U. S. 295)

WILLIAMS v. VREELAND.

(Submitted April 23, 1919. Decided June 2, 1919.)

No. 318.

1. TRIAL ⚡177 — PEREMPTORY INSTRUCTIONS—EFFECT OF REQUEST.

Both parties requesting a peremptory instruction, and doing nothing more, thereby assume the facts to be undisputed, and, in effect, submit to the trial judge determination of the inferences to be drawn therefrom.

2. APPEAL AND ERROR ⚡997(3)—REVIEW—FINDINGS OF FACT.

Finding of fact by the trial court, where both parties requested a peremptory instruction, must stand if the record discloses substantial supporting evidence.

3. BANKS AND BANKING ⚡250(5) — NATIONAL BANKS—ASSESSMENTS—STOCKHOLDERS — UNAUTHORIZED TRANSFER — RATIFICATION—NEGATING INFERENCES.

To negative inference of ratification by wife of husband's unauthorized transfer of national bank stock to her, from her indorsing the certificates in blank at his request, on his declaring this necessary to enable him to correct his mistake, facts and circumstances concerning the indorsement may be shown by her, when sued for assessment levied under Rev. St. § 5151.

4. BANKS AND BANKING ⚡250(5) — NATIONAL BANKS — ASSESSMENTS — STOCKHOLDERS—UNAUTHORIZED TRANSFER—RATIFICATION—EVIDENCE.

Finding, in suit to enforce against defendant assessment under Rev. St. § 5151, on national bank stock, that unauthorized transfer thereof to her by her husband was not ratified, *held* supported by the evidence; approval, ratification, and acquiescence all presupposing existence of some actual knowledge of the prior action and what amounts to a purpose to abide by it.

In Error to the United States Circuit Court of Appeals for the Third Circuit.

Action by Christopher L. Williams, receiver of the First National Bank of Bayonne, N. J., against Mary A. Vreeland. Judgment for defendant was affirmed by the Circuit Court of Appeals (244 Fed. 346, 156 C. C. A. 632), and plaintiff brings error. Affirmed.

Mr. Stuart G. Gibboney, of New York City, for plaintiff in error.

Mr. Pierre P. Garven, of Jersey City, N. J., for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Williams, as receiver, sued defendant in error in the United States District Court for New Jersey to enforce *an assessment against her levied by the Comptroller of the Currency (section 5151, Rev. Stat.) because she apparently owned certain stock of the First National Bank when it failed, December 6, 1913. She admits that the certificates were made out in her name and at time of the failure were so entered on the bank books. But she claims that, without her knowledge or consent, her husband caused them to be thus issued and entered, and, further, that although she signed blank powers of attorney indorsed thereon and thereby made it possible to transfer the stock from her name, she never really approved, ratified, or acquiesced in the transfer to herself.

Each side asked for an instructed verdict without more. The trial judge directed one in favor of Mrs. Vreeland, and in support of this action said:

"Although the burden was upon the defendant to show that she was not in fact the owner of the stock (Finn v. Brown, 142 U. S. 56, 67, 12 Sup. Ct. 136, 35 L. Ed. 936), I think that she has borne the burden by proving that the placing of the stock in her name in the first instance was unauthorized—without her knowledge and consent—and that she did not thereafter acquiesce in this act or in any way ratify it. * * * I am constrained to hold, therefore, that the defendant is not liable and that a verdict should be directed in her favor."

Final judgment entered upon the consequent verdict was approved by the Circuit Court of Appeals. 244 Fed. 346, 156 C. C. A. 632.

In respect of the evidence and its conclusions therefrom the latter court said:

"The plaintiff proved that the defendant was a shareholder of record and that she did nothing to remove her name as such. This was sufficient to establish prima facie the defendant's liability. Finn v. Brown, supra; Matteson v. Dent, 176 U. S. 521, 530, 20 Sup. Ct. 419, 44 L. Ed. 571. The burden then shifted to her (Finn v. Brown) to show that the act of making her a shareholder was in the first instance unauthorized; that it was without her knowledge or consent; and that she has not since acquiesced in or ratified it. That she has sustained the burden upon the first two points is not disputed; therefore the remaining question is as to evidence of her ratification. * * * Considering this testimony in connection with corroborating testimony, it appears to us that what Mary A. Vreeland did, in legal effect, was to make a valid execution of a power of attorney for the transfer of stock. That act, in so far as it authorized a transfer of stock, she cannot avoid by pleading ignorance. As the question here does not involve the validity of the act to effect a transfer, but concerns its evidential imputation of the knowledge with which it was done, we are of opinion that the circum-

stances which attended the act were a part of it, and affected the evidential inferences to be drawn from it. These circumstances show that, before acting, the defendant requested to be informed as to what she was asked to do; this information was denied her. It was denied her under representations and influences which, when she acted, led her to believe she was doing something entirely different from that which she was actually doing; that is, she was made to believe she was correcting a mistake of her husband, a mistake affecting his affairs, not that she was dealing with or assigning away her own property. Therefore we think the circumstances were such as to negative the knowledge, which otherwise it is presumed her act would have imparted. They contradicted the normal imputations of her act, and left her without that knowledge which was a prerequisite to a valid ratification of her husband's unauthorized act."

It further held:

*298 "Instead of submitting the case to the jury, however, each party asked the court for binding instructions in his favor, which, under *Beuttell v. Magone*, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654, is not a submission to the court without the intervention *of a jury, within the intent of Rev. Stat. §§ 649, 700 (Comp. St. §§ 1587, 1668), but is equivalent to a joint request for a finding of fact by the court, and when the court, acting upon such request, directs the jury to find for one of the parties, both are concluded on its finding. In this case the parties submitted to the court the question of the wife's ratification of her husband's unauthorized act; that question was one of fact; upon it depended her liability. The court's decision, as evidenced by its instruction to the jury that they render a verdict for the defendant, was a finding of fact, which concluded both parties as effectually as if the same fact had been found by the jury."

[1, 2] The established rule is:

"Where both parties request a peremptory instruction and do nothing more they thereby assume the facts to be undisputed and, in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom."

And upon review a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it. *Anderson v. Messenger*, 158 Fed. 250, 253, 85 C. C. A. 468; *Beuttell v. Magone*, supra, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; *Empire State Cattle Co. v. Atchison Ry. Co.*, 210 U. S. 1, 8, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70; *Sena v. American Turquoise Co.*, 220 U. S. 497, 501, 31 Sup. Ct. 488, 55 L. Ed. 559; *American National Bank v. Miller*, 229 U. S. 517, 520, 33 Sup. Ct. 883, 57 L. Ed. 1310; *Mead v. Chesbrough Bldg. Co.*, 151 Fed. 998, 1002, 81 C. C. A. 184; *American National Bank v. Miller*, 185 Fed. 338, 341, 107 C. C. A. 456.

[3] Counsel for the receiver maintained that, when Mrs. Vreeland indorsed the certificates in blank at the request of her hus-

band, who declared this necessary to enable him to correct his mistake, she thereby indisputably ratified his unauthorized transfer of the stock to her and assumed the duty promptly to remove her name from the bank books or suffer the liability imposed upon duly registered shareholders. But we think the courts below rightly held that facts and circumstances concerning this indorsement could be shown in order to negative the inference which *would have followed if unexplained. *Glenn v. Garth*, 133 N. Y. 18, 36, 37, 30 N. E. 649, 31 N. E. 344. And as without doubt there is substantial evidence tending to show she had no actual intention to ratify, affirm, or acquiesce in her husband's unauthorized act, we must accept that as finally established.

In *Keyser v. Hitz*, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531, which involved the liability of a married woman for an assessment levied against national bank stockholders, speaking through Mr. Justice Harlan, this court approved a charge:

"If the stock in controversy was transferred upon the books of the German-American Savings Bank to and in the name of the defendant without her knowledge and consent, she was entitled to a verdict, unless she subsequently ratified and confirmed such transfer."

And it was further said:

"We must not be understood as saying that the mere transfer of the stocks on the books of the bank to the name of the defendant imposed upon her the individual liability attached by law to the position of shareholder in a national banking association. If the transfers were, in fact, without her knowledge and consent, and she was not informed of what was so done—nothing more appearing—she would not be held to have assumed or incurred liability for the debts, contracts, and engagements of the bank. But if, after the transfers, she joined in the application to convert the savings bank into a national bank, or in any other mode approved, ratified or acquiesced in such transfers, or accepted any of the benefits arising from the ownership of the stock thus put in her name on the books of the bank, she was liable to be treated as a shareholder, with such responsibility as the law imposes upon the shareholders of national banks."

[4] Approval, ratification, and acquiescence all presuppose the existence of some actual knowledge of the prior action and what amounts to a purpose to abide by it. *Owings v. Hull*, 9 Pet. 607, 629, 9 L. Ed. 246; *Western National Bank v. Armstrong*, 152 U. S. 346, 352, 14 Sup. Ct. 572, 38 L. Ed. 470; *Glenn v. Garth*, supra. When *defendant in error signed blank powers of attorney she did not know what her husband had done, and certainly entertained no purpose to approve transfer of the certificates to herself. She thought she was merely doing something to enable him to correct his avowed mistake and nothing else. Nobody was misled or put

in a worse position as the result of her act. "As between the original parties that could not be deemed a ratification which was accompanied by a refusal to ratify and a declared purpose to undo the unauthorized act. The form adopted, by itself and unexplained, would tend to an inference of ratification, but it is not left unexplained. The actual truth is established, and that truth must prevail over the form adopted as between parties who have not been misled, to their harm, by the form of the transaction as distinguished from its substance." "The presumption which might have flowed from the form of the transaction disappears upon the explanation made, and in view of the substantial truth proved by the evidence." *Glenn v. Garth*, supra, 133 N. Y. 36, 37, 30 N. E. 651, 652.

The record reveals no material error, and the judgment below is

Affirmed.

(250 U. S. 153)

PUBLIC SERVICE CO. OF NORTHERN ILLINOIS v. CORBOY, Drainage Com'r.

(Argued March 20, 1919. Decided June 2, 1919.)

No. 258.

1. STATES ⇐191(2)—IMMUNITY FROM SUIT—ENJOINING STATE OFFICER—ENFORCING STATE LAW.

Though a state may not be sued without its consent, a state officer acting under color of his official authority may be enjoined from carrying into effect a state law till determination of its claimed repugnancy to federal Constitution.

2. COURTS ⇐508(1) — FEDERAL COURTS — STAYING PROCEEDINGS IN STATE COURT.

Suit to enjoin state officer carrying into effect judgment of state court is not one within Judicial Code, § 265 (Comp. St. § 1242), prohibiting granting of injunction in federal court to stay proceedings in court of state; this applying only to exercise of judicial power.

3. COURTS ⇐385(4)—SUPREME COURT—DIRECT APPEAL—QUESTIONS CONSIDERABLE.

The Supreme Court, on direct appeal from District Court on the question of jurisdiction of the lower court as a federal court, cannot consider questions of general principles of comity or of adequacy of bill.

Appeal from the District Court of the United States for the District of Indiana.

Suit by the Public Service Company of Northern Illinois against Stephen B. Corboy, Drainage Commissioner. Bill dismissed, and complainant appeals. Reversed and remanded.

Messrs. Buell McKeever, William G. Beale, and Gilbert E. Porter, all of Chicago, Ill., and Charles W. Smith, for appellant.

Messrs. John H. Gillett, of Hammond, Ind., Frank B. Pattee, of Crown Point, Ind., and Randall W. Burns, of Chicago, Ill., for appellee.

*Mr. Chief Justice WHITE delivered the opinion of the court.

An "act concerning drainage," passed in Indiana in 1907 (Laws 1907, c. 252), briefly outlined is as follows: (1) It authorized the appointment by the county commissioners of each county of an officer called a drainage commissioner and made the county surveyor also ex officio such an officer. (2) It empowered a defined circuit court, on the petition of private landowners or of municipal or other public bodies representing public ownership, to establish a drainage district and to authorize the carrying out in such district of the work petitioned for, and gave the court authority to appoint an additional drainage commissioner, the three being directed to aid the court to the extent by it desired in securing data concerning the questions required to be passed upon in disposing of the petition. (3) To accomplish the purposes of the statute, personal notice to known property holders and notice by publication to those unknown was exacted, and the court was empowered to reject the whole suggested scheme or to authorize such part of it as might be deemed best, or to devise and sanction a new plan. (4) As to any plan which it authorized, the court was empowered to provide for the cost of the work by distributing the amount upon the basis of the benefits to be received and the burdens to result to each landowner. (5) It authorized the designation by the court of one of the drainage commissioners, or, if it deemed best, of any other resident of the district, to carry into execution under the general supervision of the court any work authorized, with power to contract and subject to accountability to the court as the work progressed and at its conclusion.

The Little Calumet river, rising in the state of Indiana, flows in a westerly direction across Porter and Lake counties in that state into Cook county, Ill., within whose boundaries it commingles with the Grand Calumet, which empties into Lake Michigan.

After proceedings under the statute, the circuit court of Porter county, in May, 1911, established a drainage district in Porter and Lake counties and authorized the construction of a ditch to proceed from the Little Calumet river in a northerly direction to Lake Michigan. This action of the court was taken to the Supreme Court of Indiana and there affirmed (*Lake Shore & M. S. R. Co. v. Clough*, 182 Ind. 178, 104 N. E. 975,

105 N. E. 905), and on error from this court was also affirmed (242 U. S. 375, 37 Sup. Ct. 144, 61 L. Ed. 374).

Before work on the ditch was commenced, however, the appellant, an Illinois corporation which was not a party to the proceedings to establish the district, brought this suit against Corboy, the drainage commissioner appointed by the court to do the work, to enjoin the execution of the same. The relief prayed was based on the ground that the effect of the ditch would be to draw off from the Little Calumet river, an interstate stream, such a quantity of water as to seriously diminish the flow in that river and thereby practically cripple, if not destroy, the capacity of petitioner to continue to operate a plant for the production of electrical energy established and owned by it on the banks of the Little Calumet in Cook county, Ill. It was alleged that the right to have the river flow in its normal volume was a property right enjoyed by petitioner under the law of Illinois, protected by the Constitutions both of the state and of the United States, and which therefore could not be impaired or taken away without depriving the petitioner of property in violation of due process of law as afforded by both Constitutions. The court, being of opinion that the relief prayed was prohibited by section 265 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. § 1242]), dismissed the bill for want of jurisdiction. The case is here by direct appeal on that question alone.

[1] Although a state may not be sued without its consent, nevertheless a state officer acting under color of his official authority may be enjoined from carrying into effect a state law asserted to be repugnant to the Constitution of the United States, even though such injunction may cause the state law to remain inoperative until the constitutional question is judicially determined. The doctrine is elementary, but we refer to a few of the leading cases by which it is sustained: *Pennoyer v. McConnaughty*, 140 U. S. 1, 9, 11 Sup. Ct. 699, 35 L. Ed. 363; *Regan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 392, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Ex parte Young*, 209 U. S. 123, 152, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 230, 29 Sup. Ct. 67, 53 L. Ed. 150; *Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278, 33 Sup. Ct. 312, 57 L. Ed. 510; *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 506, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

There was jurisdiction therefore in the court below as a federal court to afford appropriate relief unless the want of power resulted from the prohibition of section 265 of the Judicial Code, which is as follows:

"The writ of injunction shall not be granted by any court of the United States to stay pro-

ceedings in any court of a state, except in cases where such injunction *may be authorized by any law relating to proceedings in bankruptcy."

In *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150, the facts, briefly stated, were these: By the Constitution and laws of Virginia the Corporation Commission of that state was constituted a court and was authorized in that capacity to establish railroad rates and to enforce them. The authority thus conferred was exerted and the jurisdiction of a court of the United States was invoked to enjoin the commission from enforcing the rates so fixed on the ground that to put them in operation would amount to a confiscation of the property of the railroad, and hence would be repugnant to the Constitution of the United States. The power to afford relief was challenged on the ground that, as the Corporation Commission was a court under the Constitution and law of the state, its proceedings could not be stayed by a court of the United States because of the prohibition of section 265 of the Judicial Code. It was held, however, that as the power to fix rates was legislative, and not judicial, the prohibition had no application, and the injunction prayed was granted.

In *Simon v. Southern Railway*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492, suit was brought in a court of the United States by the railway company against Simon to enjoin the enforcement of a judgment which had been rendered in a state court in favor of Simon and against the railway company on the ground of want of notice and fraud. Asserting that to grant the relief would be to stay proceedings in the state court, the jurisdiction was disputed, based upon the prohibition of the section previously quoted. The jurisdiction was upheld and it was decided that, although the prohibition might have prevented the granting of an injunction staying proceedings before the judgment was rendered, it did not so operate after the entry of the final judgment because "when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors *to use such judgment—a new state of facts not within the language of the statute may arise." The execution of the judgment was therefore enjoined.

This conclusion was sustained by the text as elucidated by the purely remedial purposes intended to be accomplished by its enactment. The court thus stated the origin of the statute as illustrative of its remedial scope (236 U. S. 123, 124, 35 Sup. Ct. 258, 59 L. Ed. 492):

"In 1793, when that statute was adopted (1 Stat. 334), courts of equity had a well-recognized power to issue writs of injunction to stay proceedings pending in court, in order to avoid a multiplicity of suits, to enable the defendant to avail himself of equitable defenses and the like.

It was also true that the courts of equity of one state or country could enjoin its own citizens from prosecuting suits in another state or country. *Cole v. Cunningham*, 133 U. S. 107 [10 Sup. Ct. 269, 33 L. Ed. 538]. This, of course, often gave rise to irritating controversies between the courts themselves which could, and sometimes did, issue contradictory injunctions. "On principles of comity and to avoid such inevitable conflicts the act of 1793 was passed."

Be this as it may, it is certain that the prohibitions which the statute imposes secure only the right of state courts to exert their judicial power; that is, a power called into play alone between parties to a controversy, and the operation of which power when exerted was, from the very fact that it was judicial, confined to the parties, their duties, interests and property, in other words, to a power falling within the general limitation of things judicial as demarked by the great distinction between legislative, executive and judicial power upon which the Constitution was framed. This is the necessary result of the ruling in the *Prentis Case*, by which it is made certain that, although a state may have power to confer upon its courts such authority as may be deemed appropriate, it cannot by the exertion of such right draw into the judicial sphere powers which are intrinsically legislative and executive or both, and thus bring the exercise of such powers within the scope of the prohibition of the statute, with the result of depriving the courts of the United States to that extent of their omnipresent authority to enforce the Constitution.

It follows necessarily, therefore, that although the Constitution did not limit the power of the states to create courts and to confer upon them such authority as might be deemed best for state purposes, that right could not, by its exertion, restrain or limit the power of the courts of the United States by bringing within the state judicial authority subjects which in their constitutional sense were nonjudicial in character, and therefore not within the implied or express limitation by which courts of the United States were restrained from staying judicial proceedings in state courts. To hold to the contrary would be in large measure to recognize that the exertion of the authority of the courts of the United States was dependent, not upon the nature and character of the subject-matter with which they are called upon to deal, but merely upon a state classification.

This conclusion renders it unnecessary to consider whether the construction of the ditch under the authority of the state statute, isolatedly considered, could be regarded as a judicial proceeding within the meaning of the statute, or whether, putting that view aside under the assumption that the proceedings were judicial, the order for con-

struction could be treated as final and for that reason alone capable of being stayed, within the ruling of *Simon v. Railway*.

[3] The arguments at bar pressed upon our attention considerations based upon the assumed application of general principles of comity, but, as on this direct appeal we have power alone to consider questions of the jurisdiction of the court below as a federal court, they are not open to our consideration. *Louisville Trust Co. v. Knott*, 191 U. S. 225, 24 Sup. Ct. 119, 48 L. Ed. 159. This, moreover, puts out of view the argument advanced concerning the adequacy of the averments of the bill to justify relief, since that subject necessarily, for the reasons stated, must be left to the consideration of the court below when it exercises jurisdiction of the cause.

Our order, therefore, is that the decree be reversed and the case be remanded for further proceedings in conformity with this opinion.

Reversed.

(250 U. S. 235.)

PARKER, Superintendent of Five Civilized Tribes, et al. v. RICHARD et al.

(Argued April 24, 1919. Decided June 2, 1919.)

Nos. 313 and 563.

1. INDIANS ⇐ 16(3)—LANDS — ALLOTMENTS — RESTRICTION ON ALIENATION — INHERITANCE BY FULL-BLOOD INDIANS — OIL LEASES.

Within provision of an oil lease, given on land of a full-blood Creek allottee with approval of Secretary of the Interior, under authority of Act May 27, 1908, § 2, that supervision of the lease by the Secretary should cease in the event of restriction on alienation of the land being removed, such restriction, continuing up to allottee's death, was not thereby removed, but only qualified, his heir being a full-blood Indian; provision of section 9, that death of an allottee shall remove all restriction on alienation of his land, being controlled by the proviso that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of settlement of the deceased allottee's estate.

2. INDIANS ⇐ 16(3) — ALLOTTED LANDS — OIL LEASES—SUPERVISION BY SECRETARY OF THE INTERIOR.

Supervisory authority of Secretary of Interior over royalties under oil lease of full-blood Indian allottee's land, made under Act May 27, 1908, § 2, continues after death of allottee leaving a full-blood Indian heir; it naturally falling to him, under Rev. St. §§ 441, 463 (Comp. St. §§ 681, 716), in the absence of some provision to the contrary, and none such appearing in the leasing provision, or in the proviso to section 9, Act May 27, 1908, as to sale of the land by the heir with approval of the court.

Appeals from the United States Circuit Court of Appeals for the Eighth Circuit.

Suit by Eastman Richard and another, administrators, against Gabe E. Parker, Superintendent of the Five Civilized Tribes, and another. From adverse decrees of the Circuit Court of Appeals (*Richard v. Parker*, 245 Fed. 330, 157 C. C. A. 522; 257 Fed. 990), on appeals from the District Court, defendants appeal. Reversed.

Mr. Assistant Attorney General Kearful, for appellants.

Messrs. Britton H. Tabor and James B. Lucas, both of Checotah, Okl., for appellees.

* Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit to enjoin two representatives of the Secretary of the Interior—the Superintendent and the cashier of the Five Civilized Tribes—from collecting future royalties on an oil and gas lease of land allotted to a Creek Indian and to compel them to surrender royalties already collected. In the District Court there was a decree for the defendants, which the Circuit Court of Appeals reversed, one judge dissenting (*Richard v. Parker*), 245 Fed. 330, 157 C. C. A. 522. The District Court then complied with the mandate by entering a decree for the plaintiffs, and this the Circuit Court of Appeals declined to disturb. 257 Fed. 990. Appeals from the decisions of the latter bring the case here.

[1] The questions to be considered are whether the land covered by the lease is land from which restrictions on alienation have been removed, and whether the supervisory authority of the Secretary of the Interior over the collection, care and disbursement of the royalties has terminated.

The land was part of the Creek tribal lands and was allotted under Act March 1, 1901, c. 676, 31 Stat. 861, and Act June 30, 1902, c. 1323, 32 Stat. 500; the allottee being a minor and an enrolled Indian of the full blood. In 1912, while he was yet a minor, the oil and gas lease was given by his guardian; the lease being approved by the court having jurisdiction of his estate and by the Secretary of the Interior. The allottee died in 1916, while still a minor, and left his father, a full-blood Creek Indian, as his only heir. Approximately \$280,000 in royalties have accrued under the lease—part before and part since the allottee died. These royalties have been collected by the defendants pursuant to the terms of the lease and the regulations of the Secretary of the Interior and are being *held by them in trust under a provision in the regulations which authorizes them to retain and care for such funds “until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs.” The plaintiffs

are the administrators of the estate of the deceased allottee.

By section 1 of the Act of May 27, 1908, c. 190, 35 Stat. 312, Congress declared that—

“All allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.”

There was no such removal in this instance and it is conceded that at the date of the lease and at the time of the allottee's death the alienation of the land was still restricted.

By section 2 of the same act Congress declared that:

“Leases of restricted lands for oil, gas or other mining purposes * * * may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise.”

The lease was given under this provision and was to run for a term of ten years and as much longer as oil or gas might be found in paying quantity. It provided, conformably to the regulations, that the Secretary of the Interior, through his representatives, should supervise all operations under the lease, that the royalties thereunder should be paid to his representatives, that, with exceptions not material here, the regulations as then or thereafter in force should be deemed part of the lease, and that in the event restrictions on alienation should be removed the *supervision of the Secretary of the Interior over the lease should be relinquished at once and all further royalties thereunder should be paid to the lessor or the then owner of the lands.

One of the regulations prescribed by the Secretary deals with the payment to lessors, their guardians, heirs, etc., of moneys collected as royalties by his representatives and specially authorizes the latter, as before indicated, to withhold such payment in whole or in part for such time as may be in accord with the best interests of the lessor or his heirs. It is under this regulation that the royalties already collected are being retained. The record indicates that a considerable portion of them has been invested in interest-bearing bonds of the United States, but as the propriety of this is not called in question, it may be passed without further notice.

By the act of 1908, which imposed the restrictions on alienation and contained the leasing provision, Congress further declared, in section 9:

"That the death of any allottee * * * shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee."

In the absence of the proviso it would be very plain that on the death of the allottee all restrictions on the alienation of the land allotted to him were removed. But the proviso is there and cannot be disregarded. It obviously limits and restrains what precedes it. In exact words it puts full-blood Indian heirs in a distinct and excepted class and forbids any conveyance of any interest of such an heir in such land unless it be approved by the court named. In other words, as to that class of heirs the restrictions are not removed but merely relaxed or qualified to the extent of sanctioning such conveyances as receive the court's approval. Conveyances without its approval fall within the ban of the restrictions. That the agency which is to approve or not is a state court is not material. It is the agency selected by Congress and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control. Thus in a practical sense the court in exercising that authority acts as a federal agency; and this is recognized by the Supreme Court of the state. *Marcy v. Board of Commissioners*, 45 Okl. 1, 144 Pac. 611. Plainly, the restrictions have the same force and operate in the same way as if Congress had selected another agency, exclusively federal, such as the Superintendent of the Five Civilized Tribes.

In cases presenting the question whether lands inherited from allottees by full-blood Indian heirs are freed from restrictions by section 9, and thus brought within another provision in the same act declaring that land "from which restrictions have been or shall be removed" shall be taxable and subject to other civil burdens, the Supreme Court of the state and the federal court of that district have both held that under the proviso such land remains restricted in the hands of the full-blood heirs, and so is not within the taxing provision. *Marcy v. Board of Commissioners*, supra; *United States v. Shock* (C. C.) 187 Fed. 870.

Entertaining a like view of the proviso, we conclude that the land covered by the lease is still restricted land.

[2] As to the other question this is the situation:

Under the act of 1908, as already shown, leases of "restricted lands" for oil and gas mining may be made with the approval of the Secretary of the Interior, under regulations prescribed by him, "and not otherwise." The present lease was made and approved under that provision. The land was then restricted and the restrictions have not since been removed. Thus the event which the regulations and the lease declare shall terminate the supervision by the Secretary of the Interior of the collection, care and disbursement of the royalties has not occurred. Nor has the occasion for some supervision disappeared. The heir is a full-blood Indian, as was the allottee, and is regarded by the act as in need of protection, as was the allottee. In the absence of some provision to the contrary the supervision naturally falls to the Secretary of the Interior. *R. S. §§ 441, 463* (Comp. St. §§ 681, 716); *West v. Hitchcock*, 205 U. S. 80, 85, 27 Sup. Ct. 423, 51 L. Ed. 718. And see *Catholic Bishop of Nesqually v. Gibbon*, 158 U. S. 153, 166, 15 Sup. Ct. 779, 39 L. Ed. 931. There is nothing to the contrary in the leasing provision or in any other of which we are aware. True, it is possible under the proviso in section 9 for the heir, if the court approves, to sell and convey his interest in the land. But that has not been done, and it well may be that the heir will remain the owner until the restrictions expire in regular course—April 26, 1931. There is nothing in the proviso indicating that it is intended in the meantime to take from the Secretary or to commit to the court the supervision of matters pertaining to the lease or the royalties. A purpose to do that doubtless would be plainly expressed.

In this situation we think the authority of the Secretary of the Interior to supervise the collection, care and disbursement of the royalties has not terminated.

Criticism is made of some of the regulations, but all that are material here seem to be well within the limits of the Secretary's authority, and the acts of his representatives in respect of the lease and the royalties, so far as questioned here, seem to be well within the regulations.

It results that the original decree in the District Court was right and should stand, and that the second decree in that court and those in the Circuit Court of Appeals must be reversed.

Decrees reversed.

(250 U. S. 199)

UNITED STATES v. FERGER et al.

(Argued April 29, 1919. Decided June 2, 1919.)

No. 776.

COMMERCE §16—COUNTERFEITING BILLS OF LADING—INTERSTATE COMMERCE.

Power of Congress, under Const. art. 1, § 8, to regulate foreign and interstate commerce and to make all laws necessary and proper for carrying into execution such power, includes the power, exercised in Act Aug. 29, 1916, § 41 (Comp. St. § 8604u), to penalize counterfeiting and use of a fictitious bill of lading, where there was no actual or contemplated commerce; commerce being interfered with by such an instrument.

Mr. Justice Pitney, dissenting.

In Error to the District Court of the United States for the Southern District of Ohio.

August Ferger and others were indicted for counterfeiting and uttering interstate commerce bills of lading. Demurrer to indictment was sustained (256 Fed. 388), and the United States brings error. Reversed and remanded.

Mr. Assistant Attorney General Brown, for the United States.

Mr. Charles E. Hughes, of New York City, for defendants in error.

*Mr. Chief Justice WHITE delivered the opinion of the Court.

The 24 counts of the indictment in this case were concerned with the commission of acts defined as criminal and punished by the forty-first section of the Act of August 29, 1916, entitled, "An act relating to bills of lading in interstate and foreign commerce," 39 Stat. 538, 544, c. 415 (Comp. St. § 8604u).

In the first count it was charged that the accused, in violation of the section, on or about the 14th day of August, 1917, in Cincinnati, Ohio—

"did * * * feloniously, and with intent to defraud, falsely make, forge, and counterfeit, and aid and assist in feloniously making, forging, and counterfeiting, a certain bill of lading purporting to represent goods received at Fountaintown, in the state of Indiana, for shipment to Cincinnati, in the state of Ohio, and to utter and publish and aid and assist in uttering and publishing such falsely made, forged, and counterfeited bill of lading, then and there knowing the same to be falsely made, forged, and counterfeited. * * *"

A copy of the fabricated bill of lading was reproduced in the count. It was negotiable in form, following the standard approved by the Interstate Commerce Commission (Order No. 787, June 27, 1908). The bill acknowledged the receipt by the Cincinnati, Hamilton & Dayton Railway Company of corn in bulk at a designated place in Indiana, ship-

ped to Cincinnati to the order of the shipper, and with directions to notify a person named. It contained all the *earmarks which would have been found in a genuine bill of lading.

The second count charged the knowing, willful, and felonious uttering of the bill of lading, and, with criminal intent and knowledge, obtaining money on it from the Second National Bank of Cincinnati by using it as collateral.

These first 2 counts are types of the remaining 22, except that the latter dealt with 11 other bills of lading as to each of which there were 2 counts, charging in the exact words used in the first and second counts, on the one hand the felonious fabricating and uttering of a bill of lading, and on the other hand the uttering and obtaining on the same bill of money from the Second National Bank of Cincinnati.

There was a motion to quash all the counts based upon alleged defects in pleading with which we are not concerned, and by demurrer the failure of the indictment to charge an offense was asserted on these grounds:

"First. That said Act of Congress * * * approved August 29, 1916, is unconstitutional and void, especially section 41 of said act in so far as it attempts to make it a crime and punish any person who forges or counterfeits a bill of lading where no shipment from one state to another is made or intended.

"Second. That said act can only apply to bills of lading representing actual shipments of merchandise or commerce between the states. If it is intended to apply to wholly fictitious shipments it is unconstitutional and void so far as said fictitious shipments are concerned, because the power of Congress to legislate upon this subject matter is based wholly and solely upon the commercial clause of the Constitution, and if there is no commerce, there is no jurisdiction."

The demurrer was sustained and all the counts in the indictment were dismissed (256 Fed. 388). The court said:

*"It was agreed in the argument and assumed in the briefs of counsel that the so-called bills of lading were fictitious, in that there was no actual consignor or consignee and that they did not relate to any shipment or attempted shipment of corn whatsoever. This fact so agreed upon in open court is to be read into the indictments."

Dealing with the case thus made, the court observed:

"These bogus bills of lading were nothing but pieces of paper, fraudulently inscribed to represent a real contract between real people and the actual receipt of goods for interstate shipment. * * * That they were inscribed so as to purport to relate to interstate shipments was nothing else than a fraud upon such persons as innocently took them, as collateral or otherwise. The execution of them and their use for

obtaining money under false pretenses was nothing other than a crime of a kind cognizable by the criminal legislation of the states, and a matter with which the Congress, in the exercise of its power to regulate commerce, is not concerned."

And upon these premises, after reviewing what were deemed to be the controlling authorities, it was concluded that the case—

"must be decided in favor of the defendants, and the holding made that the Congress has not the power, under the commerce clause, to prescribe a punishment under the circumstances of this case, and if the Congress has sought to do so, the attempt is futile, because without authority."

Despite the hypothetical form in which this conclusion is expressed, the context of the opinion makes it certain that, reading the facts charged in the indictment in the light of the admissions made at the argument, the court construed the section of the statute as embracing such acts and decided that as thus construed it was void for repugnancy to the Constitution.

At the outset confusion in considering the issue may result unless obscurity begotten by the form in which the *contention is stated be dispelled. Thus both in the pleadings and in the contention as summarized by the court below it is insisted that, as there was and could be no commerce in a fraudulent and fictitious bill of lading, therefore the power of Congress to regulate commerce could not embrace such pretended bill. But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092) and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves. It would be superfluous to refer to the authorities which from the foundation of the government have measured the exertion by Congress of its power to regulate commerce by the principle just stated, since the doctrine is elementary and is but an expression of the text of the Constitution (article 1, § 8, cl. 18). A case dealing with a somewhat different exercise of power, but affording a good illustration of the application of the principle to the subject in hand, is *First National Bank v. Union Trust Co.*, 244 U. S. 416, 37 Sup. Ct. 734, 61 L. Ed.

1233, L. R. A. 1918C, 28S, Ann. Cas. 1918D, 1169.

Although some of the forms of expression used in the opinion below might serve to indicate that the error just referred to had found lodgment in the mind of the court, the context of the opinion makes it certain that such was not the case, since the court left no obscurity in its statement of the issue which it decided, saying "They [the fictitious bills of lading] did not affect commerce directly or indirectly. They did not obstruct or interfere *with it in any manner and had nothing whatever to do with it, or with any existing instrumentality of it."

This statement not only clearly and accurately shows the question decided, but also with precision and directness points out the single and simple question which we must consider and dispose of in order to determine whether the court below erred in holding that the authority of Congress to regulate commerce did not embrace the power to forbid and punish the fraudulent fabrication and use of fictitious interstate bills of lading.

That bills of lading for the movement of interstate commerce are instrumentalities of that commerce which Congress under its power to regulate commerce has the authority to deal with and provide for is too clear for anything but statement, as manifested not only by that which is concluded by prior decisions, but also by the exertion of the power by Congress. Nothing could better illustrate this latter view than do the general provisions of the act, the forty-first section of which is before us. See, also, Act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 593 (U. S. Comp. St. §§ 8604a, 8604aa); Act of June 18, 1910, 36 Stat. 546, c. 309, § 7 (Comp. St. § 8563); *Almy v. California*, 24 How. 169, 16 L. Ed. 644; *Thames & Mersey Marine Ins. Co. v. United States*, 237 U. S. 19, 26, 35 Sup. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D. 1087; *Atchison, Topeka & Santa Fé Railway Co. v. Harold*, 241 U. S. 371, 378, 36 Sup. Ct. 665, 60 L. Ed. 1050; *Luckenbach v. McCahan Sugar Refining Co.*, 248 U. S. 139, 39 Sup. Ct. 53, 63 L. Ed. 170; *Missouri, Kansas & Texas Railway Co. v. Sealy*, 248 U. S. 363, 39 Sup. Ct. 97, 63 L. Ed. 293. That, as instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, both domestic and foreign, largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number *of transactions in domestic and foreign exchange is also so certain and well known that we may notice it without proof.

With this situation in mind the question therefore is: Was the court below right in holding that Congress had no power to prohibit and punish the fraudulent making of spurious interstate bills of lading as a means of protecting and sustaining the vast volume of interstate commerce operating and moving in reliance upon genuine bills? To state the question is to manifest the error which the court committed, unless that view is overcome by the reasoning by which the conclusion below was sought to be sustained. What was that reasoning? That the bills were but "pieces of paper fraudulently inscribed * * * and did not affect commerce directly or indirectly * * * and had nothing whatever to do with it or any existing instrumentality of it." But this rests upon the unsustainable assumption that the undoubted power which existed to regulate the instrumentality, the genuine bill, did not give any power to prevent the fraudulent and spurious imitation. It proceeds further, as we have already shown, upon the erroneous theory that the credit and confidence which sustains interstate commerce would not be impaired or weakened by the unrestrained right to fabricate and circulate spurious bills of lading apparently concerning such commerce. Nor is the situation helped by saying that, as the manufacture and use of the spurious interstate commerce bills of lading were local, therefore the power to deal with them was exclusively local, since the proposition disregards the fact that the spurious bills were in the form of interstate commerce bills which in and of themselves involved the potentiality of fraud as far-reaching and all-embracing as the flow of the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate. As the power to regulate the instrumentality was coextensive with interstate commerce, so it must be, if the authority to regulate is not to be denied, that the right to exert such authority for the purpose of guarding against the injury which would result from the making and use of spurious imitations of the instrumentality must be equally extensive.

We fail to understand the danger to the powers of government of the several states which it is suggested must arise from sustaining the validity of the provisions of the act of Congress in question. On the contrary, we are of opinion that to deny the power asserted would be to depart from the text of the Constitution and to overthrow principles of interpretation which, as we have seen, have been settled since *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, and which in application have never been deviated from.

This conclusion remains unshaken despite an examination of the decided cases cited by the court below in its opinion or which were pressed upon our attention in argument, since in our judgment they all but express the general principles of interpretation which we have applied and which are decisive against the contention of want of power in Congress which was upheld below and is here insisted upon.

It follows that the judgment below was wrong. It must therefore be reversed, and the case be remanded for further proceedings in conformity with this opinion.

And it is so ordered.

Mr. Justice PITNEY dissents.

(250 U. S. 207)

UNITED STATES v. FERGER et al.

(Argued April 29, 1919. Decided June 2, 1919.)

No. 777.

Error to the District Court of the United States for the Southern District of Ohio.

August Ferger and others were indicted for conspiracy to counterfeit and utter interstate commerce bills of lading. Demurrer to indictment was sustained (256 Fed. 388), and the United States brings error. Reversed and remanded.

Mr. Assistant Attorney General Brown, for the United States.

Mr. Charles E. Hughes, of New York City, for defendants in error.

Mr. Chief Justice WHITE delivered the opinion of the Court.

This case is disposed of by the ruling just announced in No. 776, 250 U. S. 199, 39 Sup. Ct. 445, 63 L. Ed. —. The indictment here was for conspiring to do the various acts charged in the previous case, that is, the fraudulent fabrication and uttering of the same fictitious bills of lading and the obtaining of money thereon by delivering the same to the Second National Bank of Cincinnati as collateral. The demurrer which was sustained by the court below in the previous case was also sustained as to this.

While there is a separate writ of error and a separate record in this case, it is conceded by all parties that the cases are in legal principle the same and that the decision of one concludes the other. It follows, therefore, that for the reasons stated in the previous case No. 776, the judgment in this must be and it is reversed, and the case remanded for further proceedings in conformity with this opinion.

And it is so ordered.

Mr. Justice PITNEY dissents.

(250 U. S. 290)

WASHINGTON POST CO. v. CHALONER.

(Argued April 22 and 23, 1919. Decided June 2, 1919.)

No. 316.

LIBEL AND SLANDER — 123(3) — CONSTRUCTION OF PUBLICATION — PROVINCE OF COURT AND JURY.

Published item saying, "C. shot and killed G. while the latter was abusing his wife, who had taken refuge at C.'s" home, does not set forth the commission of a crime in unambiguous words, so as to authorize the court to declare it libelous per se.

On Writ of Certiorari to the Court of Appeals, District of Columbia.

Action by John Armstrong Chaloner against the Washington Post Company. Judgment for plaintiff was affirmed (47 App. D. C. 66), and defendant brings certiorari. Reversed and remanded.

Messrs. Wilton J. Lambert, Joseph W. Bailey, and Rudolph H. Yeatman, all of Washington, D. C., for petitioner.

Messrs. E. F. Colladay, of Washington, D. C., and Sidney J. Dudley, of Hampton, Va., for respondent.

* Mr. Justice McREYNOLDS delivered the opinion of the Court.

Saturday, April 3, 1909, the Washington Post, a daily newspaper of wide circulation published by petitioner, contained the following item:

"John Armstrong Chaloner (Chanler), brother of Lewis Stuyvesant Chanler, of New York, and former husband of Amelie Rives, the authoress, now Princess Troubetskoy, is recuperating at Shadeland, the country home of Maj. Thomas L. Emry, near Weldon, N. C., where he had gone to recuperate following a nervous breakdown as a result of the tragedy at his home, Merry Mills, near Cobham, on March 15, when he shot and killed John Gillard, while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home. Following the shooting, Chaloner suffered a nervous breakdown, and was ordered by his physician to take a long rest. He decided to visit his old friend, Maj. Emry, who, with Chaloner, was instrumental in founding Roanoke Rapids, a manufacturing town 5 miles from Weldon. Chaloner arrived at Weldon after traveling all night and was immediately hurried to Shadeland, where he received medical attention and temporary relief."

Claiming damages on account of shame, infamy, and disgrace inflicted, respondent brought an action against the publishing company in the Supreme Court, District of Columbia. He alleged:

"The said defendant, meaning and intending * * * to charge the plaintiff with the crime of murder in the killing of one John Gillard,

when on the contrary the fact was, as defendant well knew, that while the plaintiff was engaged in a most laudable effort to prevent the said Gillard from murdering his wife, * * * the said Gillard was in fact killed by accidental explosion of a pistol," and "contriving and intending to deprive the plaintiff of his said good name, credit, and reputation, and to bring him into scandal and disrepute among his friends, neighbors, and acquaintances, * * * falsely and maliciously composed and published and caused to be composed and published of and concerning the plaintiff in a certain newspaper," etc., the above-quoted item.

Upon respondent's request the trial court charged:

"The jury are instructed that the words contained in the publication sued on by the plaintiff herein imply that the crime of murder has been committed by the plaintiff and are actionable per se."

It further said to them:

"The only question really for you to consider is how much damages the plaintiff should be allowed. You ought to allow him compensation; no special damages have been shown and only general damages can be allowed, but where the libel is published, where words are published of the plaintiff which constituted a libel, which charge him with having committed a crime, for instance, as in this case, the law presumes that the plaintiff has been damaged, without proof of any special damage, because the law takes notice of the fact that a libel travels, and it comes to a great many different readers, and that it would be impossible for a plaintiff to trace out the circulation of the libel, and show by whom it had been read, and how it had affected their opinion of him, and all that; so that the jury are justified in allowing substantial damages to a plaintiff against whom a libel has been published, without proof of any particular or substantial damage to him."

* Judgment in favor of respondent upon a verdict for \$10,000 was affirmed by the Court of Appeals. Chaloner v. Washington Post Co., 36 App. D. C. 231; Washington Post Co. v. Chaloner, 47 App. D. C. 66.

We think the quoted instructions to the jury were erroneous and harmful to petitioner.

The applicable rule was tersely stated by the Circuit Court of Appeals, Sixth Circuit, through Judge Lurton, afterwards of this Court, in Commercial Publishing Co. v. Smith, 149 Fed. 704, 706, 707, 79 C. C. A. 410, 412. Citing supporting authorities, he said:

"A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item, including display lines, should be read and construed together, and its meaning and signification thus determined. When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory

or not. If, upon the other hand, it is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read."

See *Peck v. Tribune Company*, 214 U. S. 185, 190, 29 Sup. Ct. 554, 53 L. Ed. 960, 16 Ann. Cas. 1075.

*294 Counsel for respondent admit (and properly so) that, upon the authorities, a published item saying, "C. shot and killed G.," without more, would not be libelous per se; it does not set forth the commission of a crime in unambiguous words. And we are unable to conclude that, as matter of law, addition of the words "while the latter was abusing his wife, who had taken refuge at Merry Mills, Chaloner's home," would convert such a statement into a definite charge of murder. On the contrary, they might at least suggest to reasonable minds that the homicide was *without malice. Considering the wide circulation of present-day newspapers and their power for doing injury to reputation, it is highly important that the ancient doctrine "Whatever a man publishes he publishes at his peril" should be strictly enforced. But this cannot be done properly by taking away from the jury doubtful questions of fact.

We find no reason to disagree with the conclusion reached by the Court of Appeals in respect of the other errors there assigned.

A writing entitled "Answer to Petition for Writ of Certiorari and Discussion of Matters of Fact in Brief for Petitioner," signed "John Armstrong Chaloner, Pro Se," and filed here April 21, 1919, contains much irrelevant and scandalous matter and is unfit for our files. It must be stricken from them.

The judgment below must be reversed, and the cause remanded to the Supreme Court, with instructions to grant a new trial.

Reversed.

Mr. Justice CLARKE took no part in the consideration or decision of this cause.

(250 U. S. 220)

DANA v. DANA et al.

(Argued March 24, 1919. Decided June 2, 1919.)

No. 276.

COURTS ⇐391(4) — ERROR TO STATE COURT — JURISDICTION—MATTERS DRAWN IN QUESTION.

The Supreme Court cannot review by error, but only by certiorari, decree of state court,

entered since passage of Act Sept. 6, 1916, amending Judicial Code, § 237 (Comp. St. § 1214), sustaining liability of interests passing under will to succession tax under the state statute; the case having been decided on the view entertained by the court of the character of the property, and neither the opinion nor the record showing any question was raised or decided involving validity of the statute, or of an authority exercised under the state, on the ground of repugnancy to Constitution, treaties, or laws of United States.

In Error to the Supreme Judicial Court of Massachusetts.

Bill for instructions by Richard H. Dana, individually, against Richard H. Dana, executor of Edith L. Dana, deceased, and another. Decree of probate court, deciding property subject to succession tax, was reversed by Supreme Judicial Court of Massachusetts (227 Mass. 562, 116 N. E. 941), and Dana, individually, brings error. Dismissed. *221

*Mr. Hollis R. Bailey, of Boston, Mass., for plaintiff in error.

Mr. William Harold Hitchcock, of Boston, Mass., for defendants in error.

Mr. Justice DAY delivered the memorandum opinion of the court.

This is a writ of error seeking to review in this court a decree of the Supreme Judicial Court of Massachusetts. The controversy concerned the right to tax under the Massachusetts Statutes of 1909, c. 490, pt. 4, § 1, as amended by St. 1912, c. 678, the passing of certain interests under the will of Edith L. Dana, in the Duluth and Gladstone Real Estate Trust, in 30 preferred shares and 45 common shares of the Amoskeag Manufacturing Company and in 130 shares of the Boston Ground Rent Trust.

The probate court held in favor of the treasurer and receiver general—that all of the interests of the testatrix in the several trusts and companies named were taxable under the Massachusetts statute. The case was decided in the Supreme Judicial Court of Massachusetts on June 29, 1917, 227 Mass. 562, 116 N. E. 941. The ground upon which it is sought to bring the case here on writ of error rests upon the assertion that the Supreme Judicial Court erred in sustaining the succession tax because it was imposed on or on account of real estate situated outside of Massachusetts; therefore rendering the assessment of the tax a violation of rights secured by the Fourteenth Amendment to *the Constitution of the United States, in that it took the property of the plaintiff in error without due process of law. *222

The case was decided, and the decree entered in the Supreme Judicial Court, since the passage of Act Sept. 6, 1916, c. 448, 39

Stat. 726, amending, by section 2 thereof, section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156 [Comp. St. § 1214]). Since the passage of the amendment, cases brought within its effect, of the character of this one, cannot be brought here by writ of error unless there is drawn in question the validity of a statute of or an authority exercised under the state on the ground of their being repugnant to the federal Constitution, treaties, or laws. Other cases of alleged denial of federal rights, as specified in the statute, can be reviewed in this court only upon writ of certiorari.

An examination of the record in the case and the opinion of the Supreme Judicial Court, shows that neither the validity of the statute, nor the validity of any authority exercised under the state was drawn in question. The case was decided on the view which the Supreme Judicial Court entertained of the character of the property involved, and neither in the record nor in the opinion of the court does it appear that any question was raised or decided which involved the validity of the statute of the state, or of an authority exercised under the state, on the ground of their repugnancy to the Constitution, treaties, or laws of the United States. It follows that the only right of review in this court of the decree of the Supreme Judicial Court of Massachusetts was by writ of certiorari. It is only necessary to refer to our decisions construing the amendment of September 6, 1916. *Philadelphia & Reading Coal & Iron Co. v. Gilbert*, 245 U. S. 162, 38 Sup. Ct. 58, 62 L. Ed. 221; *Ireland v. Woods*, 246 U. S. 323, 38 Sup. Ct. 319, 62 L. Ed. 745; *Stadelman v. Miner*, 246 U. S. 544, 38 Sup. Ct. 359, 62 L. Ed. 875; *Northern Pacific Railway Co. v. Solum*, 247 U. S. 477, 481, 38 Sup. Ct. 550, 62 L. Ed. 1221.

The writ of error must be dismissed for want of jurisdiction.

Dismissed.

(250 U. S. 241)

DENVER & R. G. R. CO. v. CITY AND COUNTY OF DENVER et al.
(two cases).

(Submitted April 23, 1919. Decided June 2, 1919.)

Nos. 322, 323.

1. CONSTITUTIONAL LAW §134, 292—DUE PROCESS—OBLIGATION OF CONTRACT—REGULATING RAILROAD IN STREET — POLICE POWER.

Though railroad track was put in street by virtue of ordinance, and the ordinance became a contract, and the right granted became a vested property right, such contract and right is subject to the fair exercise by the state, or the city as its agent, of the power to adopt and

enforce such regulations as are reasonably necessary to secure public safety; such power being inalienable, even by express grant, and its legitimate exercise contravening neither the contract clause of the Constitution nor the due process clause of the Fourteenth Amendment, but otherwise, if the regulation be plainly unreasonable and arbitrary.

2. CONSTITUTIONAL LAW §134—DUE PROCESS—OBLIGATION OF CONTRACT—REMOVAL OF RAILROAD FROM STREET CROSSING — POLICE POWER.

Ordinance of Denver requiring removal of so much of a railroad side track as lies within an intersection of two streets, just opposite entrance of Union Depot, practically in gateway of city, held not plainly unreasonable and arbitrary, so as to be obnoxious to obligation of contract or due process clause.

3. COMMERCE §58—STATE POLICE POWER—RAILROAD IN STREET.

Ordinance requiring removal of railroad track from crossing of streets does not offend against commerce clause of Constitution; it making no discrimination against interstate commerce, and not impeding its movement in regular course, and affecting it only incidentally and indirectly.

In Error to the Supreme Court of the State of Colorado.

In Error to the District Court of the City and County of Denver, State of Colorado.

Action by the Denver & Rio Grande Railroad Company against the City and County of Denver and others. Judgment for plaintiff was reversed by the Supreme Court of Colorado (167 Pac. 969, L. R. A. 1918D, 659), and plaintiff brings error. Affirmed.

Mr. E. N. Clark, of Denver, Colo., for plaintiff in error.

Messrs. James A. Marsh and Norton Montgomery, both of Denver, Colo., for defendants in error.

*Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit to enjoin the enforcement of an ordinance directing the removal of a railroad track from the intersection of two streets in Denver. On the hearing the plaintiff prevailed, but this was reversed by the Supreme Court of the state with a direction to dismiss the complaint (City and County of Denver v. Denver & Rio Grande R. Co. [Colo.] 167 Pac. 969, L. R. A. 1918D, 659), and the direction was followed. The case is here on two writs of error when one would suffice.

The ordinance is assailed as contravening the contract and commerce clauses of the Constitution and the due process clause of the Fourteenth Amendment.

In 1881 a union depot with appurtenant tracks was established in Denver, the streets and alleys within the grounds thus occupied

being vacated by the city, and since then all railroads entering the city have used this depot and its tracks. Wynkoop street is outside the depot grounds and extends east and west along their south line. The depot faces that street and is but a short distance from it. On the other side of the depot are the depot tracks. These connect on the west with several railroad yards, including that of the Rio Grande Company, and on the east with other railroad yards, including that of the Union Pacific Company. Wynkoop street is intersected just opposite the entrance to the depot by Seventeenth street, which extends northward through the city and is one of its main thoroughfares. Persons and vehicles approaching or leaving the depot pass over this intersection; the number doing so each day being approximately 2,000.

*The plaintiff, the Rio Grande Company, has a track in Wynkoop street from Nineteenth street to Fourteenth street. At its eastern terminus—near Nineteenth street—this track meets a track of the Union Pacific Company which is connected with the yard of that company, and at Fourteenth street it curves and leads to the Rio Grande Company's yard. Originally it was part of the Rio Grande Company's main line, but since 1881, when the Union Depot was established, it has been used only as a side track in serving industries on the south side of Wynkoop street.

The ordinance assailed directs the removal of so much of this track as lies within the intersection of Wynkoop and Seventeenth streets, that is to say, the portion over which persons and vehicles pass in moving to and from the Union Depot; and a preamble recites that the use of that portion of the track impedes public travel, affects the safety of persons approaching or leaving the Union Depot, and is no longer essential to the Rio Grande Company.

The Union Pacific Company has a track in the same intersection which the ordinance deals with in the same way, but that company apparently is not complaining.

If the ordinance is enforced, the Rio Grande Company can reach the industries on its track in Wynkoop street, between Seventeenth and Nineteenth streets, only through the tracks of the Union Depot and the Union Pacific. Because of this it will be subjected to some expense and delay not heretofore attending that service, and it also will be prevented from switching cars to and from those industries for other railroads and thereby will lose some revenue. But, according to the record, the loss in expense and otherwise incident to these disadvantages will be relatively small.

The track in Wynkoop street has been there since 1871, and we shall assume, as did the Supreme Court of the state, that it was put there in virtue of some ordinance

of *that period, and that the ordinance became a contract and the right granted became a vested property right. But, as this court often has held, such contracts and rights are held subject to the fair exercise by the state, or the municipality as its agent, of the power to adopt and enforce such regulations as are reasonably necessary to secure the public safety; for this power "is inalienable even by express grant," and its legitimate exertion contravenes neither the contract clause of the Constitution nor the due process clause of the Fourteenth Amendment. *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548, 558, 34 Sup. Ct. 364, 58 L. Ed. 721; *Chicago & Alton R. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 35 Sup. Ct. 678, 59 L. Ed. 1204. Of course, all regulations of this class are subject to judicial scrutiny, and where they are found to be plainly unreasonable and arbitrary must be pronounced invalid, as transcending that power and falling within the condemnation of one or both, as the case may be, of those constitutional restrictions.

The scope of the power and instances of its application are shown in the decisions sustaining regulations (a) requiring railroad companies at their own expense to abrogate grade crossings by elevating or depressing their tracks and putting in bridges or viaducts at public crossings, *Northern Pacific R. R. Co. v. Duluth*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630; *Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis*, 232 U. S. 430, 34 Sup. Ct. 400, 58 L. Ed. 671; *Missouri Pacific Ry. Co. v. Omaha*, 235 U. S. 121, 35 Sup. Ct. 82, 59 L. Ed. 157; (b) requiring a railroad company at its own cost to change the location of a track and also to elevate it as a means of making travel on a highway safe, *New York, etc., R. R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; (c) prohibiting a railroad company from laying more than a single track in a narrow busy street although its franchise authorized it to lay a double track there, *Baltimore v. Baltimore Trust Co.*, 166 U. S. 673, 17 Sup. Ct. 696, 41 L. Ed. 1160; and (d) requiring a gas company whose mains and pipes were laid beneath the surface of a street under an existing franchise to shift them to another *location at its own cost to make room for a public drainage system, *New Orleans Gas Co. v. Drainage Commission*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831.

[2] Is the ordinance here in question plainly unreasonable and arbitrary? That there is occasion for some real regulation is clear. The crossing is practically in the gateway to the city. Persons in large numbers pass over it every day—many of them unacquainted with the surroundings. Moving engines and cars to and fro over such a place makes it one of danger. Any one of several forms of corrective regulation might

be applied. To illustrate: The city might call on the railroad company to construct and maintain a viaduct over the crossing or a tunnel under it, or might lay on the company the duty of maintaining watchmen or flagmen at the crossing. What it actually does by the ordinance is to call on the company to remove the track from the crossing and avail itself of other accessible and fairly convenient means of getting cars to and from its track east of the crossing. No doubt in this the company will experience some disadvantages, but they will be far less burdensome than would be the construction and maintenance of a viaduct or tunnel, and not much more so than would be the keeping of watchmen or flagmen at the crossing.

The situation is unusual and the ordinance deals with it in a rather practical way. Giving effect to all that appears, we are unable to say that what is required is plainly unreasonable and arbitrary.

Counsel for the company manifest some concern lest the rates for switching cars to and from its track east of the crossing may not be satisfactory, but there hardly can be any real trouble along that line. The rates will be subject to investigation and supervision by public commissions just as are other railroad rates, and possible differences over them will be susceptible of ready adjustment.

*[3] The objection that the ordinance offends against the commerce clause of the Constitution is not tenable. The ordinance makes no discrimination against interstate commerce, will not impede its movement in regular course, and will affect it only incidentally and indirectly. *South Covington Ry. Co. v. Covington*, 235 U. S. 537, 540, 35 Sup. Ct. 158, 59 L. Ed. 350, L. R. A. 1915F, 792; *Sligh v. Kirkwood*, 237 U. S. 52, 58, 60, 35 Sup. Ct. 501, 59 L. Ed. 835. The case of *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District*, 233 U. S. 75, 34 Sup. Ct. 564, 58 L. Ed. 857, obviously is not to the contrary.

Judgment affirmed.

(250 U. S. 269)

THE 6 S.

P. SANFORD ROSS, Inc., v. UNITED STATES.

(Argued April 24, 1919. Decided June 2, 1919.)

No. 301.

1. NAVIGABLE WATERS ⚓26(½) — ILLEGAL DUMPING—LIBEL AGAINST VESSEL.

Under Act June 29, 1888, §§ 1, 2, 4 (Comp. St. §§ 9933, 9934, 9937), as amended by Act Aug. 18, 1894, c. 299, § 3, and Act May 28,

1908, § 8 (Comp. St. § 9935), which, after making dumping within certain limits of New York Harbor illegal, and declaring penalties and punishment for persons connected with such dumping, provides that any vessel used in violating any provision of the act shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against summarily by way of libel, conviction and fining of the persons is not a condition precedent to maintenance of the libel.

2. ADMIRALTY ⚓6 — ILLEGAL DUMPING IN NAVIGABLE WATERS—LIBEL AGAINST VESSEL—COURT "HAVING JURISDICTION THEREOF."

Act June 29, 1888, § 4 (Comp. St. § 9937), providing that any vessel used in illegal dumping in New York Harbor in violation of the act may be proceeded against by way of libel in any District Court of the United States "having jurisdiction thereof," means any court within whose jurisdiction she may be found.

3. ADMIRALTY ⚓23 — ASSESSING UNLIQUIDATED FINE.

An unliquidated fine may be assessed in admiralty.

4. ADMIRALTY ⚓23—LIBEL FOR PENALTIES.

Jurisdiction of libel against vessel for penalties for illegal dumping in New York Harbor is conferred on a court of admiralty by Act June 29, 1888, § 4 (Comp. St. § 9937), even if not by Judicial Code, § 24, subd. 9 (Comp. St. § 991 [9]), as to enforcement of penalty or forfeiture under a law of the United States.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by the United States against the scow 6 S; P. Sanford Ross, Incorporated, claimant. Decree for penalty (247 Fed. 348), and claimant appeals. Affirmed.

*Mr. A. Leo Everett, of New York City, for appellant.

Mr. Assistant Attorney General Brown, for the United States.

Mr. Justice PITNEY delivered the opinion of the Court.

This was a libel in rem, brought against a scow under the Act of June 29, 1888, c. 496, 25 Stat. 209 (Comp. St. §§ 9933-9938), as amended by Act Aug. 18, 1894, c. 299, § 3, 28 Stat. 360 (Comp. St. § 9935), and Act May 28, 1908, c. 212, § 8, 35 Stat. 426 (Comp. St. § 9935), for illegal dumping in New York Harbor. Appellant, as claimant of the scow, denied the jurisdiction of the court to entertain the suit: First, on the ground that by the statute the vessel was made liable only for such penalties as might be imposed in criminal proceedings upon the persons responsible for the illegal act, and there had been in this case no conviction of such persons or assessment of penalties; and, secondly, that the assessment of such penalties was

not within the admiralty or maritime jurisdiction of the court. A motion to dismiss on this ground was overruled, the court gave judgment against the scow (247 Fed. 348), and the claimant appeals to this court upon the jurisdictional question under section 238, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1157 [Comp. St. § 1215]).

The statute forbids by section 1 the deposit of mud, etc., in the tidal waters of New York Harbor except within limits prescribed by the supervisor, and provides that—

*271 "Every such act is made a misdemeanor, and every person engaged in or who shall aid, abet, authorize, or instigate a violation of this section, shall, upon conviction, *be punishable by fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than two thousand five hundred dollars, and the imprisonment to be not less than thirty days nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide."

Section 2 provides that the master, etc., of any vessel towing a scow loaded with prohibited matter to a place of deposit elsewhere than within the limits shall be punishable as provided in section 1, and in addition have his license revoked or suspended.

Section 4 contains provisions for disposal of dredged material, and a penalty for violation thereof, and concludes as follows:

"Any boat or vessel used or employed in violating any provision of this act, shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against, summarily by way of libel in any District Court of the United States, having jurisdiction thereof."

[1, 2] The principal contention of appellant is that the purpose of the statute was to make the vessel responsible only for such pecuniary penalties as might be assessed against the offending persons in criminal proceedings, and hence that the conviction and fining of such persons is a condition precedent to the maintenance of a suit against the vessel. In support of this *The Strathairly*, 124 U. S. 558, 8 Sup. Ct. 609, 31 L. Ed. 580, is cited. That was a suit brought under sections 4252, 4253, 4255, 4266, and 4270, Rev. St., which contained provisions respecting the carriage of passengers on vessels entering or leaving ports of the United States, and prescribed fines and penalties against the master and owner of the vessel violating such provisions. Section 4270 provided:

"The amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels shall be liens on the vessel violating those provisions, and such *vessel shall be libeled therefor in any Circuit or District Court of the United States where such vessel shall arrive."

This court said (124 U. S. 580, 8 Sup. Ct. 609, 31 L. Ed. 580) that the penalty recoverable against the vessel, and by section 4270 made a lien upon it, was not an additional penalty, but the same which by section 4253 was to be adjudged against the master in the criminal prosecution.

We concur with the District Judge in the view that the case is distinguishable from the present one because of the substantial difference in the applicable provisions of law. The act of Congress here in question imposes a direct liability upon the vessel for the pecuniary penalties prescribed, and declares that it may be proceeded against summarily by libel in any District Court of the United States having jurisdiction thereof. This precludes the idea that the proceeding by libel is to be deferred to await the possibly slow course of criminal proceedings against the persons individually responsible. It treats the offending vessel as a guilty thing, upon the familiar principle of the maritime law, and permits a proceeding against her in any court of admiralty "having jurisdiction thereof"—meaning any court within whose jurisdiction she may be found.

Libels of this character, without previous conviction of the responsible persons, have been entertained under this act from the time of its enactment, and dealt with upon the merits, without question as to the jurisdiction until now. *United States v. The Sadie* (C. C.) 41 Fed. 396; *The G. L. Garlic* (D. C.) 45 Fed. 380; *The Anjer Head* (D. C.) 46 Fed. 664; *The Bombay* (D. C.) 46 Fed. 665; *The Emperor* (D. C.) 49 Fed. 751; *United States v. Various Tugs and Scows* (D. C.) 225 Fed. 505; *The J. Rich Steers*, 228 Fed. 319, 142 C. C. A. 611; *The Columbia* (C. C. A.) 255 Fed. 515.

[3, 4] There is no difficulty, on constitutional or other grounds, about assessing an unliquidated fine in the admiralty; *and, if it be not a proceeding for enforcement of a penalty or forfeiture incurred under a law of the United States within the meaning of the ninth subdivision of section 24, Judicial Code (Comp. St. § 991 [9]), the act of 1888 itself confers jurisdiction.

Judgment affirmed.

(250 U. S. 256)

LINCOLN GAS & ELECTRIC LIGHT CO. v.
CITY OF LINCOLN et al.(Argued Oct. 5 and 8, 1917. Decided June 2,
1919.)

No. 52.

1. EQUITY ⇨447(1) — BILL OF REVIEW—
LEAVE TO FILE—GROUNDS FOR DENIAL.

Complainant's application to Supreme Court for leave to file bill of review in trial court in suit to enjoin as confiscatory enforcement of ordinance reducing complainant's gas rates from \$1.20 to \$1, application alleging test, by putting in effect the \$1 rate, pending hearing on master's report, showed error in master's finding that increase of consumption would follow reduction in price, will be denied, rate having been put in effect under stipulation that company's act should not be used to influence action of court, whereby defendant was relieved of observing its effect and preparing to meet inferences therefrom; complainant having delayed a practical test for years after it had notice of Supreme Court's view of importance of practical test of prescribed rates before attacking them by suit, and the master's finding as to net return that would have been earned under prescribed rates being vitiated by inclusion as an operating expense of a large invalid occupation tax.

2. COURTS ⇨263—FEDERAL COURTS—FEDERAL AND NONFEDERAL QUESTIONS.

Even without diversity of citizenship, if a bill in federal court presents a substantial controversy under the Constitution of the United States, and the requisite amount is involved, the jurisdiction extends to the determination of all questions, including questions of state law, and irrespective of the disposition made of the federal questions.

3. COURTS ⇨52—TRANSFER OF JURISDICTION—
REVERSAL IN PART—REMAND—FINAL DECREE BELOW.

So much of decree of Circuit Court, in suit attacking gas rate ordinance and occupation tax ordinance, as adjudged occupation tax ordinance void and enjoined its enforcement, having been untouched on appeal by complainant to Supreme Court from the part of the decree dismissing bill as to rate ordinance, is to be considered part of the final decree of District Court, after reversal by Supreme Court and remand to District Court; the District Court's decree, while saying nothing on the subject of the occupation tax ordinance, not modifying the effect of the former decree thereon.

4. GAS ⇨14(2) — RATES—ORDINANCE—REASONABLENESS—INCOME.

Finding that no gas rate prescribed by ordinance yielding as much as 6 per cent. on invested capital can be regarded as confiscatory cannot be approved in view of undisputed evidence that 8 per cent. was the lowest rate sought and generally obtained on investments in banking, merchandising, and other business in the vicinity, 7 per cent. being the legal rate of interest in the state, and the complainant gas

company having no monopoly, and its profits not being virtually guaranteed.

5. APPEAL AND ERROR ⇨1018 — REVIEW—
FINDINGS.

The court on appeal in suit to enjoin enforcement of ordinance fixing gas rates *held*, having regard for the entire period under investigation, unable to say that the master erred in holding that ordinance was not shown to have been confiscatory.

6. DISMISSAL AND NONSUIT ⇨75—DISMISSAL WITHOUT PREJUDICE.

Decree dismissing bill to enjoin, as confiscatory, enforcement of ordinance fixing gas rates should be without prejudice to bringing new action, if as result of practical test of prescribed rate, or change in conditions, increased cost of labor and materials, and increased rates of return on capital, it appear that the rate has become confiscatory.

Appeal from the District Court of the United States for the District of Nebraska.

Suit by the Lincoln Gas & Electric Light Company against the City of Lincoln and others. From an adverse decree, complainant appeals. Modified and affirmed.

*Messrs. Robert Burns, of New York City, E. C. Strode, of Lincoln, Neb., and Charles A. Frueauff, of New York City, for appellant.

Messrs. W. M. Morning, C. Petrus Peterson, and G. W. Berge, all of Lincoln, Neb., for appellees.

Mr. Justice PITNEY delivered the opinion of the Court.

This is an appeal from the final decree of the District Court dismissing the bill of complaint in a suit brought by the Lincoln Gas & Electric Light Company, a Nebraska corporation, against the city of Lincoln and its officials, praying for an injunction to restrain enforcement of an ordinance of the city adopted November 19, 1906, which had the effect of reducing complainant's charges for gas from \$1.20 to \$1 per 1,000 cubic feet, and an ordinance adopted December 10, 1906, assessing an annual occupation tax upon gas companies in the city.

The action was instituted in December, 1906, without previous test of the \$1 rate, in the then Circuit Court of the United States for the District of Nebraska. Besides grounds not pressed, the rate ordinance was attacked upon the ground that its enforcement would deprive complainant of its property without due process of law, in contravention of the Fourteenth Amendment. The tax ordinance was attacked upon grounds of state law, and also upon the ground that it was violative of the "due process" and "equal protection" clauses of the Fourteenth Amendment. Upon final hearing the court, by decree entered April 6, 1909, dismissed the bill as to the rate ordi-

nance, without prejudice to the commencement of a new action, but decreed that the ordinance levying an occupation tax violated the Constitution of Nebraska and was for this reason illegal, and granted a permanent injunction against its enforcement. 182 Fed. 926.

Upon appeal by complainant to this court it was found that there was a great mass of conflicting evidence relating to the value of complainant's plant, the cost of operation, and the gross and net income; that the case had not been referred to a master, nor had specific findings of fact been made by the court below, but only general conclusions which were found not to be sufficient in view of errors assigned which opened up substantially the entire case. For this reason the decree was reversed, and the cause remanded to the District Court, with directions to refer it to a master with leave to both parties to take additional evidence. A temporary injunction *which had been granted in the court below and continued in force until final decree and afterwards pending the appeal, under a bond conditioned to account for overcharges if the rate ordinance should be sustained, was by the decree of reversal continued in force until final decree in the court below, upon condition that a new bond with sureties was given to account for overcharges to consumers since the original restraining order, in the event the ordinance should be sustained. 223 U. S. 349, 32 Sup. Ct. 271, 56 L. Ed. 466.

Upon the going down of the mandate, the District Court referred the case (July, 1912) to a master, to take the proofs and report his findings of fact and of law. After a full hearing he made an elaborate report (September, 1914), to which complainant filed about 125 exceptions, with a motion to recommit the case to the master for additional findings, which motion was denied. The master found the rate ordinance was not confiscatory, and (differing from the former decision of the Circuit Court) held that the occupation tax ordinance was valid, and included the tax as an operating expense. Upon the hearing of the exceptions the report of the master was confirmed by the District Court, and the bill dismissed as to the rate ordinance, by decree entered September 23, 1915; the judge filing a memorandum to the effect that he did not agree with the master as to the validity of the occupation tax ordinance, but deemed it unnecessary to pass upon this in the decree, since the result reached by the master would only be strengthened by adjudging the tax invalid, while, if the judge should agree with the master upon that question, he still would confirm the report. In other words, assuming the occupation tax ordinance to be valid, the addition of this tax to the annual outgoes of complainant would still leave the \$1 rate compensatory.

Complainant brings the case to this court by appeal, with about 120 assignments of error, one of which is that *the District Court erred in not decreeing that the occupation tax ordinance was in violation of the Fourteenth Amendment in that it amounted to a denial of the equal protection of the laws.

[1] Pending the hearing upon the master's report, and on or about May 1, 1915, complainant, notwithstanding the injunction pendente lite, put into effect a net rate of \$1 per thousand feet for gas, and has maintained it since.

Upon the strength of this test, and before the argument of this, the second appeal, complainant presented to us a petition for leave to file a bill of review in the court below upon the ground that, according to the master's findings, complainant, in the year 1907, earned so small a return that the rate ordinance would have been confiscatory upon the valuation as found by him, but for this additional finding:

"All human experience has shown that increased consumption follows quickly a reduction in the price of commodities, and the evidence in this case satisfactorily shows that gas is no exception to the rule."

The petition averred that the experience of complainant in an actual test of the reduced rate during a considerable period since May 1, 1915, showed that the view of the master was erroneous, and in fact under actual operating conditions there was no increase of consumption.

The application for leave to file a bill of review will be denied, for the following reasons:

First, because the \$1 rate was put into effect pursuant to a written stipulation made between the parties in the cause to the effect that the action of the company in so doing should not be construed as an acceptance of or compliance with the ordinance in controversy, and should not be "shown in evidence or presented to the court in the above-entitled cause, or used in any way by either party to influence the action of the court in the disposition of the case." Hence defendant was not called upon *to observe the effect of the reduced rate, or prepare to meet inferences drawn therefrom.

Secondly, because complainant might have made a practical test of the ordinance rate before bringing this suit for an injunction, and certainly ought to have resorted to the test long before it did so. As early as the month of January, 1909, this court, in two notable rate cases, indicated its view of the importance, in any but a very clear case, of subjecting prescribed rates to the test of practical experience before attacking them in the courts. *Knoxville v. Water Co.*, 212 U. S. 1, 16, 18, 29 Sup. Ct. 148, 53 L. Ed. 371; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19,

54, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134. When those decisions were announced this case was pending in the Circuit Court, and shortly thereafter it was decided adversely to complainant upon the question of the validity of the rate, the Knoxville and Willcox Cases being cited. 182 Fed. 926, 929. Then, if not before, complainant might have made a practical test of the sufficiency of the rate, instead of waiting six years longer before doing so. The litigation has been extremely tedious and burdensome to both sides, and it ought now to be brought to a conclusion upon the record as it stands.

And, thirdly, the argument based upon the master's finding as to the return that complainant would have earned in the year 1907 under the prescribed rates is vitiated by the fact that he included as an operating expense \$4,466, the amount of the estimated occupation tax, which was not paid and (as we shall see) has been conclusively adjudged in this suit to be unenforceable. Eliminating this would increase the net return for the year approximately 1 per cent. upon the investment.

[2, 3] Coming to the merits, we will deal first with the occupation tax ordinance. This is important not only because considerable sums of unpaid taxes have accumulated pending the litigation, but because of the effect of the tax, if sustained, upon the question of the adequacy of the rate.

* The ordinance imposes an occupation tax upon all gas companies manufacturing and furnishing gas to the inhabitants of the city of Lincoln equivalent to 2½ per cent. of their gross receipts derived from that business. It was attacked in the bill as being "partial, discriminatory, unreasonable, and oppressive in this, it imposes upon your orator an onerous tax burden to which the business and occupations of other persons within said city are not subjected"; and the bill alleged, among other things, that the Lincoln Traction Company held a franchise for furnishing electricity to the public in said city, under which it was supplying light, heat, and power in competition with complainant's gas business, and that the city had not subjected this business of the traction company to any occupation tax; wherefore the ordinance "operates to deprive your orator of the equal protection of the laws, imposes a discriminatory burden upon your orator, * * * and deprives your orator of its franchise rights and privileges and of its properties without due process of law," thus being violative of the due process and equal protection provisions of the Fourteenth Amendment. The Circuit Court deemed that this raised the question of the invalidity of the ordinance under the uniformity provision of the state Constitution, and held it was invalid as being in contravention thereof. 182 Fed. 926, 927, 929. The city requested a modifi-

cation of the opinion and decree in this respect, on the ground that the invalidity of the ordinance under the state laws and Constitution was not charged in the bill. This application was denied.

Neither the city nor any other defendant appealed from that part of the decree which adjudged the occupation tax ordinance void and granted an injunction against its enforcement. Complainant appealed only from that part which was adverse to it upon the question of the validity of the rate ordinance. None of its assignments *of error touched upon the tax ordinance; but in its brief in this court upon the first appeal complainant declared that its bill had assailed the tax ordinance only upon the ground that it was in violation of the equal protection clause of the Fourteenth Amendment; that the bill was drawn upon the theory that this ordinance, like the rate ordinance, could only be assailed in a court of the United States upon the ground "that it was violative of the Constitution of the United States," apparently overlooking that, even without diversity of citizenship (and there was none), if the bill presented a substantial controversy under the Constitution of the United States, and the requisite amount was involved, the jurisdiction extended to the determination of all questions, including questions of state law, and irrespective of the disposition made of the federal questions. *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88. It was said in the brief that the decree of the Circuit Court against the validity of the occupation tax ordinance was a nullity because the subject-matter was not cognizable in a court of the United States and the issue decided was not tendered by the bill. Upon the ground that the decree might constitute no bar to the collection of the occupation taxes, and the amount of these, if collected, would reduce complainant's returns and render the rate ordinance, if sustained, still more burdensome, appellant asked this court to pass upon the validity of the tax ordinance upon the federal grounds asserted in the bill.

Naturally this court ignored the suggestion, its jurisdiction over the question not having been invoked by an appeal, and so it happened that the occupation tax ordinance was not mentioned in the opinion or in the mandate.

There is nothing before us to show what decree, if any, was made by the District Court upon the going down of the mandate, beyond a mere order of reference to the *master. The final decree made upon the confirmation of his report says nothing upon the subject of the occupation tax ordinance. Its language is:

"That the bill of complaint herein, so far as the same relates to the ordinance of the city of Lincoln establishing a rate of charges for

gas in said city, be and the same is hereby dismissed, and the restraining order heretofore granted against the enforcement of said ordinance is hereby dissolved."

Upon this record, it is very clear that so much of the decree of the Circuit Court entered April 6, 1909, as held the occupation tax ordinance void and restrained its enforcement was untouched by the former appeal and unaffected by the subsequent proceedings. The decree now under review does not modify the effect of the former decree upon this subject; hence the adjudication of the invalidity of the occupation tax ordinance and the award of an injunction to restrain its enforcement are to be taken as a part of the final decree in the cause. We deem it entirely clear also that the issue of the validity of that ordinance upon grounds of state law was fairly within the pleadings, and that this part of the decree is impregnable against collateral attack, in this court or elsewhere. This being so, the assignment that the District Court erred in its decree of September 23, 1915, in not decreeing that the occupation tax ordinance was in violation of the Fourteenth Amendment because amounting to a denial of the equal protection of the laws is groundless; there was no occasion for the court to make any decree to that effect, since the matter had been conclusively determined against the validity of this ordinance by the final decree of April 6, 1909, which remained in this respect unappealed from. In order to render the matter free from doubt the decree of September 23, 1915, will now be modified by embodying in it a reiteration of that part of the decree of April 6, 1909, which held the occupation tax ordinance void and restrained its enforcement.

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*Parenthetically, it may be stated that on March 16, 1908, the city council passed an ordinance imposing a like occupation tax upon corporations selling electricity for light or power purposes, but at the rate of only 2 per cent. of their gross receipts; that on December 13, 1909, both occupation taxes were repealed, and gas and electric companies alike were subjected thereafter to an occupation tax equal to 3 per cent. of their gross receipts; and that in July, 1916, the Supreme Court of Nebraska adjudged the occupation tax ordinance of December 10, 1906, to be invalid, following the decision of the Circuit Court in this case, and on the same day held that the enforcement against complainant of an occupation tax under the ordinance of December, 1909, must be stayed pending the final determination of the present case. *City of Lincoln v. Lincoln Gas & Electric Light Co.* (two cases) 100 Neb. 182, 188, 158 N. W. 962, 964.

[4, 5] The attack upon the rate ordinance brings under consideration questions of the valuation of the plant, the proper method of estimating and applying depreciation charges,

questions of working capital, going concern value, the propriety of various items of operating expense, the rate of return that reasonably ought to be allowed upon capital invested in a plant and business of this character in Nebraska, and the other questions usual in such cases. The special master conducted a patient and elaborate investigation. An enormous mass of evidence was produced before him, and analyzed in his report. In abridged form, it occupies nearly 2,000 pages of printed transcript in this court, besides numerous tabular exhibits. It would be impossible, within reasonable limits, to recite the substance of the evidence or review the master's findings. We do not feel called upon to do this. *Knoxville v. Water Co.*, 212 U. S. 1, 17, 29 Sup. Ct. 148, 53 L. Ed. 371. The findings are subjected to numerous and minute criticisms, and some of these seem to possess *force. We cannot approve the finding that no rate yielding as much as 6 per cent. upon the invested capital could be regarded as confiscatory, in view of the undisputed evidence, accepted by the master, that 8 per cent. was the lowest rate sought and generally obtained as a return upon capital invested in banking, merchandising, and other businesses in the vicinity; 7 per cent. being the "legal rate" of interest in Nebraska. Complainant had not such a monopoly nor were its profits "virtually guaranteed" in such a sense as to permit the public authorities to restrict it to a return of 6 per cent. upon its invested capital. It is not entirely clear, however, that the rate ordinance did so restrict it. Again, we question the propriety of the master's treatment of "going value," which he seems to have estimated at less than otherwise he would have placed it upon the theory that the company's business had been developed, at the expense of the public, in the expenditure of past earnings exceeding a fair return upon the capital invested, and this without any finding, or any clear evidence to which our attention has been called, that past earnings were excessive. On the other hand, the master erred in favor of complainant by allowing as operating expenses occupation taxes for the years 1907 to 1909, inclusive, these taxes not having been paid, and the taxing ordinance applicable to that period having been held invalid by the decree of the Circuit Court entered April 6, 1909, and so held since his report by the state Supreme Court. And it is possible he erred in allowing occupation taxes for the year 1910 and subsequent years, since these were not in fact paid. As we have seen, the occupation tax erroneously allowed for the crucial year 1907 amounted to more than 1 per cent. upon the invested capital at the master's valuation. He also appears to have been unduly liberal to the company in the allowance for

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*208 working capital, and in some other items of valuation, as well as in respect of some *expenditures allowed as operating expense. Without going into details, we content ourselves with announcing our general conclusion that, having regard to the entire period under investigation, we are unable to say that the master erred in holding that the ordinance was not shown to have been confiscatory in its effect. It is probable that in the years 1907 and 1912 the net return was close to the line, if not below it, but that in the other years examined it was at least 7 per cent.; and there are too many doubtful items for us to adjudge the ordinance void, in the absence of an actual and timely test.

[6] The decree dismissed the bill, however, so far as it related to the rate ordinance, without reservation or qualification. Perhaps it would go without saying, but in our opinion the decree ought to be modified so as to permit complainant to make another application to the courts for relief against the operation of the ordinance hereafter, if it can show, as a result of its practical test of the dollar rate since May 1, 1915, or upon evidence respecting values, costs of operation, and the current rates of return upon capital as they stand at the time of bringing suit and are likely to continue thereafter, that the rate ordinance is confiscatory in its effect under the new conditions. It is a matter of common knowledge that, owing principally to the world war, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future.

*209 The final decree of September 23, 1915, will be modified by embodying in it a reiteration of that part of the *final decree of April 6, 1909, which held that the ordinance of the city of Lincoln approved December 10, 1906, levying an occupation tax against complainant, was illegal and void because violative of the Constitution of the state of Nebraska, and that the enforcement of the same as to complainant should be perpetually enjoined.

The decree of September 23, 1915, will be further modified so that the dismissal of the bill of complaint, in so far as it relates to the ordinance of the city of Lincoln approved November 19, 1906, establishing a rate of charges for gas in said city, shall be without prejudice to the commencement of a new action to restrain the enforcement of said ordinance hereafter, and decree, as thus modified, affirmed, with costs.

(250 U. S. 229)

BRAINERD, SHALER & HALL QUARRY CO. v. BRICE et al.

(Submitted under Rule 32, March 17, 1919.
Decided June 2, 1919.)

No. 431.

1. COURTS ⇨322(2)—JURISDICTION—DIVERSE CITIZENSHIP—PLEADING.

Complaint against executor of principal in bond and the surety, containing but single cause of action, and praying for joint judgment against defendants, *held* to show action was on the bond, and not an action to recover the obligee's interest in an estate, because of the wrongful conversion thereof by the principal, to which action the surety would not be a proper party.

2. ASSIGNMENTS ⇨78—ASSIGNMENT OF PRINCIPAL'S OBLIGATION — OBLIGATION OF SURETY.

Assignment to a certain amount by the obligee in a bond of the principal's obligation thereon carries with it the obligation of the surety given to secure the faithful performance of the duty required of the principal.

3. COURTS ⇨312(6) — FEDERAL JURISDICTION —ACTION BY ASSIGNEE—"ASSIGNEE WITHOUT FORMAL ASSIGNMENT."

Plaintiff, in action against executor of the principal in a bond and the surety thereon, by the assignee, from an obligee, of the principal's obligation thereon, to a certain amount, is assignee, without formal assignment, of the bond, within Judicial Code, § 24 (Comp. St. § 991), declaring that no district court shall have cognizance of a suit to recover on a chose in action in favor of an assignee unless such suit might have been prosecuted there had there been no assignment.

In Error to the District Court of the United States for the Southern District of New York.

Action by the Brainerd, Shaler & Hall Quarry Company against Wilson B. Brice, executor of Henry Van Schaick, deceased, and another. Judgment of dismissal, and plaintiff brings error. Affirmed.

* Mr. E. D. Worcester, of New York City, for plaintiff in error.

Mr. Bronson Winthrop, of New York City, for defendants in error.

Mr. Justice DAY delivered the opinion of the Court.

The Quarry Company brought an action at law in the District Court of the United States for the Southern District of New York to recover \$20,000 and interest from Wilson B. Brice as executor of Henry Van Schaick, deceased, and the American Surety Company. Answers were filed and the case was at issue, and came on for trial, when, upon motion of the defendants, the action was dismissed for want of jurisdiction. The only question here concerns the correctness

of this ruling of the District Court. The ground of the dismissal is thus stated in the record:

"In this cause I hereby certify that this writ of error is allowed solely, and that the order herein dismissing the complaint was based solely, on the ground that no jurisdiction of the District Court existed; that this question has been determined by me on the following grounds:

"This action is brought on a surety bond made by one Henry Van Schaick (since deceased) as principal, and the defendant the American Surety Company of New York, as surety, for the purpose of securing the due payment, at Henry Van Schaick's death, of the remainder interests in a certain fund of money held by Henry Van Schaick as life tenant; that one Eugene Van Schaick (since deceased) was at the time of the assignment below mentioned the owner of one of the remainder interests secured by said bond; that Eugene Van Schaick, during the continuance of the life estate, assigned to the plaintiff a portion of his said remainder interest, and thereafter survived the said *Henry Van Schaick, and this action is based on such assignment; that Eugene Van Schaick was in his lifetime a citizen and resident of the state of New York, and both of the defendants are citizens and residents of the state of New York; that this suit could not have been prosecuted in this court upon said remainder interest and said bond if no such assignment had been made."

Section 24 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. § 991]), among other things, provides:

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

To determine the character of the action for the purposes of jurisdiction recourse must be had to the allegations of the complaint. They are quite voluminous, but for our purposes may be summed up as stating: The plaintiff is a corporation of the state of Connecticut. The defendant the American Surety Company is a corporation of the state of New York. The defendant Wilson B. Brice is a resident and citizen of the state of New York. (It was conceded for the purposes of the motion that Eugene Van Schaick was a citizen of New York.) Jane C. Van Schaick died May 20, 1893, seized of certain real estate in the state of New York. By her last will and testament she gave one-half of her real estate to Henry Van Schaick, of New York, during his life, with remainder to his descendants who should be living at the time of his decease and living also at the time of the testatrix's decease, if she should survive him. The will was duly probated on June 28, 1893. Henry Van Schaick survived the testatrix, and had living chil-

dren, one of whom was Eugene *Van Schaick. The complaint then recites certain conveyances, and the prosecution of a partition suit, the decree in which was, by order of the court, considered upon the motion to dismiss. In that suit it was adjudged that Henry Van Schaick had an estate as tenant for life in one-half of the said real estate; that among others Sarah Van Schaick, wife of Eugene Van Schaick, had an estate in remainder in the land to commence in possession upon the death of Henry Van Schaick. It being found that the land could not be divided, it was ordered sold. The sale for \$134,369.74 is recited. One-half of the proceeds, \$67,184.87, was found to belong to Henry Van Schaick for life, at his death to vest in the descendants of Henry Van Schaick as should be then living, or in such persons as should then be the legal owners of said shares. The decree provided that the fund might be paid to Henry Van Schaick upon his giving security to the remaindermen, and provision was made for giving the bond now sued upon. Henry Van Schaick as principal and the American Surety Company then executed the bond in the sum of \$75,000. The obligees of the bond were the descendants of Henry Van Schaick living at the time of his death, the amount to be paid to them, their executors, administrators, or assigns. The condition of the bond was that Henry Van Schaick during his lifetime should safely keep and preserve said principal sum, and the same should be paid over to his descendants as provided in the decree. Eugene Van Schaick acquired the interest which had been assigned to his wife. On May 9, 1901, Eugene Van Schaick assigned to the Quarry Company the sum of \$20,000, to be paid out of his remainder interest. Henry Van Schaick died on November 15, 1914, leaving Eugene Van Schaick and others surviving him. Eugene Van Schaick died on January 27, 1916. Henry Van Schaick did not keep and preserve the principal of said \$67,148.67, the same was not paid as provided in the decree, but was lost by said Henry *Van Schaick. The complaint avers demand of the \$20,000 and interest, and prays judgment against the defendants.

[1, 2] The action thus appears to have been brought upon the assignment of Eugene Van Schaick, a citizen of New York, to the plaintiff, a corporation of Connecticut, against defendants, who were residents and citizens of New York. Eugene Van Schaick could not have maintained the suit in the federal court, being himself a citizen and resident of New York. This suit was an action at law upon the bond. It was against both the executor and the surety company. The surety company was liable at law only upon the bond. The complaint, fairly considered, shows that such was the real nature of the suit. It contained but a

single cause of action, and prayed for joint judgment against the executor of Henry Van Schaick and the surety company. Henry Van Schaick was liable to Eugene Van Schaick upon the bond. Eugene Van Schaick assigned that obligation to the plaintiff to the extent of \$20,000. That assignment carried with it the obligation of the surety company given to secure the faithful performance of the duty required of Henry Van Schaick. *George v. Tate*, 102 U. S. 564, 571, 26 L. Ed. 232.

[3] The defenses, if any, of the surety company against the claim in the hands of Eugene Van Schaick could have been urged against the plaintiff. We think the plaintiff was an assignee within the meaning of section 24, without formal assignment of the bond. *Shoecraft v. Bloxham*, 124 U. S. 730, 8 Sup. Ct. 686, 31 L. Ed. 574; *Plant Investment Co. v. Jacksonville, etc., Ry. Co.*, 152 U. S. 71, 14 Sup. Ct. 483, 38 L. Ed. 358.

Brown v. Fletcher, 235 U. S. 589, 35 Sup. Ct. 154, 59 L. Ed. 374, is an entirely different suit from the one now under consideration. In that action there was an assignment of an interest in a trust estate by the beneficiary, who was a resident and citizen of New York, to the complainants, who were residents and citizens of Pennsylvania and suit was brought in the District Court of the United States for the Southern District of New York, the defendants being residents and citizens of New York. It was held that the suit to recover this interest in a trust estate was not a suit by an assignee within the meaning of section 24 of the Judicial Code. That suit, this court held, was not a suit upon a chose in action, but was one to recover upon the conveyance of an alienable interest acquired from the owner in a trust estate. Such interests might be sued for in the federal courts when the requisite amount and diversity of citizenship exist. 235 U. S. 598, 599, 35 Sup. Ct. 154, 59 L. Ed. 374. But here the case is different; the suit was upon the bond, the right to recover arising from the assignment of the interest of Eugene Van Schaick in the fund in the hands of Henry Van Schaick. It was not a suit to recover the interest of Eugene Van Schaick in the estate because of the wrongful conversion thereof by Henry Van Schaick. To such a suit the surety company would not be a proper party. It was, as we have stated, an action upon a single cause of action against the executor of the principal and the surety upon the contract evidenced by the bond. The right to such action was derived by assignment from Eugene Van Schaick, a citizen and resident of New York, and as he could not have sued in the federal court, his assignee, the plaintiff, could not, by reason of section 24 of the Judicial Code.

Affirmed.

(250 U. S. 246)

THE LAKE MONROE.

Petition of UNITED STATES.

(Argued April 21 and 22, 1919. Decided June 2, 1919.)

No. 30.

1. ADMIRALTY ⚓—LIABILITY TO MERCHANT VESSEL LAWS—VESSELS CHARTERED FROM SHIPPING BOARD—APPLICABILITY OF ACT—REQUISITIONED VESSELS.

Shipping Board Act Sept. 7, 1916, § 9 (Comp. St. § 8146e), declaring that vessels purchased, chartered, or leased from the Shipping Board, established by the act, while employed solely as merchant vessels, shall be subject to all laws, regulations, and liabilities governing merchant vessels, *held*, in view of Act July 15, 1918, amending Shipping Board Act, and Act July 18, 1918, conferring power on the president as to charter rates, etc., to apply to vessels requisitioned by the President under authority of the emergency shipping fund clause of the Emergencies Appropriation Act of June 15, 1917 (Comp. St. 1918, § 3115^{1/2}_{16d}) through the Emergency Fleet Corporation, organized by the Shipping Board under authority of section 11 of the act of 1916 (Comp. St. § 8146f), and constituting only an operating agency of that Board.

2. ADMIRALTY ⚓—VESSELS "CHARTERED" FROM SHIPPING BOARD.

Shipping Board Act Sept. 7, 1916, § 9 (Comp. St. § 8146e), declaring that vessels "purchased, chartered or leased" from the Shipping Board shall be subject to all laws, regulations, and liabilities governing merchant vessels, indicates intent to include a contract for temporary use of vessel or its services, not amounting to a demise of it, as an agreement whereby the shippers pay a stipulated rate per ton for cargo carried; "chartered" being employed in a sense as broad as the definition of "charter" afterwards embodied in Act July 18, 1918, giving the President power as to charter rates.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Charter.]

3. ADMIRALTY ⚓—"EMPLOYED SOLELY AS MERCHANT VESSELS"—FUEL ADMINISTRATION.

Though a vessel was assigned to the New England coal trade, and at the time the government, through the Fuel Administration, was rationing the coal supply of the country, she could be employed "solely as a merchant vessel," within Shipping Board Act Sept. 7, 1916, § 9 (Comp. St. § 8146e), declaring that vessels purchased, chartered, or leased from the Shipping Board, while employed solely as merchant vessels, shall be subject to all laws, regulations, and liabilities governing merchant vessels, "whether the United States be interested therein as owner * * * or hold any * * * other interest therein."

4. ADMIRALTY ⚓—LIABILITIES GOVERNING MERCHANT VESSELS — ADMIRALTY PROCESS FOR COLLISION.

Liability of a merchant vessel to be subjected to judicial process in admiralty for collision

is among "all laws, regulations and liabilities governing merchant vessels" to which Shipping Board Act Sept. 7, 1916, § 9 (Comp. St. § 8146e), declares vessels chartered from the Shipping Board shall, under certain circumstances, be subject.

Petition of the United States, owner of the American steamship Lake Monroe, for writ of prohibition to District Court. Order to show cause discharged, and petition dismissed.

*Mr. Assistant Attorney General Brown, for petitioner.

*Mr. Edward E. Blodgett, of Boston, Mass., for respondent.

Mr. Justice PITNEY delivered the opinion of the Court.

Upon petition of the United States this court granted an order to show cause why a writ of prohibition or mandamus should not be issued in order to prevent the United States District Court for the District of Massachusetts, sitting in admiralty, from directing the seizure, attachment, or arrest of a steam vessel known as the Lake Monroe, owned and operated by the government of the United States, to satisfy a claim of the master and part owner of the American auxiliary fishing schooner Helena for damages arising out of a collision between the two vessels which occurred on October 8, 1918, off the coast of Cape Cod.

A libel having been filed in the District Court in behalf of the Helena against the Lake Monroe to recover damages, and praying that process issue for the seizure and attachment of the steamship, the United States appearing specially, filed suggestions to the effect that, as the steamer was the property of the United States and in its possession and control, the court was without jurisdiction to enforce claims against her by process.

The essential facts are as follows: The Lake Monroe, while in process of construction on the Great Lakes, was requisitioned and completed by the United States Shipping Board Emergency Fleet Corporation, and on completion was delivered to the United States Shipping Board for operation, and thereafter assigned by that board, through the Emergency Fleet Corporation, to the firm of William H. Randall & Co., of Boston, as operating and managing agents, that firm being a copartnership having experience in the operation of privately owned vessels for commercial purposes. They selected the master and other officers of the vessel, put them in charge of her, and furnished her crew; and thereafter they manned, equipped, and repaired her, collected freight moneys from the consignees, and paid the expenses of manning, equipping, and supplying her, and other running expenses, and for these services they were to be paid by, and were to account for

the moneys received by them to, the Emergency Fleet Corporation as the agent of the United States Shipping Board. At the time of the collision the Lake Monroe was loaded with coal, and operating under a charter executed by Randall & Co., as agents of the Shipping Board, to the New England Fuel & Transportation Company, a private concern in Boston; the cargo having been purchased from a private owner for private use, and the freight for its carriage paid by the Transportation Company to Randall & Co.

The District Court, conceding that the Lake Monroe, being a government-owned vessel, would be exempt from arrest except for the provisions of section 9 of the Shipping Board Act of September 7, 1916, c. 451, § 39 Stat. 728, 730 (Comp. St. § 8146e), held that, because at the time of the collision she was employed solely as a merchant vessel, by the terms of that section she was subject to arrest on process in rem to answer for the collision.

[1] It is the principal contention of the government that the Shipping Board Act has no application to the Lake Monroe because she was requisitioned by the President through the Emergency Fleet Corporation under the authority of other legislation, was documented in the name of the United States, and then employed by the President through the Shipping Board and the Fleet Corporation. This contention renders it necessary to review the several acts of legislation and the executive action that has been had pursuant thereto.

The Act of September 7, 1916, passed before the United States entered the great war, but when our commerce already was feeling the ill effects of the world-wide shortage in shipping occasioned by that war, is entitled:

"An act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes."

It created a board of five commissioners, and authorized them (section 5 [Comp. St. § 8146c]), with the approval of the President, to cause to be constructed and equipped, in American shipyards or elsewhere, or to purchase, lease, or charter, "vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit for use as naval auxiliaries or army transports or for other naval or military purposes" and also (section 7 [Comp. St. § 8146d]) to charter, lease, or sell to any citizen of the United States any vessel so purchased or constructed.

The important section 2 in its original form, provided as follows.

"Sec. 9. That any vessel purchased, chartered, or leased from the board may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: Provided, that foreign-built vessels admitted to American registry or enrollment and license under this act, and vessels owned, chartered, or leased by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered to any person a citizen of the United States, as provided in this act, may engage in the coastwise trade of the United States. Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely *as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

There followed prohibitions not necessary now to be particularly considered.

Section 11 (Comp. St. § 8146f) authorized the Shipping Board to form one or more corporations under the laws of the District of Columbia for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States, the total capital stock not to exceed \$50,000,000, and the Board to acquire for and on behalf of the United States not less than a majority of the capital stock. The act contained numerous provisions imposing duties upon common carriers by water, and conferring powers of regulation upon the Shipping Board.

The members of this Board were appointed by the President in December, 1916, and, having been confirmed by the Senate, were formally organized in the following month.

By the time the United States declared war, April 6, 1917, the world's merchant shipping had reached the stage of demoralization. The President, by a proclamation dated February 5, 1917, had declared an emergency, and brought into play the prohibition of one of the clauses of section 9 of the above act against the sale, lease, or charter to a person not a citizen of the United States or the transfer to a foreign registry or flag of any vessel registered or enrolled and licensed under the laws of the United States.

Soon after the declaration of war the Shipping Board, under authority of section 11 of the above act, caused to be organized (April 16, 1917) under the laws of the District of Columbia a corporation known as the United States Shipping Board Emergency Fleet Corporation, with \$50,000,000 of capital stock, all owned by the United *States. It was officered by the commissioners of the Shipping Board and their nominees, and was but an operating agency of that Board.

In this state of affairs, Congress embodied

in the Urgent Deficiencies Appropriation Act of June 15, 1917 (chapter 29, 40 Stat. 182), a clause entitled "Emergency Shipping Fund," which conferred upon the President broad powers of control over contracts for the building, production, or purchase of ships or material, and among others the power—

"to purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship."

Another clause declared:

"The President may exercise the power and authority hereby vested in him * * * through such agency or agencies as he shall determine from time to time: Provided, that all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct." Comp. St. 1918, § 3115¹/_{16d}.

Under this authority the President made an executive order July 11, 1917, directing that the Fleet Corporation should have and exercise all power and authority vested in him by said provision, so far as applicable to the construction of vessels, the purchase or requisitioning of vessels in process of construction, and the completion thereof, and that the Shipping Board should exercise all power and authority vested in him by said provision, so far as applicable to the taking over of title or possession, by purchase or requisition, of constructed vessels or charters therein, and the operation, management, and disposition of such vessels, and of all others theretofore or there*after acquired by *the United States, declaring:

"The powers herein delegated to the United States Shipping Board may, in the discretion of said Board, be exercised directly by the said Board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose."

It was under the authority thus conferred that the Lake Monroe was requisitioned while in process of construction and carried to completion by the Fleet Corporation, and thereafter operated by the Shipping Board through that corporation. She was documented in the name of the United States, and assigned to Randall & Co. as operating and managing agents, and at the time of the collision was operating under a charter executed by them as agents of the Shipping Board to a private concern for carrying coal in coastwise commerce.

Reference should be made to two acts approved respectively July 15 and July 18, 1918,

the former an amendment to the Shipping Act of 1916, the latter "An act to confer on the President power to prescribe charter rates and freight rates and to requisition vessels, and for other purposes." Chapters 152 and 157, 40 Stat. 900, 913. They were introduced as companion measures, the former as H. R. 12,100, the latter as H. R. 12,099, and proceeded *pari passu* through Congress. The Act of July 15th amended section 9 of the Shipping Act of 1916 with respect to some of its prohibitions, but re-enacted almost verbatim the part we have quoted from that section. The Act of July 18 begins with some definitions, and among them:

"The term 'charter' means any agreement, contract, lease, or commitment by which the possession or services of a vessel are secured for a period of time, or for one or more voyages, whether or not a demise of the vessel."

In view of this legislation we regard the contention of the government that the Shipping Act of 1916 has no application to the Lake Monroe as untenable. The argument adduced in support of it would cause the restrictive provisions of the Act of 1916 to operate only with respect to vessels constructed or acquired under that particular act and would render the powers conferred upon the Shipping Board and the Fleet Corporation by the executive order of July 11, 1917, absolute powers, subject to no regulation except such as the President might from time to time prescribe.

But at the time of the emergency provision of June 15, 1917, the Shipping Board had been established as a public commission, with broad administrative powers and subject to definite restrictions, and the Fleet Corporation had been created as its agency, financed with public funds. The emergency shipping legislation evidently was enacted in the expectation that the President would employ the Shipping Board and the Fleet Corporation as his agencies to exercise the new powers, for the Fleet Corporation was mentioned in the act, and it was known to be but an arm of the Board. It is not necessary to hold that Congress, while entertaining this expectation, went to the extent of restricting the President to those agencies; but it is not to be believed that they intended he should exercise the powers arbitrarily. And when in fact he designated the Fleet Corporation to exercise those powers so far as they pertained to the construction of vessels and the requisitioning of vessels in process of construction, and the Shipping Board so far as they applied to the operation, management, and disposition of vessels, it is to be presumed that he did so because of the general powers that already had been conferred upon them by law, and because they were subject to the regulatory provisions that Congress had enacted.

The provision of section 9 of the Act of

September 7, 1916, that vessels purchased, chartered, or leased from the Shipping Board, while employed solely as merchant vessels, should be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States were interested therein as owner or otherwise, was a most material restriction, deemed by Congress to be essential to subject them to the same duties and liabilities as privately owned merchant vessels with which they competed.

That Congress considered this provision and the other provisions of the Act of 1916 as having living force and general application after the executive order of July 11, 1917, is manifest from the amendatory act approved July 15, 1918, while the war was at its height, and treated by Congress as an emergency war measure. See House Rep. 568 and Senate Rep. 536, 65th Cong., 2d Sess.; also House Rep. 569 and Senate Rep. 535, same Session, relating to the companion measure. These reports and the accompanying bills show that the Shipping Board was understood to be executing all its powers under the regulations prescribed by the Act of 1916.

[2] The government contends further that section 9 of that act has no application to the present case, because liability is imposed thereby only with respect to vessels "purchased, chartered or leased from" the Shipping Board, and only when "employed solely as merchant vessels"; it being insisted that the Lake Monroe does not come within either of these descriptions. The return, however, makes it clear that at the time of the collision she was operating under a charter executed by the agents of the Board to a certain coal company; and even were it merely an agreement whereby the shippers paid a stipulated rate per ton for the cargo carried, we think that this would be a charter within the meaning of the Act of 1916. The words "purchased, chartered or leased" indicate an intent to include a contract for the temporary use of a vessel or its services, not amounting to a demise of the ship; in short, the term "charter" was here employed in a sense as broad as the definition afterwards embodied in the Act of July 18, 1918.

[3] We cannot accede to the suggestion that the Lake Monroe was not employed "solely as a merchant vessel" because she was assigned to the New England coal trade, and because at that time the government, through the Fuel Administration, was rationing the coal supply of the country. The language of section 9 "such vessels, while employed solely as merchant vessels," must be read in connection with the phrase "whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein." Her service at the time was purely commercial,

and she was subject by the terms of the act to the ordinary liability of a merchant vessel, notwithstanding the indirect interest of the government in the outcome of her voyage.

[4] We deem it clear, also, that among the liabilities designated by the section is the liability of a merchant vessel to be subjected to judicial process in admiralty for the consequences of a collision.

Order to show cause discharged, and petition dismissed.

(250 U. S. 328)

UNITED STATES v. BABCOCK.

SAME v. HAYDEN.

(Argued April 15, 1919. Decided June 2, 1919.)

Nos. 708, 915.

1. UNITED STATES 127 — CREATION OF RIGHTS AGAINST—PROVIDING COURT REMEDY.

The United States, when creating rights in individuals against it, need not provide a remedy through the courts.

2. COURTS 458—CLAIMS AGAINST UNITED STATES—JURISDICTION—PRIVATE PROPERTY LOST IN MILITARY SERVICE.

Under Act March 3, 1885 (Comp. St. § 6403), providing for ascertainment and determination by Treasury officers of value of private property of officers and enlisted men in the military service, lost or destroyed in such service under stated circumstances, and payment of amount ascertained, and that any claim presented and acted on under authority of the act shall be held as finally determined and shall never thereafter be reopened or considered, the Treasury Department has jurisdiction of such a claim, to the exclusion of the Court of Claims.

3. UNITED STATES 99—CLAIMS AGAINST—PRESENTMENT—HORSES LOST IN MILITARY SERVICE.

Under Act Jan. 9, 1883, and Act Aug. 13, 1888, right to present claims against the United States, under Rev. St. § 3482 (Comp. St. § 6390), as amended by Act June 22, 1874 (Comp. St. §§ 6391, 6392), for horses lost in military service, finally expired in 1891.

Appeals from the Court of Claims.

Two actions, one by Conrad S. Babcock and the other by Herbert B. Hayden, against the United States. From judgments for plaintiffs (53 Ct. Cl. 629), the United States appeals. Reversed.

*Mr. Assistant Attorney General Frierson, for the United States.

Mr. George A. King, of Washington, D. C., for appellees.

Mr. Justice BRANDEIS delivered the opinion of the Court.

These cases, which were argued together,

are appeals by the United States from judgments entered in the Court of Claims. In each an officer in the army recovered compensation under the Act of March 3, 1885, c. 335, 23 Stat. 350 (Comp. St. § 6403), for the loss, while in the service, without fault or negligence on his part, of privately owned personal property. In each case the claim had been duly presented within two years of the occurrence of the loss, and the Secretary of War had decided that the articles in question were "reasonable, useful, necessary, and proper for" such officer "while in quarters, engaged in the public service, in the line of duty."

In the Babcock Case the horse of a captain stationed at the Presidio died in 1910 of strangulation because the government furnished as the forage ration barley with the awns on it. In the Hayden Case, a lieutenant stationed at Texas City, Tex., lost in 1915 his personal effects during a hurricane and inundation, while he was endeavoring to save the property of the government and of others as well as his own. The claim for the horse had been disallowed by the Auditor of the War Department on the ground that "the death of officer's horse was not caused by any exigency of the service, nor from a cause incident to or produced by the military service." He had disallowed the claim for the personal effects because "the *property was not lost or destroyed by being shipped on an unseaworthy vessel, nor by reason of the claimant giving his attention to saving property belonging to the United States," and the Auditor's decision was affirmed on appeal by the Comptroller of the Treasury. The Auditor made no finding as to the value of the property lost. This was fixed by the Court of Claims at \$200 for the horse and \$333 for the personal effects; and for these amounts it entered judgments on the authority of *Newcomber v. United States*, 51 Ct. Cl. 408, and *Andrews v. United States*, 52 Ct. Cl. 373. The loss in each case occurred prior to April 5, 1917, so that the rights of the parties are not affected by the provisions of the Act of March 28, 1918, c. 28, 40 Stat. 459, 479, 480, or chapter VI of the Act of July 9, 1918, c. 143, 40 Stat. 845, 880, 881.

The questions whether the Act of March 3, 1885 authorizes recovery for horses under any circumstances and under what circumstances it authorizes recovery for other personal property have long been the subject of controversy in the Auditing Department and in that of the Comptroller of the Treasury. See 20 Decisions of the Comptroller, 238. But here we are confronted with the preliminary inquiry: Has Congress conferred upon the Court of Claims jurisdiction to determine in any case whether recovery may be had under that statute for an article lost

or destroyed? The right asserted is based upon the provision which declares:

"That the proper accounting officers of the Treasury be, and they are hereby, authorized and directed to examine into, ascertain, and determine the value of the private property belonging to officers and enlisted men in the military service of the United States which has been, or may hereafter be, lost or destroyed in the military service, under the following circumstances: * * *" and that "the amount of such loss so ascertained and determined shall be paid out of any money in the Treasury not otherwise *appropriated, and shall be in full for all such loss or damage."

[1, 2] These general rules are well settled: (1) That the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts. *United States ex rel. Dunlap v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354; *Ex parte Atocha*, 17 Wall. 439, 21 L. Ed. 696; *Gordon v. United States*, 7 Wall. 188, 195, 19 L. Ed. 35; *De Groot v. United States*, 5 Wall. 419, 431, 433, 18 L. Ed. 700; *Comegys v. Vasse*, 1 Pet. 193, 212, 7 L. Ed. 108. (2) That where a statute creates a right and provides a special remedy, that remedy is exclusive. *Wilder Manufacturing Co. v. Corn Products Co.*, 236 U. S. 165, 174, 175, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118; *Arnsen v. Murphy*, 109 U. S. 238, 3 Sup. Ct. 184, 27 L. Ed. 920; *Barnet v. National Bank*, 98 U. S. 555, 558, 25 L. Ed. 212; *Farmers' & Mechanics' National Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196. Still the fact that the right and the remedy are thus intertwined might not, if the provision stood alone, require us to hold that the remedy expressly given excludes a right of review by the Court of Claims, where the decision of the special tribunal involved no disputed question of fact and the denial of compensation was rested wholly upon the construction of the act. See *Medbury v. United States*, 173 U. S. 492, 498, 19 Sup. Ct. 503, 43 L. Ed. 779; *Parish v. MacVeagh*, 214 U. S. 124, 29 Sup. Ct. 556, 53 L. Ed. 936; *McLean v. United States*, 226 U. S. 374, 33 Sup. Ct. 122, 57 L. Ed. 260; *United States v. Laughlin* (No. 200), 249 U. S. 440, 39 Sup. Ct. 340, 63 L. Ed. 696, decided April 14, 1919. But here Congress has provided:

"That any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered."

These words express clearly the intention to confer upon the Treasury Department exclusive jurisdiction and to make its decision final. The case of *United States v. Harmon*, 147 U. S. 268, 13 Sup. Ct. 327, 37 L. Ed. 164, strongly relied upon by claimants, has no application. Compare *D. M. Ferry & Co. v.*

United States, 85 Fed. 550, 557, 29 C. C. A. 345.

[3] In the *Babcock Case* claimant insists also that section 3482 of the Revised Statutes (Comp. St. § 6390), as amended by Act of June 22, *1874, c. 395, 18 Stat. 193 (Comp. St. §§ 6391, 6392) affords a basis for the recovery. That section provided for reimbursement for horses lost in the military service, among other things "in consequence of the United States failing to supply sufficient forage." The 1874 amendment provided for reimbursement in any case "where the loss resulted from any exigency or necessity of the military service, unless it was caused by the fault or negligence of such officers or enlisted men." Even if these statutes were applicable to facts like those presented here, there could be no recovery; because under Act Jan. 9, 1883, c. 15, 22 Stat. 401, and Act Aug. 13, 1888, c. 868, 25 Stat. 437, the right to present claims under section 3482 of the Revised Statutes as amended finally expired in 1891. See *Griffis v. United States*, 52 Ct. Cl. 1, 170.

The Court of Claims was without jurisdiction in either case, and the judgments are Reversed.

(250 U. S. 300,

UNITED STATES v. COLGATE & CO.

(Argued March 10, 1919. Decided June 2, 1919.)

No. 828.

1. COURTS 385(6)—DIRECT APPEAL FROM DISTRICT COURT — QUASHING INDICTMENT — SCOPE OF REVIEW.

Under Act March 2, 1907 (Comp. St. § 1704), allowing writs of error from the District Court to be taken directly to the Supreme Court from a decision or judgment quashing or setting aside, or sustaining a demurrer to, any indictment, where such decision is based upon the invalidity or construction of the statute under which the indictment is founded, the Supreme Court must accept trial court's interpretation of indictment and confine its review to question of construction of statute.

2. MONOPOLIES 31 — INDICTMENT — VALIDITY.

On writ of error under Act March 2, 1907 (Comp. St. § 1704), to review an order of the District Court sustaining a demurrer to and quashing an indictment alleging a violation of the Sherman Anti-Trust Act, *held*, that the indictment charged no offense, for the District Court, whose interpretation is binding, construed the indictment as merely alleging that the defendant manufacturer fixed resale prices not averred to be unreasonable, and declined to sell to customers who did not agree to maintain the same.

3. MONOPOLIES 17(2) — COMBINATION IN RESTRAINT OF TRADE — SHERMAN ANTI-TRUST ACT.

The Sherman Anti-Trust Act is intended to prohibit monopolies and combinations, which probably would interfere with the free exercise of their rights by those engaged, or who wish to engage in trade; but in the absence of any purpose to create or maintain a monopoly a manufacturer engaged in private business may exercise his discretion as to parties with whom he will deal, and may refuse to sell to those who will not maintain specified resale prices.

In error to the United States District Court for the Eastern District of Virginia.

Colgate & Co. was indicted for an alleged violation of the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, commonly known as the Sherman Anti-Trust Act, and, a demurrer having been sustained and the indictment quashed (253 Fed. 522), the United States brings error. Affirmed.

* Mr. G. Carroll Todd, Asst. Atty. Gen., for the United States.

Mr. Charles E. Hughes, of New York City, for defendant in error.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

[1] Writs of error from Districts Courts directly here may be taken by the United States "from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded." Act March 2, 1907, c. 2564, 34 Stat. 1246 (Comp. St. § 1704). Upon such a writ "we have no authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the court in a case under review erroneously construed the statute." "We must accept that court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in its *decision." *United States v. Carter*, 231 U. S. 492, 493, 34 Sup. Ct. 173, 174 (58 L. Ed. 330); *United States v. Miller*, 223 U. S. 599, 602, 32 Sup. Ct. 323, 324 (56 L. Ed. 568).

Being of opinion that "the indictment should set forth such a state of facts as to make it clear that a manufacturer, engaged in what was believed to be the lawful conduct of its business, has violated some known law before it can be haled into court to answer the charge of a commission of a crime," and holding that it "fails to charge any offense under the Sherman Act [Act July 2, 1890, c. 647, 26 Stat. 209] or any other law of

the United States, that is to say, as to the substance of the indictment and the conduct and act charged therein," the trial court sustained a demurrer to the one before us. Its reasoning and conclusions are set out in a written opinion. 253 Fed. 522.

We are confronted by an uncertain interpretation of an indictment itself couched in rather vague and general language. Counsel differ radically concerning the meaning of the opinion below and there is much room for the controversy between them.

The indictment runs only against Colgate & Co., a corporation engaged in manufacturing soap and toilet articles and selling them throughout the Union. It makes no reference to monopoly, and proceeds solely upon the theory of an unlawful combination. After setting out defendant's organization, place and character of business, and general methods of selling and distributing products through wholesale and retail merchants, it alleges:

"During the aforesaid period of time, within the said Eastern district of Virginia and throughout the United States, the defendant knowingly and unlawfully created and engaged in a combination with said wholesale and retail dealers, in the Eastern district of Virginia and throughout the United States, for the purpose and with the effect of procuring adherence on the part of such dealers (in reselling such products sold to them aforesaid) to resale prices fixed by the defendant, and of preventing such dealers from reselling such products at lower prices, thus suppressing competition amongst such wholesale dealers, and amongst such retail dealers, in restraint of the aforesaid trade and commerce among the several States, in violation of the act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890."

Following this is a summary of things done to carry out the purposes of the combination: Distribution among dealers of letters, telegrams, circulars and lists showing uniform prices to be charged; urging them to adhere to such prices and notices, stating that no sales would be made to those who did not; requests, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon "suspended lists;" requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to any who failed to give the same; sales to those who did; similar assurances and promises required of, and given by, other dealers followed by sales to them; unrestricted sales to dealers with established accounts who had observed specified prices, etc.

Immediately thereafter comes this paragraph:

"By reason of the foregoing, wholesale dealers in the aforesaid products of the defendant in the Eastern district of Virginia and throughout the United States, with few exceptions, resold, at uniform prices fixed by the defendant, the aforesaid products, sold to them by the defendant, and refused to resell such products at lower prices to retail dealers in the state where the respective wholesale dealers did business and in other states. For the same reason retail dealers in the aforesaid products of the defendant in the Eastern district of Virginia and throughout the United States resold, at uniform prices fixed by *the defendant, the aforesaid products, sold to them by the defendant and by the aforesaid wholesale dealers, and refused to sell such products at lower prices to the consuming public in the states where the respective retail dealers did business and in other states. Thus competition in the sale of such products, by wholesale dealers to retail dealers, and by retail dealers to the consuming public, was suppressed, and the prices of such products to the retail dealers and to the consuming public in the Eastern district of Virginia and throughout the United States were maintained and enhanced."

In the course of its opinion the trial court said:

"No charge is made that any contract was entered into by and on the part of the defendant, and any of its retail customers, in restraint of interstate trade and commerce, the averment being, in effect, that it knowingly and unlawfully created and engaged in a combination with certain of its wholesale and retail customers, to procure adherence on their part, in the sale of its products sold to them, to resale prices fixed by the defendant, and that, in connection therewith, such wholesale and retail customers gave assurances and promises, which resulted in the enhancement and maintenance of such prices, and in the suppression of competition by wholesale dealers and retail dealers, and by the latter to the consuming public. * * *

"In the view taken by the court, the indictment here fairly presents the question of whether a manufacturer of products shipped in interstate trade, is subject to criminal prosecution under the Sherman Act, for entering into a combination in restraint of such trade and commerce, because he agrees with his wholesale and retail customers, upon prices claimed by them to be fair and reasonable, at which the same may be resold, and *declines to sell his products to those who will not thus stipulate as to prices. This, at the threshold, presents for the determination of the court, how far one may control and dispose of his own property; that is to say, whether there is any limitation thereon, if he proceeds in respect thereto in a lawful and bona fide manner. That he may not do so, fraudulently, collusively, and in unlawful combination with others, may be conceded. *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600, 614, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788. But it by no means follows

that being a manufacturer of a given article, he may not, without incurring any criminal liability, refuse absolutely to sell the same at any price, or to sell at a named sum to a customer, with the understanding that such customer will resell only at an agreed price between them, and should the customer not observe the understanding as to retail prices, exercise his undoubted right to decline further to deal with such person. * * *

"The pregnant fact should never be lost sight of that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstances that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferentially, others declined so to do. No suggestion is made that the defendant, the manufacturer, attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. The retailer, after buying, could, if he chose, give away his purchase or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by *the fact that he might by his action incur the displeasure of the manufacturer who could refuse to make further sales to him, as he had the undoubted right to do. There is no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually."

[2, 3] Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon the indictment—not to interpret it ourselves; and then to determine whether, so construed, it fairly charges violation of the Sherman Act. Counsel for the government maintain, in effect, that, as so interpreted, the indictment adequately charges an unlawful combination (within the doctrine of *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502) resulting from restrictive agreements between defendant and sundry dealers whereby the latter obligated themselves not to resell except at agreed prices, and to support this position they specifically rely upon the above-quoted sentence in the opinion which begins, "In the view taken by the court," etc. On the other hand, defendant maintains that looking at the whole opinion it plainly construes the indictment as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with any one who failed to maintain the same.

Considering all said in the opinion (notwithstanding some serious doubts) we are unable to accept the construction placed upon it by the government. We cannot, e. g., wholly disregard the statement that—

"The retailer, after buying, could, if he chose, give away his purchase or sell it at any price

he saw fit, or not sell it at all, his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer who could refuse to make further sales to him, as he had the undoubted right to do."

And we *must conclude that, as interpreted below, the indictment does not charge Colgate & Co. with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company.

The position of the defendant is more nearly in accord with the whole opinion and must be accepted. And as counsel for the Government were careful to state on the argument that this conclusion would require affirmation of the judgment below, an extended discussion of the principles involved is unnecessary.

The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell. "The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases." *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 320, 17 Sup. Ct. 540, 551 (41 L. Ed. 1007). "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade." *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600, 614, 34 Sup. Ct. 951, 955 (58 L. Ed. 1490, L. R. A. 1915A, 788). See also *Standard Oil Co. v. United States*, 221 U. S. 1, 56, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *United States v. American Tobacco Co.*, 221 U. S. 106, 180, 31 Sup. Ct. 632, 55 L. Ed. 663; *Boston Store of Chicago v. American Graphophone Co. et al.*, 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. 551, Ann. Cas. 1918C, 447. In *Dr. Miles Medical Co. v. Park & Sons Co.*, supra, the unlawful *combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell.

The judgment of the District Court must be

Affirmed.

(250 U. S. 273)

BLAIR v. UNITED STATES. TEMPLETON v. SAME. PHILLIPS v. SAME. BLAIR v. UNITED STATES et al. TEMPLETON v. SAME. PHILLIPS v. SAME.

(Argued Jan. 28, 1919. Decided June 2, 1919.)

Nos. 763-768.

1. CONSTITUTIONAL LAW ¶46(1)—CONSTITUTIONALITY OF ACT—NECESSITY OF DETERMINATION.

Both from considerations of propriety as well as long-established practice courts will refuse to pass upon the constitutionality of an act of Congress, unless obliged to do so in performance of the judicial function when the question is raised by a party whose interests entitle him to raise it.

2. GRAND JURY ¶36—INVESTIGATION—TESTIMONY OF WITNESS.

In view of the historical development of the doctrine of compulsion of witnesses, the giving of testimony and the attendance upon court or grand jury in order to testify which matters are regulated by Rev. St. §§ 861-865, 876, 877 (Comp. St. §§ 1468, 1470, 1472-1474, 1487, 1488), are public duties, so where a witness is subpoenaed to testify before a federal grand jury he may be required, subject to the constitutional exemption against self-incrimination, to answer any question within his knowledge concerning the matter under investigation.

3. GRAND JURY ¶36—INVESTIGATIONS—WITNESSES—OBJECTIONS TO EVIDENCE.

A witness before the federal grand jury cannot urge objections of incompetency and irrelevancy to questions which a party might urge.

4. GRAND JURY ¶36—INVESTIGATIONS—WITNESSES—CHALLENGING AUTHORITY.

A witness before a federal grand jury cannot challenge the authority of the court or of the grand jury, provided they have de facto existence and organization.

5. GRAND JURY ¶36—WITNESSES—EXAMINATION—"GRAND INQUEST."

An examination of witnesses by a federal grand jury need not be preceded by a formal charge against a particular individual, the body being recognized by the Fifth Amendment and statutes relative to grand juries to have the same powers that pertain to its British prototype, and it is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be narrowly limited by questions of propriety or forecasts of the probable results of the investigation or by doubts whether any particular individual will be found properly subject to an accusation of crime; hence a witness summoned before a grand jury cannot set limits on the investigation.

6. GRAND JURY ¶36—INVESTIGATIONS—WITNESSES.

Residents of Michigan, subpoenaed to testify in the Southern district of New York before a grand jury, investigating supposed viola-

tions of Corrupt Practices Act of June 25, 1910, as amended (Comp. St. §§ 188-198), in connection with verification and filing in that district of reports to the Secretary of the Senate of the United States, made by a candidate for nomination as Senator at a primary election held in Michigan, cannot decline to answer questions on the ground that District Court was without jurisdiction, and that Corrupt Practices Act, as amended, was unconstitutional, for the witnesses, who were informed the investigation was not directed against them, had no interest entitling them to raise those questions.

In Error to the District Court of the United States for the Southern District of New York.

Appeals from the District Court of the United States for the Southern District of New York.

Frank W. Blair, Allen A. Templeton, and Thomas P. Phillips were adjudged guilty of contempt of court because of their refusal to obey an order directing them to answer questions asked of them before a federal grand jury, and, having been committed to the custody of Thomas D. McCarthy, United States Marshal for the Southern District of New York, each petitioned for writ of habeas corpus. The petitions were dismissed (253 Fed. 800), and petitioners remanded, and they bring error to review the final orders adjudging them guilty of contempt, and appeal from the final orders discharging the writs of habeas corpus and remanding them to custody. Final orders affirmed.

Mr. Martin W. Littleton, of New York City, for plaintiffs in error and appellants.

Mr. Assistant Attorney General Porter, for the United States.

*276 * Mr. Justice PITNEY delivered the opinion of the Court.

Three of these cases come here on writs of error, the other three on appeals. The writs bring up final orders adjudging plaintiffs in error guilty of contempt of court because of their refusal to obey an order directing them to answer certain questions asked of them before a federal grand jury, and committing them to the custody of the United States marshal until they should comply. The appeals bring under review final orders discharging writs of habeas corpus sued out by appellants to review their detention under the original orders of commitment and remanding them to the custody of the marshal. Blair, Templeton, and Phillips are plaintiffs in error, as well as appellants.

It appears that in October, 1918, the federal grand jury of the Southern district of New York was making inquiry concerning supposed violations of section 125 of the Criminal Code (Act March 4, 1909, c. 321,

35 Stat. 1111 [Comp. St. § 10295]) (relating to perjury) and of the so-called Corrupt Practices Act of June 25, 1910, ch. 392, 36 Stat. 822, as amended (Comp. St. §§ 188-198), in connection with the verification and filing in that district of reports to the Secretary of the Senate of the United States made by a candidate for nomination as Senator at a primary election held in the state of Michigan on August 27, 1918. Phillips was served with a subpoena requiring him to appear and testify before this grand jury. Blair and Templeton *were subpoenaed to appear and testify and also to produce certain records, correspondence, and other documentary evidence. All were served in the state of Michigan. They appeared before the grand jury in response to the subpoenas, were severally sworn, and were examined by counsel for the United States. Each witness, after answering preliminary questions, asked that he be informed of the object and purpose of the inquiry and against whom it was directed, whereupon he was informed by counsel for the United States that the inquiry was not directed against him (the witness). After this each witness read to and left with the grand jury a typewritten statement to the effect that upon advice of counsel he refused to answer any questions pertaining to the matter under inquiry, for the reason that the grand jury and the court were without jurisdiction to inquire into the conduct of a campaign in Michigan for the primary election of a United States Senator; that the federal Corrupt Practices Act as amended was unconstitutional; and that no federal court or grand jury in any state had constitutional authority to conduct an inquiry regarding a primary election for United States Senator. Thereupon each witness was asked by counsel for the United States whether he refused to testify for the reason that to do so would incriminate him, to which he made no other answer than to refer to the reasons for his refusal as set forth in his statement.

The grand jury made a written presentment of these facts to the district court, with a prayer that the parties named might be dealt with as contumacious witnesses.

Upon the coming in of the presentment the witnesses appeared in person and by counsel in opposition to the petition of the grand jury and contended that the Corrupt Practices Act as amended was unconstitutional and void, referring to the opinion of this court in *United States v. Gradwell*, 243 U. S. 476, 487, 37 Sup. Ct. 407, 61 L. Ed. 857. A hearing was had which *went to the merits; the minutes of the grand jury were read and made a part of the presentment; and the matter was fully argued. At the conclusion of the hearing the court directed the witnesses to answer the questions propounded to them before the grand jury. They were

again called, were asked the same questions, and again refused to answer for the same reasons before assigned. The grand jury immediately made a further presentment, whereupon the court, after hearing the parties, adjudged appellants guilty of contempt because of their refusal to comply with the order of the court, and remanded them to the custody of the marshal until they should comply.

Being in his custody, each of them presented to the District Court a petition for a writ of habeas corpus; the writ was allowed, returnable forthwith; and the United States district attorney, in behalf of the marshal, made a motion to dismiss the writ, in effect a demurrer to the petition for insufficiency. After hearing, the court discharged the writ and remanded each of the petitioners to the custody of the marshal (253 Fed. 800); and the present writs of error and appeals were allowed.

The principal contention is that the Act of June 25, 1910, chapter 392, 36 Stat. 822, and its amendments (Act of August 19, 1911, c. 33, 37 Stat. 25; Act of Aug. 23, 1912, c. 349, 37 Stat. 360) are unconstitutional in so far as they attempt to regulate and control the selection by political parties at primary elections of candidates for United States Senator to be voted for at the general elections: It being insisted that the authority of Congress under section 4 of article 1 of the Constitution extends only to the definitive general election, and not to pre-election arrangements or devices such as nominating conventions and primaries.

It is maintained further that, because of the invalidity of these statutes, neither the United States District Court *nor the federal grand jury has jurisdiction to inquire into primary elections or to indict or try any person for an offense based upon the statutes, and therefore the order committing appellants is null and void.

[1] The same constitutional question was stirred in *United States v. Gradwell*, 243 U. S. 476, 487, 37 Sup. Ct. 407, 61 L. Ed. 857, but its determination was unnecessary for the decision of the case, and for this reason it was left undetermined, as the opinion states. Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.

We do not think the present parties are so entitled, since a brief consideration of the relation of a witness to the proceeding in which he is called will suffice to show that he is not interested to challenge the jurisdiction of court or grand jury over the subject-matter that is under inquiry.

[2] Long before the separation of the American Colonies from the mother country,

compulsion of witnesses to appear and testify had become established in England. By Act of 5 Eliz. c. 9, § 12 (1562), provision was made for the service of process out of any court of record, requiring the person served to testify concerning any cause or matter pending in the court, under a penalty of £10, besides damages to be recovered by the party aggrieved. See *Havithbury v. Harvey*, Cro. Eliz. 131; 1 Leon. 122; *Goodwin (or Goodman) v. West*, Cro. Car. 522, 540, March 18. When it was that grand juries first resorted to compulsory process for witnesses is not clear. But as early as 1612, in the Countess of Shrewsbury's Case, Lord Bacon is reported to have declared that—

"All subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed *and hand, but of their knowledge and discovery." 2 How. St. Tr. 769, 778.

And by Act of 7 & 8 Wm. III, c. 3, § 7 (1695), parties indicted for treason or misprision of treason were given the like process to compel their witnesses to appear as was usually granted to compel witnesses to appear against them, clearly evincing that process for crown witnesses was already in familiar use.

At the foundation of our federal government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States. By the Fifth Amendment a presentment or indictment by grand jury was made essential to hold one to answer for a capital or otherwise infamous crime, and it was declared that no person should be compelled in a criminal case to be a witness against himself; while, by the Sixth Amendment, in all criminal prosecutions the accused was given the right to a speedy and public trial, with compulsory process for obtaining witnesses in his favor. By the first Judiciary Act (September 24, 1789, c. 20, § 30, 1 Stat. 73, 88), the mode of proof by examination of witnesses in the courts of the United States was regulated, and their duty to appear and testify was recognized. These provisions, as modified by subsequent legislation, are found in sections 861-865, Rev. Stat. (Comp. St. §§ 1468, 1470, 1472-1474). By Act of March 2, 1793, c. 22, § 6, 1 Stat. 333, 335 (Comp. St. § 1487), it was enacted that subpoenas for witnesses required to attend a court of the United States in any district might run into any other district, with a proviso limiting the effect of this in civil causes so that witnesses living outside of the district in which the court was held need not attend beyond a limited distance from the place of their residence. See section 876, Rev. Stat. (Comp. St. § 1487). By section 877 (section 1488), originating in Act of Feb. 26, 1853 (chapter 80, § 3, 10 Stat. 161, 169), witnesses required to attend any term of the district court on

the part of the United States may be subpoenaed to attend to testify *generally; and under such process they shall appear before the grand or petit jury, or both, as required by the court or the district attorney. By the same Act of 1853 (10 Stat. 167, 168), fees for the attendance and mileage of witnesses were regulated; and it was provided that where the United States was a party the marshal on the order of the court should pay such fees. Rev. Stat. §§ 848, 855 (Comp. St. §§ 1452, 1461). And sections 879 and 881, Rev. Stat. (Comp. St. §§ 1490, 1492), contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance.

In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government (*Wilson v. United States*, 221 U. S. 361, 372, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558, quoting *Lord Ellenborough*), is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that will tend to incriminate him (see *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819); some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

But, aside from exceptions and qualifications—and *none such is asserted in the present case—the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.

[3] He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is no concern of his. *Nelson v. United States*, 201 U. S. 92, 115, 26 Sup. Ct. 358, 50 L. Ed. 673.

[4] On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a de facto existence and organization.

[5] He is not entitled to set limits to the investigation that the grand jury may conduct. The Fifth Amendment and the statutes relative to the organization of grand juries recognize such a jury as being possessed of the same powers that pertained to its British prototype, and in our system examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual. *Hale v. Henkel*, 201 U. S. 43, 65, 26 Sup. Ct. 370, 50 L. Ed. 652. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. *Hendricks v. United States*, 223 U. S. 178, 184, 32 Sup. Ct. 313, 56 L. Ed. 394.

[6] And, for the same reasons, witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation. In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not. At *least, the court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction.

The present cases are not exceptional, and for the reasons that have been outlined we are of opinion that appellants were not entitled to raise any question about the constitutionality of the statutes under which the grand jury's investigation was conducted.

Final orders affirmed.

(250 U. S. 223)

FLANDERS v. COLEMAN.

(Argued April 14 and 15, 1919. Decided June 2, 1919.)

No. 419.

1. BANKRUPTCY — 293(2) — JURISDICTION — AVOIDING PREFERENCES AND TRANSFERS.

Jurisdiction of federal District Court of suit by trustee to avoid transfers by bankrupt is to be determined, not on the conclusions on the merits of the action, but on consideration of the allegations of the bill.

2. BANKRUPTCY — 296 — JURISDICTION — AVOIDING PREFERENCES AND TRANSFERS.

Since amendment of Bankruptcy Act by Acts 1903 and 1910, federal District Courts have concurrent jurisdiction with state courts to set aside preferences under section 60b (Comp. St. § 9644), fraudulent transfers within four months before petition, under section 67e (Comp. St. § 9651) and transfers under section 70e making void any transfer by bankrupt which any creditor might have avoided, and giving the trustee right to recover it.

3. BANKRUPTCY — 302(1) — JURISDICTION — TRUSTEE'S BILL.

Bill by trustee of bankrupt *held* to allege enough to properly invoke jurisdiction of federal District Court for avoiding transfers by bankrupt as fraudulent.

Appeal from the District Court of the United States for the Southern District of Georgia.

Suit by R. A. Flanders, trustee of M. C. Coleman, bankrupt, against E. J. Coleman. Bill dismissed (249 Fed. 757), and complainant appeals. Reversed.

Messrs. Frederick T. Saussy, of Savannah, Ga., and A. S. Bradley, of Swainsboro, Ga., for appellant.

Mr. F. H. Saffold, of Swainsboro, Ga., for appellee.

Mr. Justice DAY delivered the opinion of the court.

This case is here (Judicial Code, § 238, Act March 3, 1911, c. 231 [Comp. St. § 1215]) solely upon a question of the jurisdiction of the District Court of the United States for the Southern District of Georgia to entertain the suit brought by R. A. Flanders, as trustee in bankruptcy of M. C. Coleman, against E. J. Coleman.

*Omitting unnecessary parts, the bill avers: That the jurisdiction of the court is invoked under sections 60b, 67e and 70e of the Bankruptcy Act, as amended. That in 1902 the said E. J. Coleman, the father of M. C. Coleman, owned a tract of land containing 377 acres in the state of Georgia, and placed his son, M. C. Coleman, the bankrupt, in possession thereof, expressing the intention to give the land to his son. M. C. Coleman cleared the land, moved on the same and lived there-

on for a period of at least twelve years, and placed valuable improvements thereon. That M. C. Coleman rented as landlord said 377 acres to Dan Davis, rent notes of \$1,000 each for the same being taken in the name of M. C. Coleman, payable on October 1, 1914, 1915, 1916, 1917, 1918, respectively. That M. C. Coleman collected the note maturing October 1, 1914, and that he became insolvent on December 1, 1914, and ever since that date, up to the time petition was filed, was insolvent within the meaning and intent of the Bankruptcy Act. That while so insolvent, in January or February, 1915, M. C. Coleman turned over to E. J. Coleman four of said rent notes of the value of \$4,000 with the intent to hinder, delay, and defraud his creditors. That if the conveyance of the said rent notes was not made with the purpose to hinder, delay and defraud creditors, the transfer had the effect to create a preference in favor of E. J. Coleman in that when the same was made M. C. Coleman was insolvent, and the collection thereof would enable E. J. Coleman to obtain a greater percentage of any indebtedness claimed to be owing to him by M. C. Coleman, than any other of such creditors of M. C. Coleman, of the same class. That said transfer was within four months from the filing of the petition in bankruptcy, the bankrupt was insolvent, and the transfer operated as a preference, and E. J. Coleman at the time of receiving the same had reasonable cause to believe that the same would effect a preference. That M. C. Coleman, up to December 1, *1914, had a good title to the said 377 acres of land, although it does not appear that a deed had ever been delivered from E. J. Coleman to M. C. Coleman. That E. J. Coleman placed M. C. Coleman in possession of the said land with the intention to give it to him, and the latter held possession of it as his own, and made improvements on it of great value, and dealt with the land as his own for the purpose of obtaining credit, and from said long possession the title to the land became vested in M. C. Coleman. That at the time of the transfer of the rent notes to E. J. Coleman the legal title or right to the land was completely vested in M. C. Coleman as if he had obtained a deed from E. J. Coleman. The complaint adds a description of the improvements, a house, etc., adding, it is averred, \$6,400 to the value of the premises. That M. C. Coleman, by agreeing with E. J. Coleman to relinquish his rights and title to the real estate and improvements, in the year 1915, did so with intent to hinder, delay and defraud his creditors. The petition prays that the transfer of the four rent notes be declared void as being made with the intent to hinder, delay and defraud the creditors of M. C. Coleman. That the transfer of the notes be declared to be a preference, should the court hold or find

that there is any indebtedness owing to E. J. Coleman by M. C. Coleman. That the notes collected by E. J. Coleman be accounted for. That any of said notes which may not have been collected, be decreed to be surrendered to petitioner. That the 377 acres of land be declared to be the property of the petitioner as trustee in bankruptcy for the purpose of applying the same to the credit of the creditors of the bankrupt. That in the event that the court should hold that the complainant should not have and receive the relief prayed for because of any defect in claimants' claim of title, that he be declared as such trustee to have an equitable lien or charge on the said land, at least to the extent of the value of the improvements. That the said

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*E. J. Coleman be required to specifically perform his promise and agreement to convey title to the land to M. C. Coleman, and the title be made in the petitioner's name as trustee for the benefit of the creditors of the bankrupt. Afterwards the complainant filed an amendment to the bill in which it was alleged: That within the period of four months immediately preceding the filing of the bankruptcy proceedings by M. C. Coleman, to wit, in January, 1915, while insolvent, and with intent to hinder, delay and defraud his creditors, the said M. C. Coleman, who then held the title to the above-described real estate, fraudulently disclaimed such title, and surrendered possession thereof to E. J. Coleman, and thereby fraudulently transferred his rights, title, interests and equity in said real estate to E. J. Coleman, and transferred said rent notes with the purpose and intent to make the tenant the tenant of the respondent, and as such he has attorned.

An answer was filed taking issue upon the allegations of the bill as to fraudulent transfers and conveyance, and making other allegations unnecessary to set out in detail. The cause was referred to a master, who took the evidence, and found that the District Court had jurisdiction, and that there was a fraudulent transfer, and advised a judgment in favor of the trustee. After considering the report of the master, the District Court made a final decree, finding: That, assuming for the purpose of the consideration of the question of jurisdiction, the testimony submitted by the complainant to be true, the court was without jurisdiction to make a decision on the merits of the controversy. And it was ordered and directed that the bill of complaint be dismissed without prejudice of the petitioner's right to maintain his action in a state court. The District Court also made a certificate stating: That the decree of dismissal was based solely upon the ground that the court was of opinion that it had no jurisdiction to *grant any relief to the complainant, that, in reaching this determination, the court had considered the evi-

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dence of the complainant, assuming it to be true for that purpose, only, and that it did not show such a transfer within the meaning of the laws of Congress relating to bankruptcy as would give the court jurisdiction of the proceedings.

[1,2] Whether the District Court has jurisdiction to grant any relief must be determined upon a consideration of the allegations of the bill and the amendment thereto. If there be enough of substance in them to require the court to hear and determine the cause, then jurisdiction should have been entertained. Looking to the allegation of the bill and the amendment, as we have stated them, it appears that the trustee invoked the aid of section 60b of the Bankruptcy Act, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 799 (Comp. St. § 9644), relating to preferential transfers made within four months before the filing of the petition in bankruptcy, also section 67e, 30 Stat. 564 (Comp. St. § 9651) making fraudulent transfers within four months null and void, except as to persons acting in good faith, or for a present, fair consideration, and of section 70e of the act, 30 Stat. 566 (Comp. St. § 9654) providing that the trustee may avoid any transfer of the bankrupt's property that any creditor might have avoided, and may recover the property, so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder prior to the adjudication.

Since the amendments to the Bankruptcy Act of 1903 and June 25, 1910 (32 Stat. 797; 36 Stat. 838, c. 412) the District Courts of the United States are given concurrent jurisdiction with the state courts to set aside preferences under section 60b of the act, and fraudulent transfers within four months prior to the filing of the petition, under section 67e of the act, and transfers under section 70e, making void any transfer by the bankrupt of his property which any creditor might have avoided, and giving the trustee the right to recover the same. See *Stellwagen v. Clum*, 245 U. S. 605, 614, 38 Sup. Ct. 215, 62 L. Ed. 507; *Collett v. Adams*, 249 U. S. 545, 39 Sup. Ct. 372, 63 L. Ed. 764, decided April 28, 1919.

*The opinion of the District Court, as set forth in the record, shows that its conclusion that there was no jurisdiction was based upon a consideration of the evidence, from which it was found that no preference was shown under section 60b, nor any fraudulent transfer under sections 67e or 70e. To justify its conclusion that it was without jurisdiction the District Judge cites certain decisions of this court. *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, in which this court held that under section 23 of the Bankruptcy Act (Comp. St. § 9607) the District Court could by the consent of the defendant, and not otherwise,

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entertain suits by the trustee against third persons to recover property conveyed by the bankrupt before the institution of the bankruptcy proceedings. It is sufficient to say of that case that it was decided under the terms of the act before the amendments of 1903 and 1910, respectively, to which we have referred, and which give concurrent jurisdiction to the state and federal courts. The District Court also cited *Harris, Trustee, v. Bank of Mt. Pleasant*, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528, wherein no transfer of the bankrupt's property was alleged in the petition. The suit was one by the trustee to recover securities of the bankrupt, alleged to be held by the bank for the security of an overdraft which, it was averred, had been paid; and also to recover certain notes alleged to have been paid by the bankrupt.

The opinion of the District Court shows that it really considered the merits of the case in reaching the conclusion that it was without jurisdiction. As this court has not infrequently said, jurisdiction must be determined not upon the conclusion on the merits of the action, but upon consideration of the grounds upon which federal jurisdiction is invoked.

[3] Much of the brief of counsel is taken up with a discussion as to whether the alleged transfers amount to a conveyance under the Georgia statutes and decisions. This discussion is pertinent to the merits, our sole inquiry *concerns the jurisdiction of the court. We are of opinion that there was enough alleged to properly invoke jurisdiction, and that the charges of fraudulent transfers of the rent notes, and of interests in real estate, were sufficiently made to bring the action within the jurisdiction of the District Court under the provisions of the Bankruptcy Act. In this view the judgment of the District Court dismissing the action for want of jurisdiction is

Reversed.

(250 U. S. 332)

NORTHERN PAC. RY. CO. et al. v. PUGET SOUND & W. H. RY. CO.

(Argued April 28, 1919. Decided June 2, 1919.)

No. 327.

1. CONSTITUTIONAL LAW §101—RAILROADS §91(1)—GRADE CROSSING—SAFETY DEVICES—BURDEN OF EXPENSE—VESTED RIGHT—RULE OF LAW.

A statute of Washington, in effect when the P. Railroad was constructed therein, which, as construed by its court, while giving any junior company, formed under such statute, right to cross it, required the junior company to pay the entire cost of crossing, including installing and maintaining of interlocking safety devices, was at most a rule of law, applicable to assess-

ment of damages in a proceeding to appropriate a crossing, to which a junior company was entitled by statute, and, being no part of P.'s charter, it having been organized under the law of another state, gave it no vested right to insist that the rule should not be changed by statute, as it was by Laws Wash. 1913, p. 74, or by court decision.

2. CONSTITUTIONAL LAW §297 — GRADE CROSSING—COST OF SAFETY DEVICES—TAKING WITHOUT DUE PROCESS.

As to a railroad constructed before, and crossed by another railroad after, passage of Laws Wash. 1913, p. 74, changing the prior law that the crossing road should bear all the expense of necessary interlocking safety devices, the statute was within the rule that the imposing of uncompensated charges, involved in obeying a law passed in a reasonable exercise of the police power, is not a taking of property without due process, within the Fourteenth Amendment.

In Error to the Supreme Court of the State of Washington.

Petition by the Puget Sound & Willapa Harbor Railway Company to the Public Service Commission of the State of Washington for leave to cross the Northern Pacific Railway Company's track at grade. Judgment of the superior court, affirming order of the commission that the expense of interlocking safety devices, required to be installed, be borne wholly by petitioner, was reversed by the Supreme Court of Washington (161 Pac. 850; 166 Pac. 793), and the Northern Pacific Company and the Public Service Commission bring error. Affirmed.

* Messrs. Lorenzo B. Da Ponte, of Tacoma, Wash., and C. W. Bunn and Charles Donnelly, both of St. Paul, Minn., for plaintiffs in error.

Mr. Heman H. Field, of Chicago, Ill., for defendant in error.

Mr. Justice CLARKE delivered the opinion of the Court.

The defendant in error, Puget Sound & Willapa Harbor Railway Company, hereinafter designated the Willapa Company, a railroad corporation organized under the laws of the state of Washington, in the construction of a new line of railroad in 1914, found it necessary to cross at grade, at two places, tracks which had been constructed in 1890-1892 by the plaintiff in error, Northern Pacific Railway Company, hereinafter designated the Pacific Company, a corporation organized under the laws of the state of Wisconsin.

In appropriate proceedings, provided for by the state law, the Public Service Commission of the state of Washington granted authority and permission to the Willapa Company to cross the tracks of the Pacific Company at grade at the two designated places.

This permission was subject to the condition that suitable interlocking devices, of a type to be agreed upon between the two companies, should be installed at the crossings. The companies agreed upon all of the conditions involved in the crossing of their tracks, excepting as to the cost of installing and maintaining the required interlocking devices, *and upon due submission of this question to the commission it was decided that the entire expense should be borne by the junior, the Willapa Company. The superior court affirmed this holding by the commission, but on appeal the Supreme Court of the state, in the decision which we are reviewing, reversed the two lower tribunals and ruled that the expense should be divided equally between the two companies.

[1] The decision of the Supreme Court of Washington is based upon the interpretation which it placed upon applicable state statutes enacted in 1913 (chapter 30, Laws of Washington 1913, p. 74), and the case is presented to this court on the single assignment of error:

"That the state Supreme Court erred in holding and deciding that chapter 30 of the Laws of Washington of 1913, as construed and applied to the facts of this case, is not repugnant to the Fourteenth Amendment to the Constitution of the United States."

Conceding that the construction placed upon the state statute by the state Supreme Court will be accepted by this court, the contention of the Pacific Company is that, when that company entered the state of Washington and constructed its line, an act of the Legislature, passed in 1888 (Laws 1887-88, p. 63) was in effect, which gave to railway companies formed under the act the right to cross any other railway theretofore constructed, but subject to conditions which the state Supreme Court held, in 1908, in *State v. Northern Pacific Railway Co.*, 49 Wash. 78, 94 Pac. 907, required the junior company to pay the entire cost of the crossing, including the installing and maintaining of interlocking devices where necessary; that this constituted a vested right of property in the senior company, and that the later statute of 1913, which the Supreme Court held in this case required it to bear one-half of the cost of installing and maintaining the interlocker, deprived it of its property without due process of law.

*It is admitted in argument that the act assailed would be validly applicable to apportioning the cost of crossings of highways and railroads, regardless of the dates of their construction (*New York & New England Railroad v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; *Chicago, etc., Railroad Co. v. Chicago*, 166 U. S. 226, 17 Sup.

Ct. 581, 41 L. Ed. 979), and that it would be valid as applied to crossings of railroad lines constructed prior to its enactment where no contract had been entered into with respect to the protection of the crossing (*Detroit, etc., Railway v. Osborn*, 189 U. S. 383, 23 Sup. Ct. 540, 47 L. Ed. 860). But it is contended that it is not a valid law as applied to the case at bar, where the road of the Pacific Company was constructed at a time when the state law imposed the entire cost of the construction and maintenance of the crossing upon the junior company.

Obviously this is a slender thread on which to hang a grave constitutional argument, and it is difficult to treat it seriously.

At most, the earlier statute, and the interpretation which the state Supreme Court placed upon it, was a rule of law applicable to the assessment of damages in a proceeding to appropriate a crossing to which a junior company was entitled by the statute. It was no part of the charter of the Pacific Company, which was organized under the Wisconsin law, and that company had no vested right to insist that the rule should not be changed by statute or by court decision. *Pennsylvania R. R. Co. v. Miller*, 132 U. S. 75, 83, 10 Sup. Ct. 34, 33 L. Ed. 267; *Chicago & Alton R. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 35 Sup. Ct. 678, 59 L. Ed. 1204; *New York Central R. R. Co. v. White*, 243 U. S. 188, 189, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; *Chicago & Alton R. R. Co. v. McWhirt*, 243 U. S. 422-425, 37 Sup. Ct. 392, 61 L. Ed. 826.

[2] While this is sufficient to dispose of the case, it may be added that the act of 1913 was passed in an obviously legitimate and customary exercise of the police power of the state to protect travelers and employes from injury and death at such crossings, and also to protect property in *the custody of the carriers from damage. It has long been settled law that the imposing of uncompensated charges, involved in obeying a law, passed in a reasonable exercise of the police power, is not a taking of property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States. *Chicago, etc., R. R. Co. v. Nebraska*, 170 U. S. 57, 73, 74, 18 Sup. Ct. 513, 42 L. Ed. 948; *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 461, 462, 25 Sup. Ct. 471, 49 L. Ed. 831; *Northern Pacific Ry. Co. v. Minnesota ex rel. Duluth*, 208 U. S. 583, 594, 28 Sup. Ct. 341, 52 L. Ed. 630; *Chicago & Alton R. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 35 Sup. Ct. 678, 59 L. Ed. 1204.

The judgment of the Supreme Court of Washington is Affirmed.

(250 U. S. 321)

BENEDICT v. CITY OF NEW YORK.

(Argued April 22, 1919. Decided June 2, 1919.)

No. 315.

1. COURTS $\hookrightarrow$ 382(2)—APPEAL FROM CIRCUIT COURT OF APPEALS—RIGHTS ASSERTED UNDER CONSTITUTION.

Jurisdiction of the Circuit Court having been invoked not only on the ground of diversity of citizenship, but also because of rights asserted under the federal Constitution, plaintiff's further appeal to the Supreme Court, after dismissal of bill was affirmed by the Circuit Court of Appeals, is permissible.

2. COURTS $\hookrightarrow$ 375—FEDERAL COURTS—STALE CLAIMS—STATE STATUTE OF LIMITATIONS.

While federal courts sitting in equity are not bound by state statutes of limitation, they are, under ordinary circumstances, guided by them in determining their action on stale claims.

3. TRUSTS $\hookrightarrow$ 365(3) — ENFORCEMENT — LACHES—REPUDIATION OF TRUST.

Defense of laches to suit based on alleged breach of trust by city as to fund for payment of improvement certificates is properly sustained, the state statute of limitations being at most 10 years, 17 years having been allowed to elapse after open repudiation of any trust duties before suit was begun, and more than 10 years before any attempt was made to secure settlement by negotiation, there having been no waiver of the statute, and lack of diligence being wholly unexcused.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

Suit by Elias C. Benedict against the City of New York. Decree (235 Fed. 258) dismissing bill was affirmed by the Circuit Court of Appeals (247 Fed. 758, 159 C. C. A. 616), and plaintiff appeals. Affirmed.

* Messrs. Leon Abbett, of Hoboken, N. J., and Charles K. Allen, of New York City, for appellant.

Mr. Terence Farley, of New York City, for appellee.

Mr. Justice BRANDEIS delivered the opinion of the Court.

In 1874 commissioners theretofore appointed by special act (Laws N. Y. 1871, c. 765) to improve the streets of Long Island City were directed to improve a particular district. Laws N. Y. 1874, c. 326. The act provided that the cost of the improvement should be assessed upon the land benefited and created a lien upon the land for the assessment and interest; but it declared that no sale for failure to pay the assessment could be made before the expiration of ten years after filing of

the assessment roll. The improvement was to be paid for by delivering to the contractors interest-bearing certificates of indebtedness equal, at par, to the expense of the work and materials furnished. These certificates did not provide *for a personal obligation on the part of the city or the district. They were receivable in payment of assessments at par and interest and were payable in cash only out of moneys to be derived from the assessments, which the city treasurer was directed to keep as an improvement fund separate from all other funds. The statute further provided that upon the completion of the sales for nonpayment of assessments "all the certificates issued by the said commissioners shall be paid off, and if there be any excess to the credit of said improvement fund * * * it shall be paid into the city treasury." By an amendment passed June 11, 1879 (Laws N. Y. 1879, c. 501), it was provided that, under certain circumstances, it was the duty of the officer making sale of land for nonpayment of assessment to receive in payment of the purchase price, certificates at par and interest.

Certificates were issued to the amount of \$1,847,500. A large portion of the assessments levied were left unpaid by the landowners; and it became necessary to sell the properties. Sales for nonpayment of assessments were made in 1888. The purchase price was paid in certificates at par and interest up to the amount of the assessments, the interest and the excess, if any, being paid in cash. In 1892 and 1893 sales of land were made at much less than the amounts of the assessment. Here also bidders were permitted to pay the purchase price in certificates at par and interest. Likewise the owners of lots sold were permitted to redeem lots upon paying the amount of the bid and accrued charges by certificates at par and interest. After all the land had been disposed of and the improvement fund exhausted there remained and are now outstanding unpaid certificates aggregating about \$300,000.

Prior to June 11, 1879, Benedict acquired certificates to the amount of \$8,000 which he has held ever since, and on which the principal and interest are unpaid. In July, *1910, suing on behalf of himself and others similarly situated, he brought this suit in the Circuit (now District) Court of the United States for the Southern District of New York to enforce, as upon an express trust, an accounting of the improvement fund and liability for alleged breaches of trust. The contention is that Long Island City became trustee of the lien on the several lots for the benefit of the certificate holders; and the alleged breaches of trust relied upon are in substance that, through its treasurer and in spite of the protest, the city permitted and

authorized sales of land for less than the assessment in violation of the act of 1874; that instead of canceling certificates received in payment of assessments and of the purchase price at sales, it reissued the same; and that even where sales had been made for less than the amount of the assessments it allowed redemption from sales in certificates at par and interest. The City of New York is made defendant on the ground that in 1898 Long Island City was merged into it by the Greater New York Act and that the consolidated corporation assumed the obligations and liabilities of the constituent municipalities. Laws N. Y. 1897, c. 378.

[1] Protest was made by plaintiff at time of sales against the course pursued by the treasurer, but he justified the action complained of, relying upon act of 1874 and chapter 501 of the Laws of 1879 and chapter 656 of the Laws of 1886. Writs of mandamus had previously been issued compelling him to receive certificates at par and interest even in payment for the redemption of land sold for non-payment of assessments. *People ex rel. Ryan v. Bleckwenn*, 8 N. Y. Supp. 638¹; *People ex rel. Oakley v. Bleckwenn*, 13 N. Y. Supp. 487²; *People ex rel. Oakley v. Bleckwenn*, 126 N. Y. 310, 27 N. E. 376. But plaintiff contended that, in view of section 23 of title VI of chapter 461 of the Laws of 1871, if the acts of 1879 and 1886 were construed as authorizing the action of which he complains, they impair, in violation of the *federal Constitution, the obligation of contracts previously entered into with certificate holders. The case was fully heard in the District Court on evidence, and several distinct defenses were relied upon. The city insisted, among other things, that the statutory lien did not impose a statutory trust upon it; that the persons who acted were not its agents, but independent officers, agents of the state; that the specific provision of the statute relied upon by plaintiff did not constitute terms of the contract but related merely to the remedy; and that the later legislation introduced at most permissible changes of remedy. The court without passing upon these questions, entered a decree dismissing the bill on the ground that the statute of limitations and laches constituted a complete defense. 235 Fed. 258. This decree was affirmed by the Circuit Court of Appeals on the same grounds. 247 Fed. 758, 159 C. C. A. 616. Benedict is a citizen of Connecticut; but as he invoked the jurisdiction of the Circuit Court not only on the ground of diversity of citizenship, but also

because of rights asserted under the federal Constitution, his further appeal to this court was permissible. *Vicksburg v. Henson*, 231 U. S. 259, 267, 268, 34 Sup. Ct. 95, 58 L. Ed. 209.

[2, 3] The whole case is here for review; but we find it unnecessary to decide most of the questions presented, because we are of opinion that the lower courts did not err in holding that the suit was barred by laches. None of the acts relied upon here as constituting breaches of trust occurred later than the years 1892 and 1893. Before the principal action complained of was taken, the city treasurer publicly announced his purpose to pursue the course complained of, which he asserted was in accordance with law. Plaintiff was represented at the sales by an agent who protested there orally and elsewhere in writing against the treasurer's declared purpose and against specific acts now complained of, asserting then *as now that the course pursued was illegal. We have here a definite repudiation of the alleged trust duties more than 17 years before the institution of this suit. And there are no circumstances which excuse the delay. What occurred in the interval, so far as appears, was this:

(a) In June, 1893, Benedict commenced in the Circuit Court of the United States for the Eastern District of New York a bill in equity to restrain the treasurer from receiving certificates from property owners when redeeming their properties from assessment sales, made to the complainant, and from marking upon the books as paid any assessment upon such property when it was sold for less than the amount of the assessment. It seems that hearing on the motion was adjourned to a later date, and that a restraining order issued which the plaintiff alleges was never observed. It is not shown that any other proceeding was ever taken in the suit.

(b) On May 9, 1904 (at whose instance does not clearly appear), the Legislature enacted a statute (Laws N. Y. 1904, c. 686) entitled "An act to authorize the comptroller and corporation counsel of the city of New York on behalf of said city to compromise and settle with property owners interested, certain claims for taxes, assessments and sales for the same, and for or on account of evidences of indebtedness issued on account of local improvements in the territory formerly included within the boundaries of Long Island City."

(c) On February 21, 1905, plaintiff filed with the comptroller of the city of New York an offer to sell to the city by way of compromise certificates held.

(d) On May 26, 1909, plaintiff's present counsel, acting on behalf of the holders of 233 certificates, presented to the comptroller a memorial and statement of facts, in which he requested "that provision should be made

¹ Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 55 Hun, 611.

² Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 58 Hun, 609, 59 Hun, 618.

in some way for the payment of the amount due" on the certificates.

* (e) Under date of March 19, 1910, plaintiff presented to the comptroller a similar memorial which he requested should be submitted for determination to the board of estimate and apportionment, in view of the fact that chapter 601 of the Laws of New York of 1907 provided that the comptroller may do so where he believes that, for any reason, a claim against the city is not valid legally, but in equity, justice, and fairness the same should be paid, the city having been benefited by the acts performed and the claim not being barred by the statute of limitations.

(f) On April 26, 1910, a formal request was made upon the deputy comptroller.

Under the law of New York the alleged cause of action would have been subject, if not to the six-year statute of limitations (New York Code of Civil Procedure, § 382), then to the ten-year statute of limitations (New York Code of Civil Procedure, § 388), governing bills for relief in case of the existence of a trust not cognizable by the courts of common law. *Clarke v. Boorman's Executors*, 18 Wall. 493, 21 L. Ed. 904. If the act of 1874 created an express trust, the statute of limitations would not begin to run until there had been a repudiation of the trust. *New Orleans v. Warner*, 175 U. S. 120, 130, 20 Sup. Ct. 44, 44 L. Ed. 96. Here there was an open repudiation of the trust duties which the plaintiff now seeks to enforce. And 17 years were allowed to elapse after that repudiation before this suit was begun and more than ten years before any attempt was made to secure some settlement by negotiation; and there clearly was no waiver of the statute. While it is true that federal courts sitting in equity are not bound by state statutes of limitations (*Kirby v. Lake Shore & Michigan Southern Railroad*, 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569), they are under ordinary circumstances, guided by them in determining their action on state claims (*Godden v. Kimmell*, 99 U. S. 201, 210, 25 L. Ed. 431; *Philippi v. Philippe*, 115 U. S. 151, 5 Sup. Ct. 1181, 29 L. Ed. 336; *Pearsall v. Smith*, 149 U. S. 231, 13 Sup. Ct. 833, 37 L. Ed. 713; *Alsop v. Riker*, 155 U. S. 448, 15 Sup. Ct. 162, 39 L. Ed. 218). Compare *Sullivan v. Portland & Kennebec Railroad Co.*, 94 U. S. 806, 811, 24 L. Ed. 324. Between 1892 and 1905 plaintiff did nothing to enforce his alleged rights except to commence in 1893 a suit which he did not prosecute. His lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such as to call for diligence. The lower courts did not err in sustaining the defense of laches.

Decree affirmed.

CAMP et al. v. GRESS.

(Argued March 24 and 25, 1919. Decided June 2, 1919.)

No. 279.

1. COURTS ⇨273—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP—DEFENDANTS RESIDING IN DIFFERENT STATES.

Under Judicial Code, § 51 (Comp. St. § 1033), providing that no civil suit shall be brought in any District Court against any person in any other district than that whereof he is an inhabitant, but, where jurisdiction is founded only on the action being between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant, *held*, in view of sections 50 and 52 (Comp. St. §§ 1032, 1034) and the history of the legislation, in action by resident of one state against residents of two other states in District Court for the state of which all but one of defendants were resident, that such court had no jurisdiction over such other defendant, though he was found in such district.

2. COURTS ⇨276—FEDERAL COURTS—EXEMPTION FROM SUIT—WAIVER.

Exemption of a resident of one state from suit in a federal District Court for another state asserted by plea is not waived by his acknowledgment on the summons of service thereof.

3. COURTS ⇨276—FEDERAL COURTS—EXEMPTION FROM SUIT—PERSONAL PRIVILEGE.

Exemption under Judicial Code, § 51 (Comp. St. § 1033), of a resident of one state from suit in a federal District Court for another state is personal to him, and may not be availed of by resident codefendants as defeating jurisdiction of them.

4. COURTS ⇨310—FEDERAL COURTS—PARTIES NECESSARY FOR SUIT.

Under Judicial Code, § 50 (Comp. St. § 1033), authorizing judgment to be rendered against the other defendants where jurisdiction cannot be obtained of one defendant, failure to obtain jurisdiction of him is fatal to maintenance of the suit only if he is an indispensable party.

5. PARTIES ⇨30—INDISPENSABLE PARTY—JOINT CONTRACT.

One of several joint contractors is not an indispensable party defendant to action on the joint contract.

6. APPEAL AND ERROR ⇨877(6)—HARMLESS ERROR—ERROR AS TO ONE DEFENDANT.

Overruling one defendant's claim of exemption from being sued in that district, and proceeding to judgment against him, not having prejudiced the other defendants, is not ground for reversing judgment against them.

7. COURTS ⇨356—FEDERAL COURTS—CONFORMITY ACT—APPELLATE PRACTICE.

The conformity Act (Comp. St. § 1537), by its express terms referring only to proceeding in the District Courts, has no application to ap-

pellate proceedings either in the Supreme Court or the Circuit Court of Appeals, which are governed entirely by the acts of Congress, the common law, and the ancient English statutes.

8. APPEAL AND ERROR ⇨1170(1)—**SUPREME COURT—JUDGMENT ON REVIEW—TECHNICAL ERROR.**

In cases coming from federal courts the Supreme Court is given by statute (Judicial Code, § 240 [Comp. St. § 1217], Rev. St. § 701 [Comp. St. § 1669], and Circuit Court of Appeals Act, §§ 10, 11 [Comp. St. §§ 1670, 1124]) full power to enter such judgment or order as the nature of the appeal or writ of error or certiorari requires; and by Act Feb. 26, 1919, amending Judicial Code, § 269 (Comp. St. § 1246), disregard of technical matters not affecting substantial rights is especially enjoined.

9. CERTIORARI ⇨64(1)—**TO CIRCUIT COURT OF APPEALS—REVIEW.**

The whole case being before the Supreme Court on writ of certiorari to the Circuit Court of Appeals, the contention of error in instructions on measure of damages must be examined; the objection having been properly saved.

10. CORPORATIONS ⇨30(1) — **CONTRACT TO FORM—ACTION FOR BREACH.**

Plaintiff, owning all the stock of the M. sawmill corporation, having entered into a contract with defendants, owners of timber lands, whereby they should join in forming a corporation, to which they would convey the lands, and to which he would convey the mill properties, which the contract recited he owned, title only being in the M. Company, stock in the new company to be issued to him and them in certain proportions in exchange for such properties, all the damages for defendants' breach of the contract are recoverable by plaintiff, and this without an accounting and settlement of the M.'s Company's affairs.

11. LOGS AND LOGGING ⇨3(15)—**BREACH OF CONTRACT TO FORM CORPORATION.**

Plaintiff having entered into contract with defendants whereby they should join in forming a corporation, to which he should convey a sawmill and timber lands, in exchange for which five-eighths of the corporation's stock should be issued to him and thirteen-eighths to them, his measure of damages for their failure to comply was all of the depreciation in value of the mill from being deprived of the timber supply and five-eighths of the increase in market value of timber lands.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Action by Morgan V. Gress against P. D. Camp and others. Judgment for plaintiff was affirmed by the Circuit Court of Appeals (244 Fed. 121, 156 C. C. A. 549), and defendants bring certiorari. Modified and affirmed.

*Messrs. T. D. Savage and Thomas H. Willcox, both of Norfolk, Va., for petitioners.

*Messrs. D. Lawrence Groner, of Norfolk, Va., W. M. Toomer, of Jacksonville, Fla., and Alexander Akerman, of Macon, Ga., for respondent.

Mr. Justice BRANDEIS delivered the opinion of the Court.

Section 51 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. § 1033]) declares that (with exceptions not here material)—

"No civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Resting jurisdiction wholly on diversity of citizenship, Gress, a citizen and resident of Florida, brought, in the District Court of the United States for the Eastern District of Virginia, this action against P. D. Camp, P. R. Camp, and John M. Camp, alleging them to be citizens of Virginia and residents of that district. One of them, John M., filed a "plea to jurisdiction," asking that the suit be dismissed, because he was not a citizen or resident of the district in which it was brought, but a citizen of North Carolina, resident in the Eastern district thereof. P. D. and P. R. Camp filed a separate "plea to jurisdiction" setting up the same facts, alleging that the cause of action sued on was joint and inseparable, and denying jurisdiction as to themselves also, because there was none as to John M. Camp. The pleas were overruled; the case proceeded to trial; a verdict was rendered against the three defendants; and judgment was entered thereon. Exceptions had been duly taken both by John M. and by P. D. and P. R. Camp to the decision overruling their pleas to the jurisdiction, and by the three defendants to certain rulings at the trial alleged to be erroneous; but *the judgment was affirmed by the Circuit Court of Appeals (244 Fed. 121, 156 C. C. A. 549). A writ of certiorari was granted by this court (245 U. S. 655, 38 Sup. Ct. 14, 62 L. Ed. 533).

[1] First. The several defendants below, although not citizens of the same state, were all citizens of states other than that of the plaintiff. Hence the diversity of citizenship requisite to federal jurisdiction existed. Sweeney v. Carter Oil Co., 199 U. S. 252, 26 Sup. Ct. 55, 50 L. Ed. 178. The objection of John M. Camp is not to the jurisdiction of a federal court, but to the jurisdiction over him of the court of the particular district; that is, the objection is to the venue. He asserts the

personal privilege not to be sued in a district other than that of his residence, since the action is not brought in the district of the plaintiff's residence. If he were a sole defendant, or if none of the defendants resided in the district where suit was brought, the privilege asserted would be supported by the very language of the statute. *Macon Grocery Co. v. Atlantic Coast Line Railroad Co.*, 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300. Section 51 of the Judicial Code does not in terms provide for the case where there are several defendants. Does the limitation of jurisdiction to the district of the residence "of either the plaintiff or the defendant" mean also of all the plaintiffs or all the defendants, so that, when the several defendants are not all residents of the district in which they are sued, the nonresident may assert the privilege not to be sued therein? The precise question has not been decided by this court; but the construction already given to this section in analogous cases and to analogous provisions in other statutes makes it clear that the privilege asserted should be sustained.

Section 51 of the Judicial Code embodies in substance the Act of March 3, 1887, c. 373, § 1, 24 Stat. 552, as corrected by Act of August 13, 1888, c. 866, § 1, 25 Stat. 433 (Comp. St. § 1033). From the passage of the original Judiciary Act September 24, 1789, c. 20, § 11, 1 Stat. 73, 79 (Comp. St. § 991), until 1887, suit could be brought not only in the district of defendant's residence, but also in any other district in which the defendant was found. The 1887-1888 act accomplished its purpose of restricting the jurisdiction of the federal courts, in part, by limiting the districts in which suit might be brought to that of the defendant's or of the plaintiff's residence. See *In re Keasbey & Mattison Co.*, 160 U. S. 221, 228, 16 Sup. Ct. 273, 40 L. Ed. 402. In *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, the question was presented whether this limitation prohibited suit in a district in which some, but not all, of the plaintiffs were resident. The court felt itself controlled largely by the construction which had been given in *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. Ed. 435, to a clause of the original Judiciary Act, similar in language and analogous in subject-matter, and had been steadfastly adhered to since. There this court construed the phrase "where the suit is between a citizen of the state where the suit is brought, and a citizen of another state," as meaning "that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts [courts of the United States]." Adopting a like construction, this court held in *Smith v. Lyon*, supra, that suit could not be brought in a district in which some, but not all, of the plaintiffs resided. The rule declared in

Strawbridge v. Curtiss had been applied indiscriminately to plaintiffs and defendants; and after the decision in *Smith v. Lyon* it was generally assumed in the lower courts that the rule there applied to plaintiffs must likewise be applied to defendants.¹ Compare *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Geneva Furniture Co. v. Karpen*, 238 U. S. 254, 259, 35 Sup. Ct. 788, 59 L. Ed. 1295. The same assumption appears to have been made in *Interior Construction & Improvement Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401, where the question was raised whether the resident defendant could avail himself of the objection that another defendant, who was a nonresident, was not liable to suit therein. And in *Ladew v. Tennessee Copper Co.*, 218 U. S. 357, 364, 365, 31 Sup. Ct. 81, 54 L. Ed. 1069, a like rule was applied; for it was there held that, although an alien defendant could be sued in any district where found, an American citizen joined with him as codefendant could not, without his consent, be sued in a district other than that of his or the plaintiff's residence.

It is said, however, that section 51, if read in connection with section 50 (Comp. St. § 1032) and in the light of their legislative history, shows that it was the intention of Congress to confer jurisdiction over all the defendants found within the district, if one of them resides therein. Section 50,² which embodies without substantial change the Act of February 28, 1839, c. 36, § 1, 5 Stat. 321, makes provision for enforcing a cause of action which exists against several persons, although one of them is neither an inhabitant of nor found within the district in which suit is brought and does not voluntarily appear. It does so by permitting the court to entertain jurisdiction without prejudice to the rights of the party not regularly served nor

¹ E. g., *Turk v. Illinois Cent. R. Co.*, 213 Fed. 315, 316, 134 C. C. A. 111 (Sixth Circuit); *Excelsior Pebble Phosphate Co. v. Brown*, 74 Fed. 321, 20 C. C. A. 428 (Fourth Circuit); *Revett v. Glise* (D. C.) 207 Fed. 673, 676 (Wash.); *Schultz v. Highland Gold Mines Co.* (C. C.) 158 Fed. 337, 340 (Or.); *Tice v. Hurley* (C. C.) 145 Fed. 391 (Ky.); *Lengel v. American Smelting & Refining Co.* (C. C.) 110 Fed. 19, 21 (N. J.); *Bensinger Self-Adding Cash Register Co. v. National Cash Register Co.* (C. C.) 42 Fed. 81 (Mo.). But see *Jennings v. Smith* (D. C.) 232 Fed. 921, 925 (Ga.); *Rawitzer v. Wyatt* (C. C.) 40 Fed. 609 (Cal.).

² "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not include or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

³¹⁴ voluntarily appearing. The argument is that, in order to give effect to the retention in section 50 of the words "found within the district," we must, although these words were omitted from section 51, hold that, where there are several defendants, the court has jurisdiction of all, if one or more are residents of the district, and the others are found there. The argument overlooks the fact that section 50 is applicable not only to cases in which the venue is dependent upon the residence of a defendant in the district where suit is brought, but also to those cases in which it is dependent upon the residence of the plaintiff. Ordinarily jurisdiction could be obtained in the district of the plaintiff's residence only over nonresidents, because all of the defendants must be nonresidents in order to satisfy the requirement of diversity of citizenship. And as to these there can be personal jurisdiction only so far as found within or voluntarily appearing within the district. To such persons the term "inhabitants" in section 50 obviously cannot refer. If the provision therein concerning those not "found" had been omitted, a suit would fail in case any one of those who at common law was a necessary party defendant should not be found therein or voluntarily appear. *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158. As the act of 1887-1888 did not restrict jurisdiction based on diversity of citizenship in those cases where the venue is determined by the residence of the plaintiff, it was appropriate to retain in the earlier statute (now section 50) the words "found within the district," although it had ceased to be operative in cases where the venue is determined by the residence of the defendants.

³¹⁵ On the other hand, section 52 of the Judicial Code (Comp. St. § 1034) makes it clear that the construction contended for by defendant is unsound. It provides that where a state contains more than one district a suit (not of a local nature) against a single defendant must be brought in the district where he resides, "but if there are two or more defendants, residing in different districts of the state, it may be brought in either district." We thus have an express declaration by Congress that under one particular set of circumstances a codefendant may be sued in a district in which he does not reside. "Expressio unius est exclusio alterius." This section follows directly after that which contains the general prohibition against suing a defendant in a district other than that in which he or the plaintiff resides, and constitutes one of the specified exceptions to the general prohibition. It shows, therefore, that the prohibition of section 51 expresses the deliberate purpose of Congress that a person shall not be compelled to submit to suit in the federal District Court in a state within which neither he nor the plaintiff resides, although a codefendant may reside

therein. The history of section 52 confirms this conclusion. It is substantially a re-enactment of section 740 of the Revised Statutes. After the passage of the act of 1887-1888 restricting the jurisdiction of the federal courts, considerable doubt arose as to whether the provisions of that act now contained in section 51 of the Judicial Code did not repeal section 740 of the Revised Statutes. Compare *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 26 Sup. Ct. 133, 50 L. Ed. 281.³ Congress re-enacted in the Judicial Code this provision expressly permitting, in states having more than one district, all defendants resident within the state to be sued in any district thereof in which one of them resides; while it made no similar provision for the case where the several defendants reside in different states. If Congress, in re-enacting the provisions of section 51, had intended that it should establish a rule with reference to defendants resident in different states contrary to the construction placed by the overwhelming weight of authority upon the identical provision contained in the earlier statute, it would have expressed that intention in unmistakable language.

[2] No reason appears, therefore, for refusing to apply here the rule of *Smith v. Lyon*, supra. The objection made below that the plea to the jurisdiction is bad because not limited by its terms to the question of jurisdiction over the particular defendant is highly technical, and was hardly insisted upon here; and the contention that his exemption from suit was waived by the acknowledgment on the summons of service is clearly unfounded. John M. Camp properly asserted his privilege by plea to the jurisdiction, and the plea should have been sustained. It follows that the judgment against him is void; that the judgment of the Circuit Court of Appeals, in so far as it affirms the judgment of the District Court against him, should be reversed; and the suit should be dismissed as to him.

[3-5] Second. The plea to the jurisdiction filed by P. D. and P. R. Camp was properly overruled. The objection was based wholly on the fact that John M. Camp was not suable within the district. This is an exemption from suit personal to the nonresident of the district. A resident codefendant cannot avail himself of the objection.⁴ If John M. had

³ See, also, *Doscher v. United States Pipe Line Co.* (C. C.) 185 Fed. 959; *John D. Park & Sons Co. v. Bruen* (C. C.) 133 Fed. 806; *New Jersey Steel & Iron Co. v. Chormann* (C. C.) 105 Fed. 532; *Godard v. Mailler*, 80 Fed. 422; *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* (C. C.) 49 Fed. 608, 15 L. R. A. 109.

⁴ *Tice v. Hurley* (C. C.) 145 Fed. 391, 392; *Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co.* (C. C.) 119 Fed. 942; *Smith v. Atchison, T. & S. F. R. Co.* (C. C.) 64 Fed. 1, 2; *Jewett v. Bradford Sav. Bank & Trust Co.* (C. C.) 45 Fed. 801; *Bensinger Self-Adding Cash Register Co. v. National Cash Register Co.* (C. C.) 42 Fed. 81, 82.

been an indispensable party, the failure to obtain jurisdiction over him would, of course, be fatal to the maintenance of the suit. *Harney v. Baltimore City*, 6 Wall. 280, 18 L. Ed. 825. But he was not an indispensable party; and under section 50 of the Judicial Code the trial court might, if it had sustained John M.'s plea to the jurisdiction, have rendered judgment against the other two defendants; for this is an action on a joint contract, and one of the several joint contractors is not an indispensable party defendant in such a suit. *Clearwater v. Meredith*, 21 How. 489, 16 L. Ed. 201.

[4] Third. P. D. Camp and P. R. Camp contend that, in view of the error in overruling John M. Camp's plea to the jurisdiction and proceeding to judgment against him, the court may not confine its action to correcting the error by setting aside the judgment and dismissing the suit as to him, but must set aside the judgment as against all the defendants, thus requiring a new trial as against the other two. But this is not a necessary result of erroneously retaining jurisdiction over John M. Camp; for, as above shown, John M. was not an indispensable party to a suit to enforce the liability of the other two joint obligors; and if the trial court had sustained his plea to the jurisdiction, the suit might, under section 50 of the Judicial Code, have proceeded to judgment as against the other defendants. Whether the error committed in retaining jurisdiction over John M. requires a reversal of the judgment as against the other defendants depends upon whether that error may have prejudiced them. The record does not show that the error committed could have prejudiced them in any way; and their counsel admitted at the bar that the error had not prevented them from availing themselves of any defense, and had not influenced the admission or rejection of evidence, or the granting or refusal of any instruction asked or given. Only error which may have resulted in prejudice could justify reversal of a judgment. Compare *Ysaco & Mississippi Valley Railroad Co. v. Mullins* (No. 275), 249 U. S. 331, 39 Sup. Ct. 368, 63 L. Ed. 734, decided April 21, 1919.

[7-4] It is, however, contended that the Virginia practice would require a reversal of the judgment as against all defendants, and that the *Conformity Act* and *the Statutes*, § 944 (Comp. St. § 1587) requires that the state practice be followed. If such were the Virginia practice, which is denied, it would not be binding on this court. The *Conformity Act* by its express terms refers only to proceedings in District (and formerly Circuit) Courts and has no application to appellate proceedings either in this court or to the Circuit Court of Appeals. Such proceedings are governed entirely by the acts of Congress, the common law, and the ancient English statutes. *United States v. King*, 7

How. 533, 544, 12 L. Ed. 964; *Boogher v. Insurance Co.*, 103 U. S. 90, 95, 23 L. Ed. 319; *Chattanooga Ore. & Iron Co. v. Peddionez*, 128 U. S. 444, 9 Sup. Ct. 106, 32 L. Ed. 208; *St. Clair v. United States*, 154 U. S. 134, 153, 14 Sup. Ct. 1002, 38 L. Ed. 300; *Francisco v. Chicago & A. R. Co.*, 149 Fed. 354, 358, 359, 79 C. C. A. 292, 9 Ann. Cas. 628; *United States v. Illinois Surety Co.*, 226 Fed. 653, 664, 141 C. C. A. 409. In cases coming from federal courts the Supreme Court is given by statute full power to enter such judgment or order as the nature of the appeal or writ of error (or certiorari, section 240 of the Judicial Code [Comp. St. § 1217]) requires. *Revised Statutes*, § 701 (Comp. St. § 1689). *Circuit Court of Appeals Act* of March 3, 1891, c. 517, § 11, 26 Stat. 826, 829 (Comp. St. § 1124). See, also, section 10 of the same act (Comp. St. § 1670). Compare *Balieu v. United States*, 160 U. S. 157, 198, 16 Sup. Ct. 263, 40 L. Ed. 388, et seq. And by Act of February 26, 1919 (Public—No. 251—65th Congress), amending section 269 of the Judicial Code (Comp. St. § 1246) the duty is especially enjoined of giving judgment in appellate proceedings "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The error in retaining jurisdiction over John M. Camp does not, therefore, require that the judgment as against the other two defendants be set aside.

[10] Fourth. P. D. and P. R. Camp contend, however, that the judgment against them should be reversed also on the ground that there was error in the instructions as to the measure of damages. The contention must be examined, as the whole case is here on writ of certiorari and the objection was properly saved. *Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257, 267, 30 Sup. Ct. 565, 54 L. Ed. 757; *Delk v. St. Louis & San Francisco Railroad Co.*, 220 U. S. 580, 585, 51 Sup. Ct. 617, 55 L. Ed. 590.

*Gress was the owner of the entire capital stock of the Morgan Lumber Company, a corporation which held the title to sawmill properties in Florida. The three defendants, Camp, were the owners of valuable timber lands near the mill. By contract under seal dated August 18, 1913, the Camps agreed to join with Gress in organizing a corporation and the issue of Long County Lumber Company to which Gress would convey the sawmill properties which the parties valued at \$125,000, and the Camps would convey the timber lands which they valued at \$375,000; that Gress should receive, in exchange for the mill properties, five-eightieths of the stock in the new company, and the Camps, in exchange for the lands, thirteen-eightieths of the stock; and that the parties should in that proportion finance the company. Gress was ready and willing and able to perform his part of the contract; and the Camps broke it by definitely refusing to

perform. The only question in the case seriously controverted was the amount of damages recoverable. There was evidence that by reason of the breach of contract which resulted in depriving the mill of its timber supply its value depreciated heavily. The trial judge charged the jury that among the elements of damages recoverable was the amount of the depreciation in the market value of the mill between the date of the contract and the date of the breach. The objection made to this ruling was based wholly on the ground that, as the mill properties were vested in the Morgan Lumber Company, Gress could not recover more than nominal damages, although he owned all of its stock. The contention is that before it could be determined whether plaintiff, as owner of the stock of the Morgan Lumber Company, sustained any damages by reason of the depreciation in value of the mill property, an accounting and settlement of the Morgan Lumber Company's affairs would be necessary; and it is urged that the lower court, in rejecting a ruling to that effect and in charging as it did, held erroneously that the person who owns the entire capital stock of a corporation is in fact and in law identical with the corporation.

The contention appears to rest upon a misapprehension of the plaintiff's position. The contract recited that Gress owned the mill, and that the title only was in the Morgan Lumber Company. If so, the depreciation would clearly be a loss suffered by Gress, and he could recover as compensation an amount equal to that loss, since he was equitable owner with power to require an immediate conveyance of the legal title. There was also introduced in evidence a vote of the directors of the Morgan Lumber Company, which, referring to the contract of August 18, 1913, as having been made by Gress "representing the Morgan Lumber Company," approved the same "in its entirety." There was not a particle of evidence that any other person had any interest of any kind in the corporation or its assets. Consequently whether Gress entered into the contract technically on his own behalf or technically as agent for the corporation, his undisclosed principal, is immaterial. In either case the suit is one brought by him individually; in either case all the loss suffered through defendant's breach of contract is recoverable by Gress; in either case the measure of damage is the same.⁵ There is no basis for the contention that an accounting and settlement of the Morgan Lumber Company's affairs was necessary in order to determine

the amount of plaintiff's loss; and the failure to require such an accounting does not involve any disregard of the corporate entity.

[11] The decision of the Circuit Court of Appeals denying the contention that the plaintiff was entitled to recover only thirteen-eightieths of the loss due to the depreciation in the mill properties was clearly correct. If the jury believed as contended that defendant's breach of contract, by depriving those properties of a timber supply, reduced their value, the plaintiff's loss in that respect was the whole of the reduced value. On the other hand, if the market value of the timber lands increased, the plaintiff's loss from being deprived of the gain from this source was, as the court ruled, only five-eightieths of that gain. There was no other objection taken which requires us to consider whether the rulings as to damages were in other respects proper.

The judgment as to P. D. Camp and P. R. Camp is affirmed, and as to John M. Camp is reversed, and the case as so modified is remanded to the District Court of the United States for the Eastern District of Virginia, with directions to dismiss the suit as to John M. Camp.

Modified and affirmed.

(250 U. S. 233)

RUMELY v. McCARTHY, United States Marshal, et al.

(Submitted April 16, 1919. Decided June 2, 1919.)

No. 874.

1. HABEAS CORPUS $\hookrightarrow$ 85(1) — REMOVAL FOR TRIAL—PRIMA FACIE CASE.

On habeas corpus to determine legality of detention under commitment issued by a United States commissioner pending issuance of a warrant for removal to District of Columbia to answer an indictment for alleged violation of Act Oct. 6, 1917, known as the Trading with the Enemy Act (Comp. St. 1918, §§ 3115½a-3115½j), where indictment was introduced in the proceedings before the commissioner and the petitioner's identity was admitted, the accusatory averments of the indictment must be accepted as making out a prima facie case.

2. HABEAS CORPUS $\hookrightarrow$ 3—MATTER OF DEFENSE —SCOPE OF WRIT.

Petitioner's contention that he could not be punished for failure to report to the Alien Property Custodian, as required by Trading with the Enemy Act, § 7 (Comp. St. 1918, § 3115½d), because such report would show that he had been trading with the enemy in violation of section 3 (Comp. St. 1918, § 3115½b), and compel him to bear witness against himself contrary to the Fifth Amendment, is unavailable on habeas corpus to obtain discharge from commitment into custody for removal to the District of Columbia, where the indictment was returned;

⁵ United States Telegraph Co. v. Gildersleve, 29 Md. 232, 246, 96 Am. Dec. 519; Leterman v. Charlottesvile Lumber Co., 110 Va. 769, 772, 67 S. E. 231; Groover v. Warfield, 50 Ga. 644, 654; Joseph v. Knox, 3 Campb. 320.

the constitutional question being matter for defense.

3. HABEAS CORPUS —4—USE AS WRIT OF ERROR.

The writ of habeas corpus may not be employed as an anticipatory writ of error.

4. HABEAS CORPUS —92(1)—SCOPE OF INQUIRY—FINDING OF FACT.

On petition for a writ of habeas corpus to obtain discharge from order of the commissioner committing petitioner into custody pending the issuance of a warrant for his removal to the District of Columbia, where an indictment was returned against him, a finding of fact by the commissioner, supported by competent evidence, is not reviewable.

5. CRIMINAL LAW —113—TRADING WITH THE ENEMY—OFFENSE—VENUE.

Where the office of the Alien Property Custodian was in the District of Columbia, and persons indebted to an enemy of the United States were required by the Trading with the Enemy Act (Comp. St. 1918, §§ 3115½a-3115½j) to report that fact to the custodian, one indebted to the Imperial German government, who failed to report as required, was guilty of an offense against the United States, which was committed within the District of Columbia.

6. HABEAS CORPUS —113(12)—REVIEW—DISCRETION.

Where, after defendant was indicted in the Southern district of New York for perjury in a report to the Alien Property Custodian under the Trading with the Enemy Act (Comp. St. 1918, §§ 3115½a-3115½j), he was indicted in the District of Columbia for failure to report to the Alien Property Custodian, contentions that his removal from the Southern district of New York to the District of Columbia was an invasion of his constitutional right to a speedy trial on the New York indictments, and that the District Court for the Southern District of New York should not have consented to such removal without requiring from the government a statement of reasons, relate to questions of discretion not reviewable on appeal from an order denying writ of habeas corpus to obtain release from commitment pending issuance of a warrant for removal.

The Chief Justice dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Petition by Edward A. Rumely for writs of habeas corpus and certiorari in aid thereof directed to Thomas D. McCarthy, United States Marshal for the Southern District of New York, and Samuel M. Hitchcock, United States Commissioner for the Southern District of New York. From a final order dismissing the writs (256 Fed. 565), petitioner appeals. Affirmed.

*Mr. Stephen C. Baldwin, of Brooklyn, N. Y., for appellant.

Mr. Assistant Attorney General Brown, for appellees.

Mr. Justice PITNEY delivered the opinion of the Court.

This is an appeal from a final order of the District Court for the Southern District of New York dismissing writs of habeas corpus and certiorari sued out by appellant to determine the legality of his detention under a commitment issued by appellee Hitchcock, as United States commissioner, to hold appellant in the custody of the United States marshal pending the issuance of a warrant for his removal to the District of Columbia to answer an indictment returned against him by the grand jury of that District for an alleged violation of the Act of Congress of October 6, 1917, c. 106, 40 Stat. 411 (Comp. St. 1918, §§ 3115½a-3115½j), known as the Trading with the Enemy Act.

This indictment, described as the "Washington indictment," contains two counts, each of which recites the existence, at the time of the offense charged, of a state of war between the United States and the Imperial German government, and sets out that the Act of October 6, 1917, was in force, and that the Alien Property Custodian, an officer of the United States appointed *under authority of that act, had his office for the transaction of official business in the District of Columbia and at no other place. In the first count it is recited that the statute made it the duty of any person in the United States having custody or control of any property of or on behalf of an enemy of the United States to report the fact to the Alien Property Custodian within a period said to have expired December 20, 1917; and it is alleged that on October 6, 1917, and on each day thereafter down to and including the date of the indictment (December 2, 1918), appellant had the custody and control of certain property in the United States, that is to say, certain capital stock of the S. S. McClure Newspaper Corporation, a corporation of the state of New York, which, as appellant knew, belonged to the Imperial German government, and that appellant "at the District of Columbia and within the jurisdiction of this court" willfully failed, neglected, and omitted to report that fact to the Alien Property Custodian within the period prescribed by law and continuously down to and including the date of the indictment. The second count, in addition to the matter already stated, recites the provision of the act which made it the duty of any person in the United States indebted to an enemy of the United States to report the fact to the Custodian within a period prescribed, and avers that on October 6, 1917, and on each day thereafter down to, etc., appellant, then being within the United States, was indebted in the sum of \$1,451,700 to the Imperial German government as he well knew, and being so indebted "at the District of Columbia

and within the jurisdiction of this court" willfully failed, neglected, and omitted to report the fact of such indebtedness to the Custodian.

Previous to the Washington indictment two indictments had been returned by the United States grand jury for the Southern district of New York, upon which *appellant was on bail awaiting trial. These were found August 2, 1918; one of them being against appellant alone, and charging perjury in a report made by him December 4, 1917, to the Alien Property Custodian, in that, being required to state the property held by him for alien enemies and indebtedness owed by him to alien enemies, he swore that the only item in this category was a note for \$100,000 made by him and payable to one Herman Sielcken, whereas it was alleged he was not indebted to Sielcken, but was indebted to the Imperial German government in the sum of \$1,301,700, and held and had control of certain property belonging to that government, consisting of shares of the capital stock of the S. S. McClure Newspaper Corporation, a corporation of the state of New York, which facts appellant did not report to the Custodian. In the other New York indictment appellant and one Kaufmann were indicted for a conspiracy to omit to report to the Custodian the fact that appellant had in his custody and control certain property consisting of shares of the capital stock of the S. S. McClure Newspaper Corporation for and in behalf of the Imperial German government, and that appellant was indebted to the said government in the sum of \$1,431,700.

At the hearings before the commissioner appellant admitted his identity and offered no evidence to meet the prima facie case made by producing an exemplified copy of the Washington indictment. On the other hand, it was and is admitted in behalf of the government that the New York indictments relate to the same transactions as the Washington indictment, and that they were pending in the Southern district of New York at the time the Washington indictment was found. To meet objections raised upon the hearing of the habeas corpus, the District Court embodied in the final order dismissing the writ clauses to the following effect:

*(a) One giving the consent of that court to the removal of defendant to the District of Columbia notwithstanding the pendency of the indictments in the New York district;

(b) One directing a stay of removal pending appeal to this court;

(c) And one directing that, within 30 days after appellant had pleaded to the Washington indictment, the United States attorney either for the Southern district of New York or for the District of Columbia should give

him at least two weeks' notice as to which indictment it was intended to move first for trial.

Appellant's first point is that in a legal sense there was no probable cause to believe that he had been guilty of the offense charged in the Washington indictment because he could not be required to make a report to the Alien Property Custodian of the facts alleged in that indictment, since this would compel him in a criminal case to be a witness against himself, contrary to the provision of the Fifth Amendment to the Constitution of the United States in that behalf. As a basis for this contention appellant relies upon the uncontroverted averment in the first count of the Washington indictment that he held stock in the McClure Corporation for and on behalf of the German government and did not report that fact to the Alien Property Custodian; adds to this the fact, said to have been established by his own evidence introduced before the commissioner and not controverted by the government, that during a considerable period he had traded for the benefit of and with the McClure Corporation, so that (it is said) he was guilty of trading with the enemy contrary to section 3 of the act; from which it is deduced that if, as required by section 7(a) of the act, he had reported to the Alien Property Custodian that he held the McClure Corporation stock for the German government, as the first count of the Washington indictment alleges he was obliged to do, this disclosure would have tended to show that he *was guilty under section 3 of the act of trading without a license, because it would have furnished an essential link in the chain of evidence necessary to convict him of that offense.

It is at least questionable whether the point, assuming it to have merit, would have any application to the second count of the Washington indictment, which relates not to ownership of stock in the McClure Corporation, but to an indebtedness owing by appellant to the German government and not reported.

And it is further doubtful whether there is foundation for the contention as applied to the first count, since appellant predicates his trading with the enemy solely upon the fact of his trading with the McClure Corporation, a New York corporation, whereas by section 2 of the act the definition of "enemy," for the purposes of the statute, is to include merely "any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

[1-3] But consideration of these questions, or of any question raised under the Fifth Amendment, would be premature in this pro-

(250 U. S. 208)

CAPITAL TRUST CO. v. CALHOUN.

(Argued May 2, 1919. Decided June 2, 1919.)

No. 368.

CONSTITUTIONAL LAW §146, 276—UNITED STATES §85—CLAIMS AGAINST—APPROPRIATION FOR PAYMENT—PROVISION AS TO ATTORNEY'S FEES—DUE PROCESS—OBLIGATION OF CONTRACT.

Provision of Act March 4, 1915, appropriating money to pay a claim against the United States, that not more than 20 per cent. of it shall be paid an attorney for services in connection with the claim, is within the power of Congress, and does not deprive an attorney of property without due process, nor impair the obligation of claimant's contract to pay the attorney half of what was collected; the appropriation being one the making of which could not have been compelled.

In Error to the Court of Appeals of the State of Kentucky.

Proceeding for an accounting against the Capital Trust Company, administrator of Thomas N. Arnold, deceased, in which C. C. Calhoun intervened. Judgment for intervenor was affirmed by the Court of Appeals of Kentucky (197 S. W. 944), and the administrator brings error. Reversed.

*Mr. T. L. Edelen, of Frankfort, Ky., for plaintiff in error.

Messrs. Charles F. Consaul and Joseph W. Bailey, both of Washington, D. C., for defendant in error.

*Mr. Justice McKENNA delivered the opinion of the Court.

Proceeding in equity under the law of Kentucky for an accounting from the Capital Trust Company as administrator de bonis non of the estate of Thomas N. Arnold, deceased, and that the estate be settled and distributed.

Defendant in error Calhoun and Calhoun & Sizer, a firm composed of C. C. Calhoun and Adrian Sizer, attorneys at law, appeared in the proceeding and by cross-petition prayed judgment against the trust company as such administrator for the sum of \$1,504.50, with interest from July 10, 1915.

*An outline of the facts is as follows:

Thomas N. Arnold, prior to his death, believing that he had a just claim against the United States, entered into a contract with the firm of Calhoun & Sizer and employed it to undertake the prosecution of the claim, and on August 1, 1905, entered into a written contract with it by which in consideration of the services rendered and to be rendered by it in the prosecution of the claim, he agreed to pay it a fee equal in amount to 50 per cent. of whatever sum of money should be awarded or collected on the claim, the pay-

ceeding, since it is entirely plain that they do not go to show a "want of probable cause" within the meaning of the rule that is invoked. The accusatory averments of the indictment, admitted for the purposes of this proceeding to be true, make out a prima facie case of an offense against the laws of the United States indictable in the District of Columbia. Hyde v. Shine, 199 U. S. 62, 84, 25 Sup. Ct. 760, 50 L. Ed. 90; Haas v. Henkel, 216 U. S. 462, 481, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112. Appellant's constitutional point merely raises a probability that a defense will be interposed, and that thus a controversy will arise, the determination of which is within the proper jurisdiction of the court in which the indictment was found. This furnishes no legal obstacle to the removal of the accused to that jurisdiction; nor may the writ of habeas corpus be employed as an anticipatory writ of error. Henry v. Henkel, 235 U. S. 219, 229, 35 Sup. Ct. 54, 59 L. Ed. 203.

[4, 5] It is contended, indeed, that there was no probable cause to believe that the offense charged in the Washington indictment was committed within the District of Columbia, and this upon the ground that appellant was not personally present in the District at the time of the alleged offense, and that he was under no duty to make report there to the Alien Property Custodian. The commissioner, however, found as a matter of fact that the Custodian's office was in the District of Columbia, and as the finding was supported by competent evidence the District Court properly held that it was not reviewable on writ of habeas corpus. That being so, the duty imposed by the statute to make report to the Alien Property Custodian involved the duty to make such report in the District of Columbia, and failure to make it was an offense against the United States committed in that District. United States v. Lombardo, 241 U. S. 73, 76, 36 Sup. Ct. 508, 60 L. Ed. 897; New York Central, etc., R. R. Co. v. United States, 166 Fed. 267, 269, 92 C. C. A. 331.

[6] It is contended that the removal of appellant to the District of Columbia amounts to an invasion of his constitutional right to a speedy trial on the New York indictments, and that the consent of the District Court for the Southern District of New York to such removal ought not to have been given without requiring from the representative of the government a statement of reasons. These points raise no more than questions of discretion, the determination of which is not for our review.

Final order affirmed.

The CHIEF JUSTICE dissents.

ment of which was made a lien upon the claim or upon any draft or evidence of payment that might be issued in liquidation thereof.

The firm undertook the prosecution of the claim and bills were introduced in Congress for its payment, and on May 22, 1903, it was referred to the Court of Claims by a resolution of the United States Senate for findings of fact under section 14 of the Act of March 3, 1887, c. 359, 24 Stat. 507, now section 151 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1138 [Comp. St. § 1142]). About that time the firm of Calhoun & Sizer was dissolved and subsequently Arnold died and the beneficiaries of the estate entered into a written contract with defendant in error, C. C. Calhoun, to continue the prosecution of the claim and agreed to pay him 50 per cent. of the amount which might be collected, the fee to be a lien "on any warrant" which might "be issued in payment of the claim."

January 15, 1912, the Court of Claims made findings of fact in the matter of the claim and stated the amount thereof as \$5,051. The court's findings were certified to Congress and that body, by an act approved March 4, 1915 (38 Stat. 968, c. 140), made an appropriation for the payment of the claim and the Secretary of the Treasury was directed to pay it.

The act, however, contained the following provisions:

*214 "That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be *paid or delivered to or received by any agent or agents, attorney or attorneys on account of services rendered or advances made in connection with said claim. It shall be unlawful for any agent or agents, attorney or attorneys to exact, collect, withhold or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one thousand dollars." 38 Stat. 996.

June 7, 1915, Calhoun requested the Secretary of the Treasury to issue a warrant to him for the sum of \$1,003, which he recited was to be payable to him on account of services as attorney in the claim of the Capital Trust Company against the United States, as appropriated for by the act of Congress, the receipt of said warrant to be taken and accepted as a full and final release and discharge of any claim he had against the United States on account of services in said claim.

Afterward, on July 1, 1915, notice was given to Calhoun, as attorney for the claimant, that in settlement of the claim a check

was mailed to him for \$1,003, being 20 per cent. of the claim, and to the trust company as administrator de bonis non of Arnold, check for \$4,012. A part of this money is still in the hands of such administrator and there is no other property belonging to the estate.

The cross-petition additionally asserts the following: No part of the fee except the sum of \$1,003 has been paid and there is a balance due of \$1,504.50, with interest from July, 1915, the date the money was received by the trust company.

July 10, 1915, Calhoun presented his claim to the administrator duly proved and demanded payment, but payment was refused. The whole of the \$1,504.50, therefore, remains unpaid, and he, Calhoun, has a lien upon the fund for the payment, he having accepted the check for \$1,003 under protest and only on account. The contract preceded the act of Congress and when the act was passed such contracts were lawful and Congress was without authority to take from him his property without due process of law or just compensation therefor or to deprive him of his liberty of contract.

This is repeated and emphasized in various ways and the Fifth Amendment is especially invoked as sustaining it, and for which reasons it is alleged that the "attempted limitation of attorney's fees by said act" was "null and void."

A demurrer to the cross-petition was overruled and the trust company answered. A detail of its averments is not necessary. It practically admits those of the cross-petition and pleads in defense the provisions of the act of Congress, and also section 3477, R. S. (Comp. St. § 6383).

A demurrer was sustained to the answer and judgment rendered for Calhoun for the sum of \$1,504.50, with interest from July 1, 1915. The judgment was affirmed by the Court of Appeals. The court said:

"This case runs on all fours with *Black v. O'Hara's Adm'r*, 175 Ky. 623, 194 S. W. 811, where it was held that the act of Congress approved March 14, 1915, appropriating money for the payment of similar claims and containing a similar provision limiting an attorney's fee to 20 per cent. of the amount recovered, was in so far as it attempted to limit the amount of the fee heretofore earned, unconstitutional and invalid.

"We have been urged to recede from the rule announced in *Black v. O'Hara's Adm'r*, supra, as being unsound in principle; but after a careful reconsideration of the reasoning by which the decision in that case is supported, we are satisfied of its soundness and reaffirm it."

We encounter at the outset a question upon the form *of the judgment. The cross-petition was presented in a proceeding to require an accounting of the administrator of Arnold and the petition asserted a claim and lien upon the money in the administrator's hands received from the United States

government. The judgment, however, does not refer to that money or the lien upon it; it provides only that Calhoun recover of the administrator "the sum of fifteen hundred four and $\frac{50}{100}$ dollars, with interest from July 1, 1915, and his costs herein and may have execution," etc.

If the judgment only establishes a claim against the administrator to be satisfied, not out of the moneys received from the United States but from other assets of the estate, a situation is presented which it was said in *Nutt v. Knut*, 200 U. S. 13, 21, 26 Sup. Ct. 216, 50 L. Ed. 348, would not encounter legal objection. In other words, the limitation in the act appropriating the money to 20 per cent. as the amount to be paid to an agent or attorney would have no application or be involved.

But the judgment is construed by the parties as having more specific operation, construed as subjecting the money received from the government to the payment of the balance of Calhoun's fee, doubtless because the estate has no other property. On that account it is attacked by the trust company and defendant by Calhoun. The controversy thus presented is discussed by counsel in two propositions: (1) The validity of the contract independently of the limitation imposed by Congress upon the appropriated money; (2) the power of Congress to impose the limitation as to that money. The latter we regard as the main and determining proposition; the other may be conceded, certainly so far as fixing the amount of compensation for Calhoun's services (we say Calhoun's services, as the appearance of the firm of Calhoun & Sizer was withdrawn), and even so far as the contract provided for a lien, if the distinction made by counsel be tenable—that *is, a distinction between a lien on the claim and a lien "upon any draft or evidence of payment," to quote from the first agreement, or "on any warrant which may be issued in payment," to quote from the second agreement.

So far as the contract fixed the amount of fee it is within the rule of *Nutt v. Knut*, supra, and, for the sake of the argument, the lien may be conceded to be valid against section 3477, R. S., to the contrary, if it be regarded as having been given, not upon the claim, but upon its evidence, as counsel contend. It may, therefore, not only escape the defect that was held fatal to the lien asserted in *Nutt v. Knut*, but may claim the support of *McGowan v. Parish*, 237 U. S. 285, 35 Sup. Ct. 543, 59 L. Ed. 955.

We, however, need not dwell upon the distinctions (their soundness may be disputed) nor upon the contentions based upon them, because, as we have said, we consider the other proposition, that is, the power of Congress over the appropriated money and the limitation of payment out of it to an

agent or attorney to 20 per cent. of the claim, to be the decisive one.

In its discussion counsel for Calhoun have gone far afield and have invoked many propositions of broad generality—have even adduced as impliedly against the power, if we understand counsel, the constitution of the Court of Claims and its jurisdiction as weight in the same direction.

We can only instance some of the points of the argument. The Act of February 26, 1853, c. 80, 10 Stat. 161, now section 823, R. S. (Comp. St. § 1375), is cited as recognizing the right of attorneys to compensation for their services in claims against the United States and it is said that contracts for such compensation have been universally sanctioned as legal. And, further, official statements are adduced to the effect that the Court of Claims is so constituted "that the successful prosecution of a claim" in it "is something more than a merely perfunctory performance on the part of *counsel"; it is a matter of great business hazard and risk to counsel when done upon purely contingent fees. And in many cases, it is further urged, no other than contingent fees are possible and to deny them is practically to deny the right to counsel. Mr. Justice Miller is quoted from, in *Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64, in illustration of such result and its injury.

The right to counsel being thus recognized, and recognized antecedently to the contract now involved, it became, counsel contend, a "pre-existing valid right," and to take it away is to divest the right—to take it away is to deprive of property of value assured of protection by the Constitution of the United States. To sustain the contentions a number of state cases are cited. Among them is *Black v. O'Hara*, Adm'r, 175 Ky. 623, 194 S. W. 811, the case which the Court of Appeals regarded as authority for its ruling in the present case.

In a general sense there is force and much appeal in the contentions, but we think they carry us into considerations beyond our cognizance. Liberty in any of its exertions and its protection by the Constitution are of concern. The right to bind by contract and require performance of the contract are examples of that liberty and that protection and they might have resistless force against any interfering or impairing legislation if the contest in the case was simply one between Calhoun and the Arnold estate. But there are other elements to be considered—there is the element of the condition Congress imposed on the subject-matter of the controversy regarded as a condition of its grant. Relief could only be had through legislation. This was petitioned and the Senate of the United States was prompted to refer the claim to the Court of Claims. A defect of remedy remained even after the court had

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been thus invoked and had reported the amount and facts of the claim. Further legislation was necessary, but it could not have been compelled; it *was optional, not compulsory; and it would seem to require no argument to convince that the terms of its enactment must be taken as expressed and the relief it granted accepted with the condition imposed upon it. Indeed, the proposition is confused by its discussion. And it is certainly difficult to deal with the distinction that counsel makes between pre-existing and prospective transactions. The right is absolute and universal and necessarily must be to have any strength at all. It is only arbitrary in the sense that many of the contract between Arnold and Calhoun, have seen there was exertion of one of its powers in the present case—not, however, to interfere with or lessen the asserted obligation of the contract between Arnold and Calhoun, but to limit only the application of the money gratuitously appropriated in the payment of attorney's fees. The contention is that this cannot be done, or, to put it another way, that the appropriation, though it could not be compelled, was yet subservient to the contract of Calhoun (and, we may interject, if for 50 per cent. for any per cent. or terms) and that he was entitled to all the contract provided, denuded of the condition imposed upon the appropriation.

The contention has no legal basis, and it may be said it has no equitable one. Neither the justice nor the policy of what sovereignty may do or omit to do can be judged from partial views or particular instances. It is easy to conceive what difficulties beset and what circumstances had to be considered in legislating upon such claims. Definite dis-

positions were matters of reflection and, it may be, experience—imposition was to be protected against as well as just claims provided for, and, considering claimants and their attorneys in the circumstances, it may have seemed to Congress that the limitation imposed was fully justified, that 20 per cent. of the amounts appropriated would be a proper adjustment between them. We are not concerned, however, to accuse or defend. Whatever might have been *the moving considerations, the power exercised must be sustained. *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657; *Ball v. Halsell*, 161 U. S. 72, 16 Sup. Ct. 554, 40 L. Ed. 622.

The first case dealt with conditions upon pension legislation; the second concerned a claim against the United States on account of Indian depredations. It is, therefore, contended that they are unlike Calhoun's contract with Arnold and that their principle is not applicable. We think otherwise. The legislation passed on was sustained as within the power of government.

We conclude, therefore, that Calhoun's claim for a balance due as fees cannot be paid out of the moneys appropriated by Congress and now in the hands of the administrator *de bonis non*, or recognized as having any validity as against that fund. Beyond this we need not go.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice HOLMES concurs in the result.

Mr. Justice McREYNOLDS took no part in the decision.

MEMORANDUM DECISIONS

DISPOSED OF AT OCTOBER TERM, 1918

No. —, Original. The STATE OF OHIO, complainant, v. The STATE OF WEST VIRGINIA. May 19, 1919. Motion for leave to file the bill of complaint herein granted, and process ordered to issue returnable on Monday, October 6th next.

No. —, Original. The COMMONWEALTH OF PENNSYLVANIA, complainant, v. The STATE OF WEST VIRGINIA. May 19, 1919. Motion for leave to file the bill of complaint herein granted, and process ordered to issue returnable Monday, October 6th next.

(250 U. S. 634)

No. —, Original. Ex parte In the matter of Clarence L. ZEIGLER, petitioner. May 19, 1919. Motion for leave to file a petition for a writ of habeas corpus herein denied.

(250 U. S. 633)

No. 136. L. Cass MILLER et al., appellants, v. John WIETHAUPHT et al. May 19, 1919. Appeal from the District Court of the United States for the Eastern District of Missouri. Mr. Thomas K. Skinker, of St. Louis, Mo., for appellants. Mr. Richard F. Ralph, of Clayton, Mo., for appellee.

PER CURIAM. Affirmed upon the authority of State ex rel. Clay County v. Hackman, 270 Mo. 658, 195 S. W. 706.

(250 U. S. 633)

No. 205. The UNITED STATES, appellant, v. A. H. HEYWARD et al., Administrators, etc. May 19, 1919. Appeal from the Court of Claims. For opinion below, see 52 Ct. Cl. 87. The Attorney General, for appellant. Mr. W. Boyd Evans, of Columbia, S. C., for appellee.

PER CURIAM. Judgment affirmed by an equally divided court.

(250 U. S. 633)

No. 689. Silas WHITE, plaintiff in error, v. The UNITED STATES of America. May 19, 1919. In Error to the District Court of the United States for the District of Nebraska.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of (1) Equitable Life Assurance Society v. Brown, 187 U. S. 308, 314, 23 Sup. Ct. 123, 47 L. Ed. 190; Consolidated Turnpike Co. v. Norfolk, etc., Ry. Co., 228 U. S. 596, 600, 33 Sup. Ct. 605, 57 L. Ed. 982; Manhattan Life Ins. Co. v. Cohen, 234 U. S. 123, 137, 34 Sup. Ct. 874, 58 L. Ed. 1245; Pennsylvania Hospital v. Philadelphia, 245 U. S. 20, 24, 38 Sup. Ct. 35, 62 L. Ed. 124; (2) United States v. Kagama, 118 U. S. 375, 6 Sup. St. 1109, 30 L. Ed. 228; United States v. Celestine, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195; Donnelly v. United States, 228 U. S. 243, 270, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann.

Cas. 1913E, 710; United States v. Sandoval, 231 U. S. 28, 39, 34 Sup. Ct. 1, 58 L. Ed. 107; United States v. Nice, 241 U. S. 591, 36 Sup. Ct. 696, 60 L. Ed. 1192.

(250 U. S. 639)

No. 944. SOUTHERN PACIFIC COMPANY, plaintiff in error, v. Leo L. D'UTASSY. May 19, 1919. Petition for a writ of certiorari herein denied. For opinion below, see 225 N. Y. 694, 122 N. E. 879.

(250 U. S. 647)

No. 961. ELABORATED ROOFING COMPANY OF BUFFALO, Inc., et al., petitioners, v. Charles S. BIRD. May 19, 1919. For opinion below, see Bird v. Elaborated Roofing Co., 256 Fed. 366. On petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. Petition dismissed, on motion of counsel for the petitioners.

(250 U. S. 639)

No. 970. THE Tug INTERNATIONAL, her engines, etc., and The INTERNATIONAL BRIDGE COMPANY, petitioners, v. William L. McFADDEN et al. May 19, 1919. For opinion below, see 256 Fed. 192. Messrs. Moot, Sprague, Brownell & Marcy, of Buffalo, N. Y. (Mr. Adelbert Moot, of Buffalo, N. Y., of counsel), for petitioners. Messrs. Rebadow, Ladd & Brown, of Buffalo, N. Y., for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 637)

No. 971. ERIE RAILROAD COMPANY, petitioner, v. William M. COLLINS. May 19, 1919. For opinion below, see 259 Fed. 172. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(250 U. S. 636)

No. 986. ERIE RAILROAD COMPANY, petitioner, v. ANTONIO SZARY. May 19, 1919. For opinion below, see 259 Fed. 178. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(250 U. S. 640)

No. 988. James GRAY, Trustee, etc., petitioner, v. Ella L. MOORE. May 19, 1919. For opinion below, see 256 Fed. 87. Mr. Harry H. Schutte, of Brooklyn, N. Y. (Mr. Andrew J. Nellis, of Albany, N. Y., of counsel), for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 640)

No. 989. James GRAY, trustee, etc., petitioner, v. Josie G. HANRAHAN. May 19, 1919. For opinion below, see 256 Fed. 87. Mr.

Harry H. Schutte, of Brooklyn, N. Y., for petitioner. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 640)

No. 990. *THE CITY OF OMAHA*, in the State of NEBRASKA, petitioner, v. *OMAHA ELECTRIC LIGHT & POWER COMPANY*. May 19, 1919. For opinion below, see 255 Fed. 801. Mr. William C. Lambert, of Omaha, Neb., for petitioner. Mr. William D. McHugh, of Omaha, Neb., for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(250 U. S. 640)

No. 991. *PARLIN & ORENDORFF IMPLEMENT COMPANY*, petitioner, v. Mrs. Leona FREY. May 19, 1919. For opinion below, see 200 S. W. 1143. Messrs. Francis Marion Etheridge, of Dallas, Tex., and Joseph Manson McCormick, of Dallas, Tex., for petitioner. Petition for a writ of certiorari to the Court of Civil Appeals for the Sixth Supreme Judicial District of the State of Texas denied.

No. 996. *SILVERTHORNE LUMBER COMPANY, Inc.*, et al., plaintiffs in error, v. *THE UNITED STATES OF America*. May 19, 1919. See, also, 250 U. S. —, 39 Sup. Ct. 493, 63 L. Ed. —. Motion that Frederick W. Silverthorne, one of the plaintiffs in error, be admitted to bail pending the hearing of this case, denied.

(250 U. S. 635)

No. —. Original. Ex parte In the matter of W. Gordon McCABE, Jr., and William F. Gray, Petitioners. June 2, 1919. Motion for leave to file petition for a writ of mandamus denied.

(250 U. S. 635)

No. —. *Elbert R. ROBINSON v. CHICAGO CITY RAILROAD COMPANY*. June 2, 1919. Motion submitted herein denied.

No. 33. Original. *THE COMMONWEALTH OF PENNSYLVANIA*, Complainant, v. *THE STATE OF WEST VIRGINIA*; and

No. 34. Original. *THE STATE OF OHIO*, Complainant, v. *THE STATE OF WEST VIRGINIA*. June 2, 1919. Motions for preliminary injunctions in these cases to restrain the enforcement of the statute of the State of West Virginia in controversy severally granted, and the injunctions will issue accordingly.

(250 U. S. 634)

No. 240. John D. FAXON, plaintiff in error, v. *CIVIL TOWNSHIP OF LALLIE, BENSON COUNTY, NORTH DAKOTA*. June 2, 1919. In error to the Supreme Court of the State of North Dakota. For opinion below, see 36 N. D. 634, 163 N. W. 531. Mr. S. E. Ellsworth, of Jamestown, N. D., for plaintiff in error. Mr. C. L. Young, of Bismarck, N. D., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of section 237 of

the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156) as amended by Act Sept. 6, 1916, c. 448, § 2, 39 Stat. 726.

(250 U. S. 634)

No. 349. Daniel DONAHOE, plaintiff in error, v. *THE PEOPLE OF STATE OF ILLINOIS*. June 2, 1919. In Error to the Supreme Court of the State of Illinois. For opinion below, see 279 Ill. 411, 117 N. E. 105. See, also, 39 Sup. Ct. 492, 63 L. Ed. —, Mr. Daniel Donahoe, of Chicago, Ill., in pro. per. Messrs. Edward J. Brundage and John W. Beckwith, both of Chicago, Ill., for defendant in error.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *McCain v. Des Moines*, 174 U. S. 168, 181, 19 Sup. Ct. 644, 43 L. Ed. 936; *Western Union Tel. Co. v. Ann Arbor R. R. Co.*, 178 U. S. 239, 243, 20 Sup. Ct. 867, 44 L. Ed. 1052; *Hull v. Burr*, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; *Norton v. Whiteside*, 239 U. S. 144, 147, 36 Sup. Ct. 97, 60 L. Ed. 186. Petition for certiorari denied.

(250 U. S. 648)

No. 439. William P. RICHARDSON, plaintiff in error, v. *LIBERTY OIL COMPANY et al.* June 2, 1919. For opinion below, see 143 La. 130, 78 South. 326. Mr. E. J. Jacquet, of New Orleans, La., for plaintiff in error. In Error to the Supreme Court of the State of Louisiana. Dismissed per stipulation.

No. 565. Wilson Scott NORRIS, appellant, v. *THE UNITED STATES*. June 2, 1919. For opinion below, see 53 Ct. Cl. 638. Messrs. L. T. Michener, of Washington, D. C., and William E. Russell, of New York City, for appellant. The Attorney General, for the United States. Motion to remand this case for further findings granted.

(250 U. S. 648)

No. 578. *WESTERN CASUALTY & GUARANTY INSURANCE COMPANY*, plaintiff in error, v. *CAPITOL STATE BANK OF OKLAHOMA CITY*. June 2, 1919. In Error to the Supreme Court of the State of Oklahoma. For opinion below, see 172 Pac. 954. Mr. H. L. Stuart, of Oklahoma City, Okl., for plaintiff in error. Dismissed per stipulation.

(250 U. S. 643)

No. 740. H. C. FERRIS and Alexander New, Receivers, etc., plaintiffs in error, v. B. F. SHANDY. June 2, 1919. Dismissed with costs, on motion of counsel for plaintiffs in error.

(250 U. S. 640)

No. 761. *OHIO VALLEY ELECTRIC RAILWAY COMPANY*, plaintiff in error, v. J. B. HALL, as Administrator, etc. June 2, 1919. In Error to the Court of Appeals of the State of Kentucky. For opinion below, see 180 Ky. 743, 203 S. W. 541. Dismissed with costs, on motion of counsel for the plaintiff in error.

(250 U. S. 641)

No. 926. Adolph LIPMAN, petitioner, v. Abraham SLIMMER, Jr., et al. June 2, 1919. For opinion below, see 169 N. W. 536. Mr. L. H. Salinger, of Carroll, Iowa, for petitioner. Messrs. Thomas D. O'Brien, Edward T. Young, and Alexander E. Horn, all of St. Paul, Minn., for respondents. Petition for a writ of certiorari to the Supreme Court of the State of Minnesota denied.

(250 U. S. 641)

No. 965. MINERAL DEVELOPMENT COMPANY, petitioner, v. KENTUCKY COAL LANDS COMPANY. June 2, 1919. For opinion below, see 259 Fed. 118. Messrs. S. B. Dishman, of Barbourville, Ky., E. L. Worthington, of Maysville, Ky., Wm. B. Dixon, of Louisville, Ky., and Joshua F. Bullitt, of Philadelphia, Pa., for petitioner. Messrs. Edward C. O'Rear, of Frankfort, Ky., and Henry Fitts, of Chicago, Ill. (J. C. Jones, of Frankfort, Ky., and Barthell, Fitts & Rundall, of counsel), for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(250 U. S. 641)

No. 997. Chester A. SNOW, petitioner, v. Addis H. SNOW. June 2, 1919. Messrs. Frederick D. McKenney and George P. Hoover, both of Washington, D. C., for petitioner. Mr. Henry E. Davis, of Washington, D. C., for respondent. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(250 U. S. 641)

No. 1001. GULF, COLORADO & SANTA FE RAILWAY COMPANY, petitioner, v. Mrs. E. B. CARPENTER, Administratrix, etc. June 2, 1919. For opinion below, see 201 S. W. 270. Messrs. Evans Browne, of Washington, D. C., J. W. Terry, of Galveston, Tex., and Chas. K. Lee, of Ft. Worth, Tex., for petitioner. Messrs. A. L. Curtis, of Belton, Tex., and Winbourn Pearce, of Temple, Tex., for respondent. Petition for a writ of certiorari to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas denied.

(250 U. S. 642)

No. 1005. GUARANTY TRUST COMPANY OF NEW YORK, petitioner, v. CHATHAM & PHENIX NATIONAL BANK OF THE CITY OF NEW YORK. June 2, 1919. For opinion below, see 256 Fed. 90. Mr. Frank M. Patterson, of New York City, for petitioner. Mr. David L. Podell, of New York City, for respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 642)

No. 1012. RENSSELAER & SARATOGA RAILROAD COMPANY, petitioner, v. The DELAWARE & HUDSON COMPANY, impleaded with Roscoe Irwin, collector, etc. June 2, 1919. For opinion below, see 257 Fed. 555. Mr. G. B. Wellington, of Troy, N. Y., for petitioner. Mr. Walter C. Noyes, of New York City, for respondent. Petition for a writ of cer-

tiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 642)

No. 1013. Harvey D. APGAR, petitioner, v. The UNITED STATES of America. June 2, 1919. For opinion below, see 255 Fed. 16. Messrs. J. C. Theus, of Monroe, La., and J. M. Foster, of Shreveport, La., for petitioner. Mr. Claude R. Porter, Asst. Atty. Gen., for the United States. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(250 U. S. 642)

No. 1014. Philip F. DU PONT et al., petitioners, v. Pierre S. DU PONT et al. June 2, 1919. For opinion below, see 256 Fed. 129. Messrs. William A. Glasgow, Jr., and Henry P. Brown, both of Philadelphia, Pa., and Robert Penington, of Wilmington, Del., for petitioners. Messrs. George S. Graham and George Wharton Pepper, both of Philadelphia, Pa., William S. Hilles, of Wilmington, Del., and William H. Button, of New York City, for respondents. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

(250 U. S. 643)

No. 1067. John BERNOT, plaintiff in error, v. Peter MORRISON et al. June 2, 1919. In Error to the Supreme Court of the State of Washington. See, also, 81 Wash. 533, 143 Pac. 104, Ann. Cas. 1916D, 290. Docketed and dismissed with costs, on motion of Mr. H. R. Gower for the defendants in error.

(250 U. S. 636)

No. —, Original. Ex parte in the matter of the BALDWIN COMPANY and the Valley Gem Piano Company, petitioners. June 9, 1919. Petition for the allowance of an appeal herein granted.

(250 U. S. 636)

No. —, Original. Ex parte in the matter of Charles C. FOSTER, Acting Superintendent of the Washington Asylum and Jail, petitioner. June 9, 1919. Petition for the allowance of an appeal herein denied.

No. 305. SOUTHERN PACIFIC COMPANY, petitioner, v. Henry L. BOGERT et al., executors, etc., et al. June 9, 1919. See, also, 250 U. S. 483, 39 Sup. Ct. 533, 63 L. Ed. —. Messrs. Lewis H. Freedman and Arthur H. Van Brunt, both of New York City, for petitioner. Mr. H. Snowden Marshall, of New York City, for respondent. Leave granted to present a petition for rehearing herein within 30 days, on motion of Mr. Alex. C. King in behalf of counsel.

(250 U. S. 641)

No. 349. Daniel DONAHOE, plaintiff in error, v. The PEOPLE OF STATE OF ILLINOIS. June 9, 1919. See, also, 250 U. S. —, 39 Sup. Ct. 491, 63 L. Ed. —. Mr. Daniel Donahoe, of Chicago, Ill., in pro. per., for plaintiff in error. Messrs. Edward J. Brundage and John W. Beckwith, both of Chicago, Ill., for defendant in error. Leave granted to present

petition for rehearing herein within 30 days, on motion of Mr. Leo L. Donahoe for the plaintiff in error.

No. 365. **THE AMERICAN MANUFACTURING COMPANY**, plaintiff in error, v. **THE CITY OF ST. LOUIS**. June 9, 1919. See, also, 250 U. S. 459, 39 Sup. Ct. 522, 63 L. Ed. —. Mr. Shepard Barclay, of St. Louis, Mo., for plaintiff in error. Leave granted to present a petition for rehearing herein within 30 days, on motion of Mr. John C. Brooke in behalf of counsel for the plaintiff in error.

No. 368. **CAPITAL TRUST COMPANY**, administrator, etc., plaintiff in error, v. **C. C. CALHOUN**. June 9, 1919. See, also, 250 U. S. 208, 39 Sup. Ct. 486, 63 L. Ed. —. Leave granted to present a petition for rehearing herein within 30 days, on motion of Mr. Charles F. Consaul for the defendant in error.

No. 697. **Daniel O'CONNELL et al.**, plaintiffs in error, v. **THE UNITED STATES OF AMERICA**. June 9, 1919. Motion for a writ of certiorari on suggestion of diminution of the record herein granted, without prejudice, and motion for leave to amend the assignment of errors postponed to the hearing on the merits.

(250 U. S. 635)

No. 732. **Charles Edwin LAYTON**, alias **Francis Edwin Leighton**, etc., plaintiff in error, v. **THE UNITED STATES OF AMERICA**. June 9, 1919. In error to the District Court of the United States for the Southern District of Iowa.

PER CURIAM. Dismissed for want of jurisdiction upon the authority of *Pickett v. Legerwood*, 7 Pet. 144, 148, 8 L. Ed. 638; *United States v. Abatoir Place*, 106 U. S. 160, 162, 1 Sup. Ct. 169, 27 L. Ed. 128.

No. 797. **Mary WILLEM**, a creditor of Mrs. **Kate King**, a bankrupt, appellant, v. **Dawson E. BRADLEY**, Trustee in Bankruptcy of the Estate of Mrs. **Kate King**, a Bankrupt. June 9, 1919. Motion for leave to proceed in forma pauperis denied.

(250 U. S. 635)

No. 894. **Earl DEAR**, plaintiff in error, v. **THE PEOPLE OF THE STATE OF ILLINOIS**. June 9, 1919. In error to the Supreme Court of the State of Illinois. For opinion below, see 286 Ill. 142, 121 N. E. 615.

PER CURIAM. Dismissed for the want of jurisdiction upon the authority of *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 530, 24 Sup. Ct. 174, 48 L. Ed. 287; *Shulthis v. McDougal*, 225 U. S. 561, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205; *Hull v. Burr*, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557; *Norton v. Whiteside*, 239 U. S. 144, 147, 36 Sup. Ct. 97, 60 L. Ed. 186.

No. 950. **Joseph H. SAMPLINER**, plaintiff in error, v. **MOTION PICTURE PATENTS COMPANY et al.** June 9, 1919. See, also, 255

Fed. 242, 259 Fed. 152. Motion for leave to proceed in forma pauperis denied.

No. 951. **L. R. GARRETT**, plaintiff in error, v. **THE UNITED STATES OF AMERICA**;

No. 952. **L. R. GARRETT**, appellant, v. **THE UNITED STATES OF AMERICA**; and

No. 953. **L. R. GARRETT**, appellant, v. **THE UNITED STATES OF AMERICA**. June 9, 1919. See, also, 249 U. S. 620, 39 Sup. Ct. 291, 63 L. Ed. —. Motion to vacate and set aside the orders docketing and dismissing these cases and for leave to file the records and docket the cases denied.

No. 996. **SILVERTHORNE LUMBER COMPANY (Inc.) et al.**, plaintiffs in error, v. **THE UNITED STATES OF AMERICA**. June 9, 1919. See, also, 250 U. S. —, 39 Sup. Ct. 491, 63 L. Ed. —. Former order denying motion to admit *Frederick W. Silverthorne* to bail vacated, and ordered that he be enlarged on bail pending the hearing, and the amount of the bond fixed at \$5,000, to be approved by the judge of the District Court of the United States for the Western District of New York.

(250 U. S. 642)

No. 1002. **THE SOUTH DAKOTA CENTRAL RAILWAY COMPANY**, petitioner, v. **CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK** and **Frank H. Jones**, as Trustee, etc. June 9, 1919. For opinion below, see 255 Fed. 941. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(250 U. S. 637)

No. 1003. **GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY**, petitioner, v. **L. H. WOODBURY** and **Vincent Woodbury**. June 9, 1919. For opinion below, see 209 S. W. 432. Petition for a writ of certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas granted.

(250 U. S. 637)

No. 1007. **THE COCA-COLA COMPANY**, petitioner, v. **KOKE COMPANY OF AMERICA et al.** June 9, 1919. For opinion below, see 255 Fed. 894. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit granted.

(250 U. S. 643)

No. 1008. **SANTA MARINA COMPANY**, petitioner, v. **THE CANADIAN BANK OF COMMERCE**. June 9, 1919. For opinion below, see 254 Fed. 391. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

(250 U. S. 643)

No. 1010. **GULF, COLORADO & SANTA FE RAILWAY COMPANY**, petitioner, v. **THE UNITED STATES OF AMERICA**. June 9, 1919. For opinion below, see 255 Fed. 753. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(250 U. S. 643)

No. 1011. **J. W. PRALL**, Administrator, etc., petitioner, v. **GREAT NORTHERN RAILWAY COMPANY**. June 9, 1919. For opinion below, see 177 Pac. 637. Petition for a writ of certiorari to the Supreme Court of the State of Washington denied.

(250 U. S. 643)

No. 1015. **GENERAL FIREPROOFING COMPANY**, petitioner, v. **Breckenridge JONES**, Trustee, etc., et al. June 9, 1919. For opinion below, see 254 Fed. 97, 970. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

(250 U. S. 644)

No. 1016. **Jose de GUZMAN** et al., petitioners, v. **Faustino LICHAUCO**. June 9, 1919. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(250 U. S. 644)

No. 1017. **Lora McCRAY**, petitioner, v. **WEST HELENA CONSOLIDATED COMPANY**. June 9, 1919. For opinion below, see *West Helena Consol. Co. v. McCray*, 256 Fed. 753. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(250 U. S. 644)

No. 1018. **The ASBESTOS & RUBBER WORKS OF AMERICA (Inc.)**, petitioner, v. **The SCANDINAVIAN BELTING COMPANY**. June 9, 1919. For opinion below, see *Scandinavian Belting Co. v. Asbestos & Rubber Works of America*, 257 Fed. 937. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

(250 U. S. 637)

No. 1019. **Robert B. BROWN**, petitioner, v. **The UNITED STATES of America**. June 9, 1919. For opinion below, see 257 Fed. 46. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted.

(250 U. S. 644)

No. 1023. **J. W. SIMPSON**, petitioner, v. **GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS** et al. June 9, 1919. For opinion below, see 98 S. E. 580. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied.

(250 U. S. 645)

No. 1024. **G. A. SMITH**, petitioner, v. **GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS** et al. June 9, 1919. For opinion below, see 98 S. E. 580. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied.

(250 U. S. 645)

No. 1025. **COLORADO TITLE & TRUST COMPANY**, petitioner, v. **J. G. CHILDERS, Jr.** June 9, 1919. For opinion below, see 256 Fed. 307. Petition for a writ of certiorari to

the United States Circuit Court of Appeals for the Fifth Circuit denied.

(250 U. S. 645)

No. 1027. **William E. MIKELL**, petitioner, v. **F. H. HINES**, Major, Field Artillery, U. S. Army. June 9, 1919. For opinion below, see *Hines v. Mikell*, 259 Fed. 28. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied.

(250 U. S. 645)

No. 1028. **Fred BROWNE**, petitioner, v. **Charles B. THORN** et al., partners doing business as *Thorn & Macinnis*. June 9, 1919. For opinion below, see *Browne v. Thorn*, 257 Fed. 519. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(250 U. S. 637)

No. 1029. **PERE MARQUETTE RAILWAY COMPANY**, petitioner, v. **J. F. FRENCH & COMPANY**. June 9, 1919. For opinion below, see 204 Mich. 578, 171 N. W. 491. Petition for a writ of certiorari to the Supreme Court of the State of Michigan granted.

(250 U. S. 645)

No. 1030. **Carlos GSELL**, petitioner, v. **The INSULAR COLLECTOR OF CUSTOMS**. June 9, 1919. Petition for a writ of certiorari to the Supreme Court of the Philippine Islands denied.

(250 U. S. 638)

No. 1031. **J. Hartley MANNERS**, petitioner, v. **Oliver MOROSCO**. June 9, 1919. For opinion below, see 258 Fed. 557. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted.

(250 U. S. 646)

No. 1033. **LOUISIANA AGRICULTURAL CORPORATION**, petitioner, v. **PELICAN OIL REFINING COMPANY (Inc.)**. June 9, 1919. For opinion below, see 256 Fed. 822. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(250 U. S. 638)

No. 1034. **SOUTHERN PACIFIC COMPANY**, petitioner, v. **W. S. BERKSHIRE**, Temporary Administrator, etc. June 9, 1919. For opinion below, see 207 S. W. 323. Petition for a writ of certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of the State of Texas granted.

(250 U. S. 646)

No. 1035. **The MICHIGAN MUTUAL LIFE INSURANCE COMPANY**, petitioner, v. **Ann Hope OLIVER**, as Administratrix, etc. June 9, 1919. For opinion below, see 256 Fed. 212. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(250 U. S. 638)

No. 1036. **STRATHEARN STEAMSHIP COMPANY**, Limited, petitioner, v. **John DILLON**. June 9, 1919. For opinion below, see

256 Fed. 631. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit granted.

No. 1036. STRATHEARN STEAMSHIP COMPANY, Limited, petitioner, v. John DILLON. June 9, 1919. See, also, 256 Fed. 631; 250 U. S. —, 39 Sup. Ct. 494, 63 L. Ed. —. Motion of counsel for the British Embassy for leave to intervene herein as amicus curiae, and for leave to file brief and take part in the oral argument granted.

(250 U. S. 646)

No. 1037. John H. MUDD and Elizabeth G. Mudd, petitioners, v. ALABAMA MINERAL LAND COMPANY. June 9, 1919. For opinion below, see 255 Fed. 991. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

(250 U. S. 646)

No. 1038. T. W. M. BOONE, petitioner, v. The UNITED STATES of America. June 9, 1919. For opinion below, see 257 Fed. 963. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit denied.

(250 U. S. 638)

No. 1047. NATIONAL BRAKE & ELECTRIC COMPANY, petitioner, v. Neils A. CHRISTENSEN et al. June 9, 1919. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit granted. For opinion below, see 258 Fed. 880.

(250 U. S. 647)

No. 1050. The DEER ISLAND LUMBER COMPANY and Van Dorn S. Wilkins, petitioners, v. The SAVANNAH TIMBER COMPANY. June 9, 1919. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit denied. For opinion below, see 258 Fed. 785.

(250 U. S. 639)

No. 1052. BROOKS-SCANLON COMPANY, petitioner, v. RAILROAD COMMISSION OF LOUISIANA. June 9, 1919. For opinion below, see 81 South. 727. Petition for a writ of certiorari to the Supreme Court of the State of Louisiana granted.

(250 U. S. 647)

No. 1053. Charles C. FOSTER, acting superintendent, etc., petitioner, v. Frank Joseph GOLDSOLL. June 9, 1919. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied.

(250 U. S. 647)

No. 1054. MECCANO, Limited, petitioner, v. JOHN WANAMAKER, NEW YORK. June 9, 1919. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied. For opinion below, see 250 Fed. 450, 162 C. C. A. 520.

(250 U. S. 639)

No. 1059. J. M. THOMPSON, Master and Claimant, etc., petitioner, v. Peter LUCAS and Gustav Blixt. June 9, 1919. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit granted. For opinion below, see The Westmeath, 258 Fed. 446.

(250 U. S. 336)

MINERALS SEPARATION, Limited, et al. v. BUTTE & SUPERIOR MINING CO.

(Argued March 19, 1919. Decided June 2, 1919.)

No. 599.

1. PATENTS — 328 — SCOPE OF CLAIMS — ORE CONCENTRATION.

Sulman, Picard & Ballot patent, No. 835,120, for process of ore concentration, as to "fraction of one per cent." claims 1, 2, 3, 4, and 12, extends to and covers the use in the process of oils of the patent, in amounts equal to any fraction of one per cent. on the ore.

2. PATENTS — 312(3) — ORE CONCENTRATION — NATURE OF OILS.

Under evidence in infringement case *held* petroleum and petroleum products are oils within Sulman, Picard & Ballot patent, No. 835,120, for process of ore concentration by use of oils having a preferential affinity for metalliferous matter over gangue.

3. PATENTS — 328 — INFRINGEMENT — ORE CONCENTRATION.

Sulman, Picard & Ballot patent, No. 835,120, claims 1, 2, 3, 4, and 12, for improvement on process of ore concentration by use of a fraction of 1 per cent. on the ore of oils having a preferential affinity for metalliferous matter over gangue, *held*, in view of state of prior art, not infringed by use of a more efficient, in combination with a less efficient, oil of the patent, where the former is used in an amount within the limits of the claims, but the combined amount is in excess of such limit, though the amount of the more efficient oil would probably produce better results from the process than are produced with the combination of oils.

4. PATENTS — 153 — DISCLAIMERS — TIME OF ENTRY.

Entry of disclaimer of claims of patent filed 107 days after decision of Supreme Court holding them invalid *held*, in view of patent owners residing in a foreign country and of the existing war conditions, not unreasonably neglected or delayed.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by the Minerals Separation, Limited, and others against the Butte & Superior Mining Company. Decree for plaintiffs (245 Fed. 577) was reversed by the Circuit Court of Appeals (250 Fed. 241, 162 C. C. A. 377), and plaintiffs bring certiorari. Reversed in part and remanded.

*Messrs. Henry D. Williams, William Houston Kenyon, and Lindley M. Garrison, all of New York City, Frederic D. McKenney, of Washington, D. C., Garret W. McEnerney, of San Francisco, Cal., and Odell W. McConnell, of Helena, Mont., for petitioners.

Messrs. J. Edgar Bull, of New York City, Thomas F. Sheridan, of Chicago, Ill., Frederick P. Fish, of Boston, Mass., Thomas L. Chadbourne, Jr., and Kurnal R. Babbitt, both

of New York City, and J. Bruce Kremer, of Butte, Mont., for respondent.

Mr. Justice CLARKE, delivered the opinion of the Court.

This is a suit by the Minerals Separation, Limited, et al., plaintiffs below and petitioners in this court, against the Butte & Superior Mining Company, defendant below and respondent here, to recover for infringement of United States patent No. 835,120, applied for May 29, 1905, and issued November 6, 1906, the validity of which was sustained by this court in *Minerals Separation, Limited, et al. v. Hyde*, 242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. 286.

The patent has been so frequently described in court proceedings,¹ that it will suffice to say of it here, in the terms of the specification, that it "relates to improvements in the concentration of ores, the object being to separate metalliferous material, graphite and the like, from gangue, by means of oils, fatty acids or other substances which have a preferential affinity for metalliferous matter over gangue."

The patent contains thirteen claims, which, for the purposes of this opinion, may be conveniently grouped, as follows:

(1) Numbers 1, 2, 3, 4, and 12, as "fraction of one per cent. claims," because they call for the use of that amount of oil on the ore; (2) numbers 5, 6, 7, 8 and 13, as "oleic acid claims," because they are limited to the use of oleic acid in a small fraction of 1 per cent. on the ore, 0.02–0.5 per cent.; (3) numbers 9, 10 and 11, as "small quantity of oil claims" — all three of which were held invalid by the former decision of this court. Only the five "fraction of one per cent. claims," are involved in this case.

The respondent denied the validity of the patent and the claim of infringement.

The lower courts followed the decision by this court and sustained the patent except as to the three "small quantity of oil claims."

The new evidence introduced on the validity issue is meager in amount, and of a character so unsatisfying that we see no reason for modifying our former conclusion.

[2] The chief controversy in the case centers about the claim of infringement based

¹ *British Ore Concentration Syndicate, Ltd., v. Minerals Separation, Ltd.*, 25 R. P. C. 741.

Minerals Separation, Ltd., v. British Ore Concentration Syndicate, Ltd., 27 R. P. C. 33.

Ore Concentration Company, Ltd., v. Sulphide Corporation, Ltd., Supreme Court, New South Wales, 31 R. P. C. 216, 217.

Ore Concentration Company, Ltd., v. Sulphide Corporation, 31 R. P. C. 206 (Privy Council British Empire).

Minerals Separation, Ltd., v. Hyde, 207 Fed. 956 (D. C. Montana).

Hyde v. Minerals Separation, Ltd., 214 Fed. 100, 130 C. C. A. 576 (C. C. A. 9th Circuit).

Minerals Separation, Ltd., v. Miami Copper Co., 237 Fed. 609 (D. C. Delaware).

Minerals Separation, Ltd., v. Miami Copper Co., 244 Fed. 752, 775, 157 C. C. A. 200 (C. C. A. 3d Circuit, including dissenting opinion of Judge Bufington).

upon the use of oil by the respondent in excess of 1 per cent. on (of the weight of) the ore, after the decision of the former case by this court.

*340 The evidence shows, and counsel now admit, that prior to the decision by this court in December, 1916, the respondent used, in its ore concentration operations, various oils in quantities less than one-half of 1 per cent. on the ore, but that from January 9, 1917, to the time of trial, with the exception of two or three weeks, *it used oils of a composition which we shall discuss later on, in quantities in excess of 1 per cent. on the ore. In other respects its methods were substantially those of the patent in suit.

On this showing, the District Court found the patent infringed by the respondent, when it used oil in quantities greater than, as well as when it used it in quantities less than, 1 per cent. on the ore.

The Circuit Court of Appeals held the patent infringed only when the respondent used oil in quantities equal to, or less than, one-half of 1 per cent. on the ore, and it therefore reversed both of the holdings of the District Court, but allowed recovery for the period when less than one-half of 1 per cent. of oil on the ore was used.

The Circuit Court of Appeals derived its authority to limit the claims to one-half of 1 per cent. on the ore from the construction which it placed upon the following clause of the opinion of this court in the former case, viz.:

"The patent must be confined to the results obtained by the use of oil within the proportions often described in the testimony and in the claims of the patent as 'critical proportions' 'amounting to a fraction of 1 per cent. on the ore.'"

The reasoning which carried two members of the court to their conclusion was that, as shown by the evidence of the patentees and the argument of their counsel, the amount of oil which is "critical," in the sense of marking the point of transition from the processes of the prior art to the process and discovery of the patent, is one-half of 1 per cent. of oil on the ore, and that therefore this court, by using the expression quoted, intended to limit the claims, not to a "fraction of one per cent.," but to a "fraction of one-half of one per cent. on the ore."

*341 The specification of the patent points out that the proportion of mineral which floats in the form of froth varies with different ores and with different oily substances *used and that simple preliminary tests are necessary to determine which oily substance will yield the best results with each ore. Of this feature of the patent this court said:

"Such variation of treatment must be within the scope of the claims, and the certainty which the law requires in patents is not greater than is reasonable, having regard to their subject-

matter. * * * The process is one for dealing with a large class of substances and the range of treatment within the terms of the claims, while leaving something to the skill of persons applying the invention, is clearly sufficiently definite to guide those skilled in the art to its successful application, as the evidence abundantly shows. This satisfies the law."

Thus was it plainly held proper for the patentees to claim a reasonable degree of variation—"within the terms of the claims"—in the amount of oil to be used in the application of their discovery in practice, and that the restricting of the amount to a fraction of 1 per cent. on the ore was reasonable and lawful.

The two expressions "critical proportions" and "amounting to a fraction of one per cent. on the ore" being used, the former derived from the evidence and the latter from the claims of the patent, obviously, to the extent that they differ—if they differ at all—the language of the claims must rule in determining the rights of the patentees.

[1] While in the former case this court was not called upon, and in its opinion did not attempt, to define the scope of the claims, but was considering the patent only from the point of view of the invention and usefulness of the claimed discovery, nevertheless, the language quoted seems to indicate clearly enough that the opinion of the court then was, as it is declared now to be, that as to the claims here involved the patent extends to and covers the use in the process of oils of the patent, in amounts *equal to any fraction *342 of 1 per cent. on the ore. The oleic acid claims are in terms limited to 0.02–0.5 per cent. on the ore. The Circuit Court of Appeals fell into error in the interpretation which it placed upon our opinion, and its judgment in this respect is reversed.

Since the case must be retried, there remains to be considered the reversal by the Circuit Court of Appeals of the holding by the District Court that the use of oil by the respondent in excess of 1 per cent. on the ore constituted an infringement of the patent.

As we have said, prior to the former decision by this court, the respondent used in its ore concentration process less than one-half of 1 per cent. of oil on the ore, and as to such practice infringement is clear, but from January 9, 1917, to the time of trial, with slight exceptions, it used in excess of 1 per cent. on the ore, and it is necessary to consider only the operations during this latter period. The oil used during this period was a compound, varying in composition from time to time, but we agree with the District Court in selecting as typical a mixture made up of 18 per cent. of pine oil, and the remainder of petroleum products or derivatives—12 per cent. of kerosene oil, and 70 per cent. of fuel oil. Of this compound there was used 30 pounds to the ton of ore, which would be 1.5 per cent. on the ore. As thus stated, without more, it

is obvious that the use of such an amount of oil would not infringe the claims of the patent which limit the oil to be used to a fraction of 1 per cent. on the ore.

But the contention of the petitioners, approved by the District Court, was, and now is, that kerosene and fuel oil were inert and valueless, if not harmful, as used by the respondent in the process, and rendered the recovery less than it would have been if the pine oil only had been used; that they were added solely to carry the content of oil beyond the prescribed fraction of 1 per cent. on the ore, in the hope of technically avoiding infringement; and that essentially in its operations the respondent used the process of the patent with 0.27 of 1 per cent. of pine oil on the ore, and therefore infringed it.

The respondent replied that it was not true that kerosene and fuel oil were inert and useless, and asserted that they were oils of the patent, "having a preferential affinity for metalliferous matter"; that the patentees by the claims of their patent had limited their exclusive right to the use, in the process, of any oil or oily substance having such an affinity, but in an amount not greater than a fraction of 1 per cent. on the ore, and that therefore the process of the respondent, in which more than 1 per cent. of oil on the ore was used, did not infringe the patent.

The entire evidence in the Hyde Case was introduced on the trial of this case, and whether the petroleum products or derivatives used by the respondent were oils within the scope of the patent must be determined from the record now before us.

It is admitted that petroleum products are "oils having a preferential affinity for metalliferous matter."

In each of the four claims of the "Complete Specification" of the British patent, filed by the same persons who were patentees of the patent in suit, on June 3, 1905, "petrol" is given as an equivalent of oleic acid in the process. This appears in the statement, repeated in each claim, that the ore and acidified water shall be mixed or agitated with "a small proportion of an oily substance such as oleic acid or petrol, amounting to a fraction of one per cent. on the ore." "Petrol" is the name used in England for gasoline.

The claims of the patent in suit which we are considering call for the use in the process of an "oily liquid," "an oily substance," and in the twelfth claim simply of an "oil." These expressions are said by Prof. Chandler, *an expert for the petitioners, much relied on in the Hyde Case and in this, to include petroleum products.

Higgins, one of the experimenters who discovered the process in suit, and who is much relied upon by the petitioners as an expert witness in both cases, testified as follows in the Hyde Case:

"Q. Have you since found it possible to use other oils than oleic acid with the result of producing a froth?"

"A. Yes.

"Q. What other oils?"

"A. I have obtained satisfactory results by the use of petrol and certain proportions of distillate of crude petroleum, such as Cosmos oil,"

—and he said "Cosmos oil" is "a petroleum distillate."

Chapman, an engineer and a witness for the petitioners in the Hyde Case, testified that he had obtained good recoveries in the laboratory and in commercial practice, from the ore of the Braden mine, in Chile, using three pounds of Texas fuel oil to one pound of American wood tar oil per ton of ore. Texas fuel oil is petroleum.

Greninger, an engineer employed by one of the petitioners in installing its flotation plants, testified in this case that in a mine in British Columbia he used a mixture of oil, 75 per cent. of which was derived from petroleum.

There is much more of the same character from witnesses for the petitioners, and the evidence of the respondent is strongly to the effect that petroleum products are useful and efficient and have been widely used in the process in laboratory and commercial practice.

Without quoting more from the record before us, we must conclude that when the patent in suit was obtained, and even until the testimony in the Hyde Case was closed in 1912, petroleum products were recognized by the petitioners, and that they are still used, as oils, efficient and useful in the process of the patent in suit. Much of this evidence is especially impressive because the papers from *which it is derived were written, and the witnesses testified before the question as to petroleum, now made in this case, was raised or discussed.

[3] While we thus conclude that petroleum and petroleum products are oils useful in this process of the patent, it is also clear that they are not as highly efficient as pine oil and several other oils and combinations of oils, which, in the nomenclature of the record are called "frothing oils," and also that better results would probably have been obtained by the use of less than 1 per cent. on the ore, of pine oil alone, than were obtained by the respondent with that oil in combination with the larger amounts of petroleum products. And this presents the further question necessary to a decision of the case, viz.:

Does the use of a more efficient, in combination with a less efficient, oil of the patent constitute infringement, where the former is used in an amount within the limits of the claims but the combined amount is in excess of such limit, and when the amount of the more efficient oil used would probably produce better results from the process than are produced with the combination of oils?

To answer this question requires a consideration of the state of the prior art as it was when the discovery of the patent was made, and of the scope of the claims which we are considering.

It is always difficult to recover the realities of a situation long past, such as we have here, but it is especially difficult when the importance of the discovery has led, as in this case, to extensive improvements in mechanical appliances for utilizing the invention and to large additions to the knowledge of the adaptability to the process of various oils, singly and in combination.

We held in the former case that the patentees came late into the field of ore concentration investigation, and that their discovery rests upon a prior art so fully developed that it was "clear from the record that approach was *being made slowly, but more and more nearly, to the result which was reached by the patentees of the process in suit in March, 1905," and that their final step was not a long one.

Such a patent, in such a field of investigation, must be construed strictly, but candidly and fairly, to give to the patentees the full benefit, but not more, of the disclosure of their discovery which is to become a part of the public stock of knowledge upon the expiration of the patent period, and which was the consideration for the grant to them of a patent monopoly.

With the state of the prior art in mind, we come to consider the nature and extent of the disclosures of the patent in suit, but only with respect to the kinds and quantities of oil which may be used in the process.

The specification recites that the invention of the patent relates to an "improvement" upon prior processes employed in ore concentration "by means of oils, fatty acids, or other substances which have a preferential affinity for metalliferous matter over gangue."

Next come the specific disclosures required by the patent law (R. S. § 4888 [Comp. St. § 9432]), which are intended to describe the advance which the patentees claimed to have made from the prior art Cattermole agglomeration of metalliferous matter into granules, which separate from the gangue, and sink to the bottom of the pulp under treatment, to the discovery of the patent in suit, with its metal bearing froth, rising to the surface of the pulp. Here is the essence of the discovery, and it is announced in these terms:

"We have found that if the proportion of oily substance be considerably reduced, say to a fraction of one per cent. on the ore, granulation ceases to take place, and after vigorous agitation there is a tendency for a part of the oil-coated metalliferous matter to rise to the surface of the pulp in the form of a froth or scum."

* This is followed by the description of three "factors" on which "this tendency is depend-

ent," viz., slight acidification, heat, and fine pulverization of the ore, and then the disclosure concludes with the statement that the proportion of mineral which floats in the form of froth varies with different ores and with different oily substances, and that a simple preliminary test is necessary to determine which oily substance yields the proportion of froth or scum desired.

The only additional statement contained in the specification, which is in the nature of a disclosure, is found in the description of the example of the application of the invention, in which it is stated that the "froth or scum" derives its power of flotation mainly from the inclusion of air bubbles introduced into the mass by agitation, such bubbles or air films adhering only to the mineral particles which are coated with oleic acid.

There remain the claims of the patent, in which the act of Congress requires that the patentee shall "particularly point out and distinctly claim the * * * improvement * * * which he claims as his invention or discovery." And of these this court has said in *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278 (24 L. Ed. 344):

"But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office. * * * As patents are procured ex parte, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public."

And in *White v. Dunbar*, 119 U. S. 47, 52, 7 Sup. Ct. 72, 74 (30 L. Ed. 303):

"The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms."

* And see *Motion Picture Patents Co. v. Universal Film Co.*, 243 U. S. 502, 510, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959.

Since we are concerned only with the five "fraction of one per cent. claims," and since the question we are discussing relates only to the use of petroleum products, we need consider them only with respect to the amount and character of the oil prescribed, and, as they are substantially identical, we quote the first as typical:

"The herein described process of concentrating ores which consists in mixing powdered ore with water, adding a small proportion of oily liquid having a preferential affinity for metalliferous matter (amounting to a fraction of one per cent. on the ore), agitating the mixture until the oil-coated mineral matter forms into a froth, and separating the froth from the remainder by flotation."

The first three claims declare that, so far as oil is concerned, the discovery resides or consists in "adding a small proportion of an oily liquid having a preferential affinity for metalliferous matter, amounting to a fraction of one per cent. on the ore"; the fourth claim differs only in substituting the word "substance" for "liquid" in the first three; and the twelfth claim provides for carrying out the process with "oil in water containing a fraction of one per cent. of oil on the ore."

From this consideration of the terms of the patent as written, it is apparent that it makes no differentiation whatever, either in the claims or in the specification, among the oils having a preferential affinity for metalliferous matter, and that its disclosure, to which the petitioners must be limited, is that, when a fraction of 1 per cent. on the ore of any such oil is used in the manner prescribed, there will be produced a metal-bearing froth, the result of the process. No notice is given to the public, and it is nowhere "particularly pointed out" in the claims, that some oils or combination of oils, having a preferential affinity for metalliferous matter, are more *useful than others in the process, or that some may be used successfully and some not, or that some are "frothing oils," a designation not appearing in the patent, and that some are not. The patentees discovered the described process for producing the result or effect, the metal-bearing froth, but they did not invent that result or froth—their patent is on the process, it is not and cannot be on the result—and the scope of their right is limited to the means they have devised and described as constituting the process. *Corning v. Burden*, 15 How. 252, 268, 14 L. Ed. 683; *Le Roy v. Tatham*, 14 How. 156, 175, 14 L. Ed. 367; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103; *Robinson on Patents*, § 149.

The patent in suit was applied for in this country on May 29, 1905, within a few weeks after the discovery which it embodies was made, and whether, from haste or lack of investigation, from the necessity of meeting the exigencies imposed by the prior art or from a desire to make the claims as comprehensive as possible, this discussion of its terms makes it clear that the only disclosure as to the kind and amount of oil which the patentees made to the public as necessary to the practicing of their process is that it must be an oil or oily substance, or oily liquid having a "preferential affinity for metalliferous matter," and that it shall be limited in amount "to a fraction of one per cent. on the ore."

It is argued that the provision of the claims that the mixture prescribed, of oil, water and ore, shall be agitated until the oil-coated mineral matter forms into a froth serves to differentiate the "frothing oils" from others having the required preferential affinity for metalliferous matter, but which, when agitated in the mixtures, may not pro-

duce the characteristic froth, if any such there are, and that a proper construction of the patent limits it to such "frothing oils," and renders the use of them in a fraction of 1 per cent. on the ore an infringement when used with "non-frothing oils" having the required affinity in *amounts sufficient to make the combination exceed the quantity limit of the patent.

To give such a construction to the patent would subordinate the clear description contained in it of what are oils of the process, to an implied and vague description and classification which would leave the whole subject again at large, to become a field for further experimentation, without definition in the patent of what oils or froths would satisfy it. So interpreted, the patent could not reasonably be said to contain a disclosure of the discovered process in the "full, clear, concise and exact terms" required by law (R. S. § 4888 [Comp. St. § 9432]), and the claims might conceivably be said to fall short of "particularly pointing out and distinctly claiming" any discovery at all within the meaning of the act of Congress.

Thus when to our former conclusion that the respondent used an efficient oil of the patent we add the further conclusion, derived from a study of its terms, that the patentees failed to differentiate among the oils described in the patent, we must conclude that it is impossible for the courts to distinguish among them, as more or less efficient in the process, without amending the claims of the patent, and this they are powerless to do.

We are confirmed in the conclusion thus arrived at by the evidence which the patentees in the *Hyde Case*, petitioners in this, introduced to show that their discovered process could not be made operative when more than a fraction of 1 per cent. of oil on the ore was used, and that the use of a greater amount would not produce the typical froth which results from it—this without differentiation among the oils described in the patent, save as to their varying adaptability to different ores.

Thus, Ballantyne, a metallurgist and the patent agent who prepared the patent specifications for the petitioners, when called by them as an expert witness, testifies to intimate relations with the patentees and with their in*vestigations before and since the patented discovery was made, and says:

"I have never seen the agitation-froth process successfully carried out by the use of an amount of oil equal to practically 1 per cent. by weight on the ore, and in my opinion 0.9999 per cent. of oil would not be a proper quantity (that is to say, a suitable and economical quantity), as contemplated by the patent, and would not, therefore, be a suitable fraction of 1 per cent., as contemplated by the patent."

Liebmann, an expert much relied upon by the petitioners, testified:

"Q. I understand from your answer * * * that you have never in your operations * * * obtained any floating mineral-bearing froth when using an amount of oil, or other selective agents, amounting to more than 1 per cent. of the weight on the ore. In order that there may be no misunderstanding, will you state whether I have understood you rightly?"

"A. That is my recollection."

John Ballot, one of the patentees, testified that he had never seen a froth of the character produced by the patent in suit using a pulp containing more than 1 per cent. of oil.

There is much more of similar import in the record. This, however, will suffice, adding only the record of a remarkable incident which occurred in this court during the argument of the Hyde Case by Mr. Kenyon for the petitioners:

"Mr. Justice McReynolds: I would like to ask you when in this process of reducing oil your invention came into existence?"

"Mr. Kenyon: At about one-half of 1 per cent. of oil."

"Mr. Justice McReynolds: Before you got to the one-half of 1 per cent. did you have any invention?"

* "Mr. Kenyon: We were passing from the region of Cattermole, which was a distinct—

"Mr. Justice McReynolds: I want to know when your invention came into existence."

"Mr. Kenyon: This invention was not reached, I should say, from those figures until about 0.5, that is one-half of 1 per cent. of oil was reached."

"Mr. Justice McReynolds: At 1 per cent. you had no invention?"

"Mr. Kenyon: No."

"Mr. Justice McReynolds: At one-half of 1 per cent. you did have invention?"

"Mr. Kenyon: It began to come. Remote, but it began to come. At 0.3 of 1 per cent. the float vastly increased. At 0.1 of 1 per cent. the float again vastly increased."

"Mr. Justice McReynolds: When this float has more than one-half of 1 per cent. of oil it does not infringe?"

"Mr. Kenyon: It does not infringe."

"Mr. Justice Pitney: What have you to say in answer to what Mr. Scott said the other day to the effect that 1.8 per cent., or perhaps more, of oil, would give the same result with increased agitation?"

"Mr. Williams: Absolutely no."

"Mr. Kenyon: It would not."

While parties should not be held rigidly to statements made by their counsel in the stress of argument, even when replying to questions from members of the court, nevertheless these statements from leading counsel in charge of the Hyde Case and of this case are impressive and significant.

This and much more of like character in the record brings us unhesitatingly to the conclusion that the scope we have given to the patent, based upon an interpretation of the language of the claims, is justified also by the evidence in the case, and that it is, in fact, that which the petitioners and their

counsel, until very recently, placed *upon it in full confidence, that the essence of the discovery lay to such an extent in the use of a small amount of oil, such as is described in the patent, that the result could not be obtained with more than a fraction of 1 per cent. on the ore.

It must be added that the evidence is far from satisfying that the results of the respondent's process was, in fact, that peculiarly superior quality of metal-bearing froth characteristic of the patented process when worked with a fraction of 1 per cent. on the ore. The evidence, otherwise doubtful on the point, is rendered especially so by the testimony introduced by the petitioners, and not contradicted, that a computation on the basis of the tonnage of ore treated by the respondent shows that if the process as practiced by it after January 9, 1917, had been used through the year it would have involved a loss of over a million dollars in increased cost of oil and in diminished recoveries, as compared with what the results of operation would have been for the same time using the process of the patent as practiced by the petitioners. It is difficult to see how a process so wasteful and inefficient as that of the respondent is thus proved to be can be other than substantially different from that of the petitioners.

It is vaguely suggested in the testimony for the petitioners that there was some peculiarity in the composition of the ore of the respondent, or in the treatment of it, which resulted in the presence of "clayey gangue slimes" which absorbed an unusual quantity of oil, and that this contributed to render it possible to produce the results of the patented process when more than the prescribed fraction of 1 per cent. of oil on the ore was used.

It is hard to see how this, if true, would be of value to the petitioners, but the evidence is quite too indefinite in character and meager in extent to be accepted as the basis for the judicial determination of such a claim.

[4] The respondent contends that the disclaimer filed by *the petitioners with respect to the three claims held invalid by the decision of this court in the former case was so delayed and is so evasive in form that it is invalid, and that, for this reason, the petitioners should not be permitted to further prosecute this suit, under the provisions of R. S. §§ 4917, 4922 (Comp. St. §§ 9462, 9468).

The decision holding the three claims invalid was rendered on December 11, 1916, and the disclaimer was recorded on the 28th day of March, 1917. Having regard to the fact that the owners of the patent in suit resided in a foreign country, and to the wartime conditions of communication then prevailing, the entry required by law was not "unreasonably neglected or delayed." While the wording of the disclaimer borders on finesse, we do not think it can be interpreted as giving any

rights under the patent greater than may be legitimately obtained under the claims held valid, and we therefore deem it sufficient to meet the requirements of the statutes cited.

It results that the decree of the Circuit Court of Appeals that the respondent infringed the patent only when using one-half of 1 per cent. or less of oil on the ore must be reversed, but that its implied holding that the use made by respondent of petroleum products and pine oil in excess of 1 per cent. on the ore did not constitute infringement must be sustained. The cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed in part.

(250 U. S. 135)

NORTHERN PAC. RY. CO. et al. v. STATE
OF NORTH DAKOTA ex rel.
LANGER, Atty. Gen.

(Argued May 5, 1919. Decided June 2, 1919.)

No. 976.

1. RAILROADS $\Leftarrow$ 5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—RATE-MAKING POWER.

Under Act Cong. Aug. 29, 1916 (Comp. St. § 1974a), giving the President power in time of war to take possession and control of transportation systems, presidential proclamation of December 26, 1917 (Comp. St. 1918, § 1974a), whereby the President took such possession and control, together with Act March 21, 1918, providing for the operation of transportation systems under federal control, the complete possession and control of the railroads taken by the United States impliedly included the power to fix rates, regardless of the power given by Act March 21, 1918, § 10 (Comp. St. 1918, § 3115¾j).

2. RAILROADS $\Leftarrow$ 5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL—RATE-MAKING POWER.

As the federal control and operation of railroads worked a fundamental change, Act March 21, 1918, § 10 (Comp. St. 1918, § 3115¾j), authorizing the President to prescribe rates, etc., cannot be construed as applicable only to interstate rates, for such construction would tend to prevent the change from becoming effective.

3. RAILROADS $\Leftarrow$ 5½, New, vol. 6A Key-No. Series—CONGRESS—WAR POWER.

The war power of the United States is not disputable, and therefore where Congress, under its war power, by Act Aug. 29, 1916 (Comp. St. § 1974a), authorized the President to take possession of transportation systems and the President took control of the railroads, and was by subsequent Act March 21, 1918, § 10 (Comp. St. 1918, § 3115¾j), authorized to fix rates, such rate-making power cannot be construed as limited to interstate rates, for that would be a limitation on the war powers of the United States.

4. STATES $\Leftarrow$ 4—CONFLICT BETWEEN STATE AND FEDERAL GOVERNMENT.

Under the Constitution, the authority of the United States is paramount, when exerted as to subjects concerning which it has power to control; and this is so in cases where both the state and federal government have authority to regulate.

5. RAILROADS $\Leftarrow$ 5½, New, vol. 6A Key-No. Series—FEDERAL OPERATION—CARRIERS.

Under Act March 21, 1918, § 10 (Comp. St. 1918, § 3115¾j), authorizing the President to fix rates for railroads under federal control, but providing for review by the Interstate Commerce Commission, etc., and section 15 (section 3115¾o), declaring that nothing in the act shall be construed to impair lawful police regulations of the state, the President has power to prescribe intrastate rates for railroads under federal control, though such rates conflict with rates previously fixed by state authority.

6. UNITED STATES $\Leftarrow$ 125—SUIT AGAINST UNITED STATES—RAILROADS—FEDERAL CONTROL—SUIT AGAINST DIRECTOR GENERAL.

As the claim that the power of the President, acting through the Director General, to fix rates for railroads under federal control, given by Act March 21, 1918, § 10 (Comp. St. 1918, § 3115¾j), was limited to interstate rates, was not wholly frivolous, the courts had jurisdiction of a proceeding to compel the Director General by mandamus to desist from charging intrastate rates so fixed, and to exact only the rates fixed by the state; such proceeding not being a suit against the United States, in view of the question as to the Director General's authority.

In Error to the Supreme Court of the State of North Dakota.

Original application by the State of North Dakota, on the relation of William Langer, Attorney General, for writ of mandamus against the Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads. A peremptory writ was awarded (172 N. W. 324), and defendants bring error. Reversed and remanded.

Messrs. John Barton Payne, of Chicago, Ill., and Charles Donnelly, of St. Paul, Minn., for plaintiffs in error.

Messrs. Frank E. Packard, of Bismarck, N. D., and W. V. Tanner, of Olympia, Wash., for defendant in error.

*Mr. Chief Justice WHITE delivered the opinion of the court. *141

In taking over the railroads from private ownership to its control and operation, was the resulting power of the United States to fix the rates to be charged for the transportation services to be by it rendered subordinated to the asserted authority of the several states to regulate the *rates for all local or intrastate business, is the issue raised on this record. It arises from the allowance by the court below, of a peremptory writ of mandamus com- *142

manding the Director General of the railroads, appointed by the President, and the officers of the Northern Pacific Railway Company to desist from charging for transportation in intrastate business in North Dakota the rates fixed by the United States for such services. When this command was obeyed, the mandamus ordered that the Director General should thereafter exact for the services stated only lesser rates which were fixed in a schedule on file with the State Utilities Commission prior to the bringing of suit and which rates under the law of North Dakota could not be changed without the approval of the Utilities Commission. In the opinion of the court below it was stated that all the parties admitted that there was no question as to the jurisdiction to consider the controversy and that they all also agreed that no contention was presented as to the power of Congress to enact the law upon which the controversy depended, as the correct interpretation of such law was the only issue to be decided. We consequently put those subjects temporarily out of view. We say temporarily, since even upon the assumption that issues concerning them necessarily inhere in the cause and cannot be waived by the parties, we could not decide concerning such issues without interpreting the statute, which we proceed to do.

On the 29th of August, 1916 (39 Stat. 645, c. 418 [Comp. St. § 1974a]), Congress gave the President power, "in time of war, * * * to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." War with Germany was declared in April, 1917, and with Austria on December 7th of the same year. *40 Stat. 1, c. 1; 40 Stat. 429, c. 1. On December 26, 1917, the President, referring to the existing state of war and the power with which he had been invested by Congress in August, 1916, proclaimed that—

"Under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, [I] do hereby * * * take possession and assume control at 12 o'clock noon on the 28th of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, and warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly

used upon or operated as a part of such rail or combined rail and water systems of transportation, to the end that said systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion so far as may be necessary of all other traffic thereon, and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers." Comp. St. 1918, § 1974a.

By the proclamation a Director General of Railroads was appointed with full authority to take possession and control of the systems embraced by the proclamation and to operate and administer the same. To this end the Director General was given authority to avail himself of the services of the existing railroad officials, boards of *directors, receivers, employes, etc., who were authorized to continue to perform their duties in accordance with their previous authority "until and except so far as such Director shall from time to time by general or special orders otherwise provide." Limited by the same qualification the systems of transportation taken over by the government were made subject to existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof might be located. In addition, however, to the limitation previously stated the proclamation in express terms declared:

"But any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such."

The proclamation imposed the duty upon the Director General to negotiate with the owners of the railroad companies for an agreement as to compensation for the possession, use and control of their respective properties on the basis of an annual guaranteed compensation and with reservations in the interest of creditors, bondholders, etc. The proclamation in concluding declared that—

"From and after twelve o'clock on said twenty-eighth day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said Director without further act or notice."

Carrying out the authority exerted by the proclamation, the railroads passed into the possession, control and operation of the Director General.

On March 21, 1918 (Act March 21, 1918, c. 25, 40 Stat. 451 [Comp. St. 1918, § 3115½a]), dealing with the subject Congress passed a law entitled:

"An act to provide for the operation of transportation systems while under federal control, for the just compensation of their owners, and for other purposes."

The opening sentences of the act declared:

"The President, having in time of war taken over the possession, use, control, and operation (called herein federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June 30, 1917."

Without going into detail it suffices to say that the first eight sections of the act comprehensively provided for giving effect to the purposes just stated and in a general way contemplated affording what was deemed to be just compensation to the owners for the use of their property. In addition it empowered agreements in the interest of security holders of the railroads and sanctioned provisions deemed fair to the United States and to the owners of the property for betterments which might be required to be made during the term of control and for the return of the property when the government possession came to an end, which return was to be accomplished within a stated period after the cessation of war by the proclamation of the ratification of a peace treaty.

Beyond doubt also, for the purpose of enabling the United States to perform the obligations which it assumed and to secure it from ultimate loss from the pecuniary responsibilities which might result, including the repayment to it of an appropriation of \$500,000,000 which the act made applicable, all the earnings of the railroads were by the act expressly made the property of the United States.

The remaining eight sections of the act need not be stated; but as section 10 (Comp. St. 1918, § 3115½j), which expressly provides for the power to fix rates, and section 15 (Comp. St. 1918, § 3115¼o), making certain reservations concerning the powers granted, were greatly relied upon in the opinion below and in the argument at bar, we reproduce in the margin the more relevant portions of section 10 and the text of section 15.¹

¹"Section 10. * * * That during the period of federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter

*On May 25, 1918, the Director General made an order establishing a schedule of rates for all roads under his control and covering all classes of service, intrastate as well as interstate. The order made these rates effective on designated dates in the month of June and they were continuously enforced during a period of about eight months up to the 14th of February, 1919, when the bill in this case was filed by the State Utilities Commission for mandamus against the Director General and the officers of the Northern Pacific Railway, asserting the want of power in the United States over intrastate rates and the exclusive right of the state of North Dakota to fix such rates for all intrastate business done in that state. The Director General, admitting that he had made the order complained of and had collected the rates earned thereunder and paid them into the treasury of the United States, sustained his action and denied the alleged right of the state upon the legislation and official acts which we have stated. The Northern Pacific denied interest on the ground that its railway had passed under federal control and that it was receiving the compensation therefor which had been agreed on between itself and the United States. It alleged that the rates under the order complained of had been collected by the Director General through agents appointed by him who were not officials of the company and therefore it had no

upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation or practice of any carrier under federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition.

"After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said act: Provided, however, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make."

"Sec. 15. That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

responsibility concerning them. The prayer was that it be dismissed from the suit.

Taking the case under the complaint, the returns and the exhibits, the court, as we have previously stated, two of its members dissenting, denied the authority of the United States and upheld that of the state, and the mandamus was made peremptory as to both the Director *General and the officers of the Northern Pacific Railway. We are thus brought to the question whether the state authority controls the power of the United States as to intrastate rates.

[1] No elaboration could make clearer than do the act of Congress of 1916, the proclamation of the President exerting the powers given, and the act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing. This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them which was plainly essential to the authority given was not included in it.

[2-5] Conclusive as are these inferences, they are superfluous, since the portion of section 10 as previously reproduced in the margin in express terms confers the complete and undivided power to fix rates. The provision is this:

"That during the period of federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination."

These quoted words are immediately followed by provisions further defining the power of the commission and its duty in the premises, so as to enable it beyond doubt to consider the situation resulting from the act

and to which the rates were to be applied. The union between that which is inferable and that which is expressed demonstrates the true significance of the statute.

A brief consideration of the contentions relied upon to the contrary will at once show either their inappositeness, the mistaken premises upon which they rest, or the errors of deduction upon which they proceed. It is argued that as state control over intrastate rates was the rule prior to the enactment of the statute creating the United States control, the statute must be interpreted in the light of a presumption that a change as to state control was not made. But in view of the unambiguous provision of the statute as to the new character of control which it created, the principle of interpretation applied in its ultimate aspect virtually was: That because the statute made a fundamental change, it must be so interpreted as to prevent that change from becoming effective.

Besides, the presumption in question but denied the power exerted in the adoption of the statute, and displaced by an imaginary the dominant presumption which arose by operation of the Constitution as an inevitable effect of the adoption of the statute, as shown by the following:

(a) The complete and undivided character of the war power of the United States is not disputable. Selective Draft Law Cases, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856; Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Legal Tender Cases, 12 Wall. 457, 20 L. Ed. 287; Stewart v. Kahn, 11 Wall. 493, 20 L. Ed. 176. On the face of the statutes it is manifest that *they were in terms based upon the war power, since the authority they gave arose only because of the existence of war, and the right to exert such authority was to cease upon the war's termination. To interpret, therefore, the exercise of the power by a presumption of the continuance of a state power limiting and controlling the national authority was but to deny its existence. It was akin to the contention that the supreme right to raise armies and use them in case of war did not extend to directing where and when they should be used. Cox v. Wood, 247 U. S. 3, 38 Sup. Ct. 421, 62 L. Ed. 947.

(b) The elementary principle that under the Constitution the authority of the government of the United States is paramount when exerted as to subjects concerning which it has the power to control, is indisputable. This being true, it results that although authority to regulate within a given sphere may exist in both the United States and in the states, when the former calls into play constitutional authority within such general sphere the necessary effect of doing so is, that to the extent that any conflict arises the state power is limited, since in case of

conflict that which is paramount necessarily controls that which is subordinate.

Again, as the power which was exerted was supreme, to interpret it upon the basis that its exercise must be presumed to be limited was to deny the power itself. Thus, once more it comes to pass that the application of the assumed presumption was in effect but a form of expression by which the power which Congress had exerted was denied. In fact, error arising from indulging in such erroneous presumption permeates every contention. To illustrate: Because in *Reagan v. Mercantile Trust Co.*, 154 U. S. 418, 14 Sup. Ct. 1062, 38 L. Ed. 1030, and other cases unnecessary to be referred to, it was held that it would be presumed that Congress in creating a corporation intended that it should be subject to applicable state laws and regulations so far as Congress did not otherwise provide, therefore, because Congress had *taken over to the government of the United States property to be used by it in the performance of a governmental function, Congress must be presumed to have intended that such property (and such functions) should continue to be subject to and controlled by state power.

The confusion produced is again aptly illustrated by the rule of interpretation by which it is insisted that the express power to fix rates conferred by the statute was rightly disregarded. Thus, while admitting that the power which was conferred to initiate rates, when considered in and of itself included all rates, it is nevertheless said that such power must be presumed to be limited to the only character of rates which under the prior law the Interstate Commerce Commission had the power to consider, that is, interstate rates, because the new rates when initiated were to be acted upon by that body. As, however, the statute in terms gives power to the Interstate Commerce Commission to consider the new rates in the light of the new and unified control which it creates, the error in the contention becomes manifest, even putting out of view the fact that by the effect of the duty imposed and the new control created the new rates applying to the new conditions were within the purview of the power which the Interstate Commerce Commission previously possessed. Certainly, to mistakenly disregard one provision of the statute intended to give effect to another and upon that basis to decide that the statute is not enforceable, cannot be said to be a correct interpretation. And this view is also true as

to the application which was made of the asserted presumption to the excepting clauses of section 15 previously reproduced in the margin, since that section in the light of the purpose to retain the prior law is interpreted so as to cause it to be but an additional means of destroying the all-embracing power to initiate rates fixed by section 10.

[6] It follows that the judgment below was erroneous. The *relief afforded against the officer of the United States proceeded upon the basis that he was exerting a power not conferred by the statute, to the detriment of the rights and duties of the state authority, and was subject therefore to be restrained by state power within the limits of the statute. Upon the premise upon which it rests, that is, the unlawful acts of the officers, the proposition is undoubted, but in view of our conclusion that the acts of the officers complained of were authorized by the law of the United States, the question arises how far, that being established, it results that the suit was one against the United States over which there was no jurisdiction within the rulings in *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; *Postal Supply Co. v. Bruce*, 194 U. S. 601, 24 Sup. Ct. 820, 48 L. Ed. 1134; *Louisiana v. McAdoo*, 234 U. S. 627, 34 Sup. Ct. 938, 58 L. Ed. 1506; *Minnesota v. Hitchcock*, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954; *Wells v. Roper*, 246 U. S. 335, 38 Sup. Ct. 317, 62 L. Ed. 755.

The principle of these cases however can only be applicable by giving effect to the conclusion we have reached as to the legality of the acts of the officers which were complained of, and to decide which question the United States was not a necessary party. This is undoubtedly true unless it can be said that the contentions concerning the want of power in the officers were so unsubstantial and frivolous as to afford no basis for jurisdiction and hence caused the suit to be from the beginning directly against the United States. As however we are of the opinion that there is no ground for that view, it follows that the case as made gave jurisdiction to dispose of the question of wrong committed by the officials and that a decree giving effect to our conclusion on that subject will dispose of the entire case.

Our decree therefore must be and it is

Reversed and remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BRANDEIS concurs in the result.

(250 U. S. 163)

DAKOTA CENT. TELEPHONE CO. et al. v.
STATE OF SOUTH DAKOTA ex rel.
PAYNE, Atty. Gen., et al.

(Argued May 5 and 6, 1919. Decided June 2,
1919.)

No. 967.

1. TELEGRAPHS AND TELEPHONES ⚡26½,
New, vol. 7A Key-No. Series—FEDERAL CON-
TROL—POWERS OF CONGRESS.

Under its war power, Congress possessed the right to confer upon the President, as it did by joint resolution of July 16, 1918 (Comp. St. 1918, § 3115¼x, appendix), authority to take possession and control of telegraph, telephone, marine cable, or radio systems, and to operate the same as may be desirable for duration of the war.

2. CONSTITUTIONAL LAW ⚡74 — COURTS —
POWERS—GOVERNMENT CONTROL OF TELE-
GRAPHS.

Where Congress, in the exercise of its war power, by resolution of July 16, 1918 (Comp. St. 1918, § 3115¼x, appendix), authorized the President to take control and management of telegraph and telephone systems and to operate the same as may be desirable for the duration of the war, the question whether the conditions warranted the President in taking control of telegraph and telephone systems at the time he did is not a judicial one, being a matter for the executive and legislative branches.

3. TELEGRAPHS AND TELEPHONES ⚡26½,
New, vol. 7A Key-No. Series — CONTROL BY
PRESIDENT—AUTHORITY CONFERRED.

In view of Act Oct. 30, 1918, the joint resolution of July 16, 1918 (Comp. St. 1918, § 3115¼x, appendix), authorizing the President to take possession and control of telegraphs, telephones, and cable and radio systems, and to operate the same during war, authorized him, as he did in case of telegraphs and telephones, to take complete possession and control of such systems, and to operate the same as might be desirable for duration of the war.

4. TELEGRAPHS AND TELEPHONES ⚡26½,
New, vol. 7A Key-No. Series—FEDERAL CON-
TROL—REGULATION OF INTRASTATE RATES—
"POLICE POWER."

The joint resolution of July 16, 1918 (Comp. St. 1918, § 3115¼x, appendix), providing that the President during the then existing war should be empowered to take possession and assume control of telegraph, telephone, cable, and radio systems and to operate the same as might be needful for the duration of the war, providing that just compensation should be made, and that nothing should be construed to amend, repeal, impair, or affect the lawful police regulations of the several states, except wherein such laws might affect the transmission of government communications, or the issue of stocks and bonds, did not reserve to the states the right under the guise of police power to regulate intrastate rates of telegraph and telephone companies after the President had taken possession and was operating the same, for the words "police power" are capable of two sig-

nifications, a comprehensive one embracing in substance the whole field of state authority, and a narrower one including only state power to deal with health, safety, and morals, and the context showed that the latter was the one intended by Congress.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Police Power.]

5. TELEGRAPHS AND TELEPHONES ⚡26½,
New, vol. 7A Key-No. Series—FEDERAL CON-
TROL—RATES—STATE REGULATION OF INTRA-
STATE LINES.

Where Congress, in the valid exercise of its war power, authorized the President by a joint resolution of July 16, 1918 (Comp. St. 1918, § 3115¼x, appendix), to assume control of telegraph and telephone companies, and the President assumed such control, and they were operated as a governmental agency, *held*, that the states cannot regulate intrastate rates, for there would be nothing upon which the state power could be exerted, except upon the power of the United States; that is, its authority to fix rates for the service it was rendering through a governmental agency.

Mr. Justice Brandeis dissenting.

In Error to the Supreme Court of the State of South Dakota.

Original action by the State, on the relation of Byron S. Payne, as Attorney General, and others against the Dakota Central Telephone Company and others. Defendants were enjoined from putting into effect a schedule of intrastate rates prepared by the Postmaster General, who under presidential proclamation had assumed control of telephone companies (171 N. W. 277), and they bring error. Reversed, with directions.

Mr. Solicitor General King, for plaintiffs in error.

Mr. Oliver E. Sweet, of Rapid City, S. D., for defendants in error.

* Mr. Chief Justice WHITE delivered the opinion of the Court.

Involving as this case does the existence of state power to regulate, without the consent of the United States, telephone rates for business done wholly within the state over lines taken over into the possession of the United States and which by the exercise of its governmental authority it operates and controls, it does not in principle differ from the North Dakota case (*Northern Pac. Ry. Co. v. State of North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. —), just announced, where it was decided that under like conditions the state had no such power as to railroad rates. We consider this case as far as may be necessary, by a separate opinion, however, because the authority under which the control was exerted is distinct and because of the assumption in argu-

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ment that this distinction begets a difference in the principles applicable.

In January, 1919, the state of South Dakota on the relation of its Attorney General and Railroad Commissioners sued the Dakota Central and other telephone companies doing business within the state to enjoin them from putting in effect a schedule of rates as to local business which it was alleged had been prepared by the Postmaster General and which it was averred the telephone companies were about to apply and enforce. It was charged that such rates were higher than those fixed by state authority and that the proposed action of the companies would be violative of state law, since the companies were under the *duty to disregard the action of the Postmaster General and apply only the lawful state rates. The duty of the relators, as state officers, to prevent such wrong was alleged—a duty in which, it was further asserted, the state had a pecuniary interest springing from the expenditure which it was obliged to make for telephone services.

The companies answered, disclaiming all interest in the controversy on the ground that by contract, a copy of which with one of the defendant companies was annexed, their telephone lines and everything appurtenant thereto had passed into the possession and control of the United States and were being operated by it as a governmental agency. The answer also alleged that any connection of the companies through their officials or employés with the business was solely because of employment by the United States. The purpose to enforce the rates fixed by the Postmaster General was admitted and it was averred that the suit was one over which the court had no jurisdiction because it was against the United States.

The case was heard on the bill, answer, exhibits, and an admission by all the parties that the contract annexed to the answer was accurate and that a similar one had been made with all the other defendants.

Assuming that Congress had power to take over the telephone lines, that it had conferred that power upon the President, that the power had by the President been called into play conformably to the authority granted, and that the telephone lines were under the complete control of the United States, the court yet held that the state had the power to fix the local rates. In reaching this conclusion the court, assuming argumentatively that the right which the United States possessed gave at least the implied authority to fix all rates, nevertheless held that such power did not embrace intrastate rates because they had been carved out of the grant of power by Congress in conferring authority on the President. It was *therefore decided that the President, the Postmaster General, and those operating the telephone service under his authority were mere wrongdoers in

giving effect to the rates fixed by the Postmaster General and in refusing to enforce the conflicting intrastate rates made lawful by state law. The proceedings to prevent this wrong, it was held, did not constitute a suit against the United States and the injunction prayed was granted.

The appellees do not confine their contention to the question of statutory construction below decided. On the contrary, they press questions of power which the court below assumed and did not pass upon and insist upon a construction of the statute contrary to that which the court below took for granted as a prelude to the question of construction upon which is based its conclusion.

We must dispose of the issues thus insisted upon before testing the soundness of the interpretation of the statute upon which the court below acted, and for the purpose of considering them as well as the question of construction which the court below expressly decided, we state the case.

On the 16th of July, 1918, Congress adopted a joint resolution (40 Stat. 904, c. 154 [Comp. St. 1918, § 3115½x, appendix]), providing:

"That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided, that just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President: * * *

Provided further, that nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transmission of government communications, or the issue of stocks and bonds by such system or systems."

Six days thereafter, on the 22d of July, the President exerted the power thus given. Its exercise was manifested by a proclamation, which, after reciting the resolution of Congress, declared:

"It is deemed necessary for the national security and defense to supervise and take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable.

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and every telegraph and telephone system, and every part

thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies.

"It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General. * * *"

*183 The proclamation gave to the Postmaster General plenary power to exert his authority to the extent he might deem desirable through the existing owners, managers, directors or officers of the telegraph or telephone lines, and it was provided that their services might continue as permitted by general or special orders of the Postmaster General. It was declared that—

"From and after twelve o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice."

Under this authority the Postmaster General assumed possession and control of the telephone lines and operated the same. On the 31st day of October, 1918, the President through the Postmaster General, in the exertion of the duty imposed upon him by the resolution of Congress to make compensation, concluded a contract with the telephone companies of the most comprehensive character covering the whole field while the possession, control and operation by the United States continued. By its terms stipulated amounts were to be paid as consideration for the possession, control and operation by the United States and the earnings resulting from such operation became the property of the United States. Although concluded in October, 1918, by stipulation the contract related back to the time when the President took over the property.

Following this, by authority of the President, the Postmaster General fixed a general schedule of rates and it was the order to put this schedule in effect which gave rise to the suit, the trial, and the resulting judgment which we have now under consideration.

[1] That under its war power Congress possessed the right to confer upon the President the authority which it gave him we think needs nothing here but statement, as we have disposed of that subject in the North Dakota railroad rate case. And the completeness of the war power under which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other contentions urged as to the want of power in Congress to confer upon the President the authority which it gave him.

*184 * [2] The proposition that the President in

exercising the power exceeded the authority given him is based upon two considerations: First, because there was nothing in the conditions at the time the power was exercised which justified the calling into play of the authority; indeed, the contention goes further and assails the motives which it is asserted induced the exercise of the power. But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.

[3] The second contention, although it apparently rests upon the assertion that there was an absence of power in the President to exert the authority to the extent to which he did exert it, when it is correctly understood amounts only to an asserted limitation on the power granted based upon a plain misconception of the terms of the resolution of Congress by which the power was given. In other words, it assumed that by the resolution only a limited power as to the telephone lines was conferred upon the President, and hence that the assumption by him of complete possession and control was beyond the authority possessed. But although it may be conceded that there is some ground for contending, in view of the elements of authority enumerated in the resolution of Congress, that there was power given to take less than the whole if the President deemed it best to do so, we are of opinion that authority was conferred as to all the enumerated elements and that there was hence a right in the President to take complete possession and control to enable the full operation of the lines embraced in the authority. The contemporaneous official steps taken to give effect to the resolution, the proclamation of the President, the action of the Postmaster General under the authority of the President, the contracts made with the telephone companies in pursuance of authority to fix their compensation, all establish the accuracy of this view, since they all make it clear that it was assumed that power to take full control was conferred and that it was exerted so as to embrace the entire business and the right to the entire revenues to arise from the act of the United States in carrying it out. Indeed, Congress in subsequently dealing with the situation thus produced would seem to have entertained the same conception as to the scope of the power conveyed by the resolution and dealt with it from that point of view. Act Oct. 30, 1918, c. 197, 40 Stat. 1017.

*185 [4] This brings us to the proposition upon which the court based its conclusion, that is, that although complete possession, exclusive

control, and the right to all the revenues derived from the operation of the business were in the United States as the result of the resolution, the proclamation, and the contracts, yet as to intrastate earnings, the state power remained to "incumber" the authority of the United States, because that situation necessarily resulted from the terms of the congressional resolution.

This superficially was based on an interpretation of the resolution, but in substance was caused by the application to the clause of the resolution interpreted, of the erroneous presumption as to the continuance of state power dealt with in the North Dakota case. Let us see if this is not necessarily so. The provision dealt with was the proviso of the resolution which in the first place saved "the lawful police regulations of the several states" and therefore subjected the control of the United States to the operation of such power, and in the second place prohibited the states during the United States control from exerting authority as to the issue of stocks and bonds.

It was conceded that the words "police power" were *susceptible of two significations, a comprehensive one embracing in substance the whole field of state authority and the other a narrower one including only state power to deal with the health, safety and morals of the people. Although it was admitted that the reservation, considered intrinsically, was not susceptible of being interpreted in the broader of the two lights, it was held that it was necessary to so interpret it because of the clause of the proviso prohibiting the states from legislating concerning the issue of stocks and bonds by the companies during the United States control. The reasoning was this: It was inconceivable, it was said, that the subject, stocks and bonds, should have been withdrawn from state control by an express prohibition unless that subject would have been under state control in the absence of the prohibition, a result which could only exist by giving the saving clause as to police power its widest significance. But the fact that the rule of construction applied had the result of incorporating in the act of Congress unlimited state authority merely as the result of a prohibition by Congress against the exertion of state power in a specific instance, in and of itself admonishes of the incorrectness of the rule. But its want of foundation is established by two further considerations: (1) Because it causes the provision as to stocks and bonds, which was plainly enacted to preserve the financial control of the United States over the corporations, to limit if not destroy such control; (2) because by converting the prohibition against state power into an affirmative and comprehensive grant of that power, it so interprets the act as to limit the grant of authority which the act beyond doubt gave to the United States.

These considerations not only show the mistake of the interpretation, but also point out the confusion and conflict which must necessarily arise from giving effect to the mistaken presumption of the continuance of state power to which we have previously referred.

[5] *Inherently the power of a state to fix rates to be charged for intrastate carriage or transmission is in its nature but derivative, since it arises from and depends upon the duty of those engaged in intrastate commerce to charge only reasonable rates for the services by them rendered, and the authority possessed by the state to exact a compliance with that duty. Conceding that it was within the power of Congress, subject to constitutional limitations, to transplant the state power as to intrastate rates into a sphere where it, Congress, had complete control over telephone lines because it had taken possession of them and was operating them as a governmental agency, it must follow that in such sphere there would be nothing upon which the state power could be exerted except upon the power of the United States; that is, its authority to fix rates for the services which it was rendering through its governmental agencies. The anomaly resulting from such conditions adds cogency to the reasons by which in the North Dakota case the error in presuming the continuance of state power in such a situation was pointed out and makes it certain that such a result could be brought about only by clear expression or at least from the most convincing implication.

This disposes of the case, but before leaving it we observe that we have not overlooked in its consideration the references made to proceedings in Congress concerning the resolution at the time of its passage, and further, that we have also considered all the suggestions made in the many and voluminous briefs filed on behalf of various state authorities and individuals having interests in suits pending elsewhere, concerning the construction of the resolution. In saying this, however, we must except suggestions as to want of wisdom or necessity for conferring the power given, or as to the precipitate or uncalled for exertion of the power as conferred, from all of which we have turned aside because the right to consider them was wholly beyond the sphere of judicial authority.

*In view of our conclusion we shall in this case, as we did in the previous one and for the reasons therein stated, content ourselves with reversing the judgment below upon the merits with directions for such further proceedings as may be not inconsistent with this opinion.

And it is so ordered.

Mr. Justice BRANDEIS dissents.

(250 U. S. 191)

BURLESON, Postmaster General, v. DEMPCY et al.

(Argued May 5 and 6, 1919. Decided June 2, 1919.)

No. 1006.

Appeal from the District Court of the United States for the Northern District of Illinois.

Suit by Albert S. Burleson, Postmaster General, against Thomas E. Dempcy and others, members of the Public Utilities Commission of Illinois, and Edward J. Brundage, Attorney General of the State of Illinois, who filed a cross-bill. From a decree enjoining the complainant, he appeals. Reversed and remanded, with directions.

See, also, 250 U. S. —, 39 Sup. Ct. 392, 63 L. Ed. —.

Messrs. Solicitor General King, of Atlanta, Ga., and Henry S. Robbins, of Chicago, Ill., for appellant.

Mr. Raymond S. Pruitt, of Chicago, Ill., for appellees.

*Mr. Chief Justice WHITE delivered the opinion of the Court.

In a suit commenced by the Postmaster General, the members of the Public Utilities Commission of Illinois and the Attorney General of that state filed a cross-bill to enjoin the Postmaster General from enforcing telegraph rates which he had directed to be charged for services rendered over lines which were in the possession, under the control, and being operated by the United States under authority of the resolution of Congress and the proclamation of the President, considered in the Dakota Central Telephone Case, 250 U. S. 163, 39 Sup. Ct. 507, 63 L. Ed. —, this day announced.

The theory of the cross-bill was that the United States in operating the lines was governed as to intrastate rates by state authority and could not lawfully exact for such services rendered any charges but those which the state sanctioned. The court below upheld this view and therefore permanently enjoined the Postmaster General from charging any other than the state rates for the intrastate business. The case is before us on appeal from the decree to that effect.

As there is no difference in legal principle as to the question of power between the Dakota Central Case and this, it follows that the decision in that case is conclusive here and makes certain the error committed below. In this case, therefore, as in that, as a decree of reversal will dispose of every issue in the case, it follows that the decree below must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

Mr. Justice BRANDEIS dissents.

(250 U. S. 195)

MACLEOD et al. v. NEW ENGLAND TELEPHONE & TELEGRAPH CO.

(Argued May 5 and 6, 1919. Decided June 2, 1919.)

No. 957.

On Writ of Certiorari to the Supreme Judicial Court of the State of Massachusetts.

Petition by Frederick J. Macleod and Everett E. Stone, constituting the Public Service Commission of Massachusetts, against the New England Telephone & Telegraph Company. On the petition and answers, the case was reserved for the consideration of the Supreme Judicial Court, which dismissed the petition (122 N. E. 567), and petitioners bring certiorari. Affirmed.

Mr. William Harold Hitchcock, of Boston, Mass., for petitioners.

Mr. Solicitor General King, of Atlanta, Ga., for respondent.

*Mr. Chief Justice WHITE delivered the opinion of the Court.

The petitioners, composing the Public Utilities Commission of the state of Massachusetts, filed their bill against the respondent to compel it to enforce certain telephone rates for intrastate business established in conformity to the state law and to forbid the putting into effect of conflicting rates fixed by the Postmaster General in a schedule by him established and the enforcement of which he had ordered.

On the petition and answers the case was reserved for the consideration of the Supreme Judicial Court where it was finally decided. The court in a lucid opinion, speaking through Mr. Chief Justice Rugg, having after full consideration reached the conclusion that the Postmaster General was empowered by the law of the United States to fix the schedule of rates complained of and that the telephone company was authorized by such law to put in effect and enforce such rates even though in doing so the rate established by the Public Service Commission of the state was disregarded, held that the suit was virtually one against the United States which the court was without *power to entertain and entered a decree of dismissal for want of jurisdiction. But the form of the decree thus entered affects in no way the control and decisive result, upon every issue in the case, of the ruling this day announced in the Dakota Central Telephone Case, 250 U. S. 163, 39 Sup. Ct. 507, 63 L. Ed. —. It follows, therefore, that in this case our decree must be and is one of affirmance.

Affirmed.

Mr. Justice BRANDEIS dissents.

(250 U. S. 188)

STATE OF KANSAS v. BURLESON, Postmaster General, et al.

(Argued May 5 and 6, 1919. Decided June 2, 1919.)

No. 31, Original.

In Equity. Original bill by the State of Kansas against Albert S. Burleson, Postmaster General, and the Southwestern Bell Telephone Company. Bill dismissed.

Mr. Fred S. Jackson, of Topeka, Kan., for complainant.

Mr. Solicitor General King, of Atlanta, Ga., for respondents.

* Mr. Chief Justice WHITE delivered the opinion of the Court.

The state of Kansas, invoking the original jurisdiction of this court, filed its bill to enjoin the Postmaster General from enforcing and the defendant corporation from giving effect to a schedule of telephone rates which the Postmaster General had established and which he had directed should be applied for telephone services rendered on lines which were in the control and possession of the United States and were being operated as governmental agencies in virtue of the resolution of Congress and the proclamation of the President referred to and considered in the Dakota Central Telephone Case (just announced) 250 U. S. 163, 39 Sup. Ct. 507, 63 L. Ed. —.

The defendants, insisting that the suit was not in substance against an officer to restrain the doing of unauthorized acts, but was really one to prevent an official of the United States from discharging his duty under a law of the United States, both disputed the merits and challenged the jurisdiction. The case was heard coincidentally with the Dakota Central Case this day decided. As the ruling in that case establishes the want of foundation for the contention made in this, as to the illegality of the acts of the officer complained of, it follows also that what was stated in that case as to the form of our decree is likewise here controlling and for the reasons there stated in this as in that case our decree must be and is one of dismissal of the bill.

And it is so ordered.

Mr. Justice BRANDEIS dissents.

(250 U. S. 360)

COMMERCIAL CABLE CO. v. BURLESON, Postmaster General, et al.

COMMERCIAL PAC. CABLE CO. v. SAME.

(Argued March 7, 1919. Decided June 9, 1919.)

Nos. 815 and 816.

1. APPEAL AND ERROR 801(2)—REVIEW—MOOT CASE.

Where, after bills by cable companies to enjoin the Postmaster General or his representatives from interfering with their property under presidential proclamation of November 2, 1918,

wherein the President, through the Postmaster General, assumed control, possession, and supervision of each and every marine cable system, etc., the cable lines of the complainant companies were turned over to and accepted by them, the cases became moot, and appeals from decrees of dismissal must be dismissed, notwithstanding contentions by the companies that an adjudication of their rights was necessary to prevent future encroachments.

2. APPEAL AND ERROR 801(1)—REVIEW—MOOT CASE.

Where bills by the complainant cable companies to enjoin the Postmaster General or his representatives from interfering with their property pursuant to presidential proclamation, whereby the President assumed control, possession, and supervision of marine cable systems, etc., were dismissed, and pending appeal from the decrees of dismissal the property was returned to the companies, thus making the cases moot and necessitating dismissal of the appeals, the original decrees dismissing the bills ought not to be allowed to stand, but should be reversed, and the causes remanded, with directions to set aside the decrees and substitute decrees dismissing the bills without prejudice.

Appeals from the District Court of the United States for the Southern District of New York.

Bills by the Commercial Cable Company and by the Commercial Pacific Cable Company against Albert S. Burleson and Newcomb Carlton. On motion of defendants, the bills were dismissed (255 Fed. 99), and complainants appeal. Decrees reversed, and causes remanded, with directions to set aside the decrees and substitute decrees dismissing the bills without prejudice.

Mr. Charles E. Hughes, of New York City, for appellants.

Mr. Solicitor General King, of Atlanta, Ga., for appellees.

* Mr. Chief Justice WHITE delivered the opinion of the Court.

By virtue of the Joint Resolution of July 16, 1918 (40 Stat. 904, c. 154 [Comp. St. 1918, § 3115½x, appendix]), considered in the Dakota Central Telephone Case, 250 U. S. 163, 39 Sup. Ct. 507, 63 L. Ed. —, decided June 2, 1919, the President, by proclamation dated November 2, 1918 (Sess. Laws 65th Cong., 2d Sess., part 2, "Proclamations, 1918," p. 228), assumed control, possession, and supervision "of each and every marine cable system and every part thereof owned or controlled and operated by any company or companies organized and existing under the laws of the United States, or any state thereof."

As in the case of the telephone lines, the proclamation conferred authority upon the Postmaster General to carry out its provisions. In the name of the President, the Postmaster General then took possession and assumed control of the cable lines owned or

under the control of the two companies which are appellants on these records. The companies thereupon filed their bills in the court below to enjoin the Postmaster General or his representatives from interfering with their property because (1) under the circumstances alleged the President had no power to take possession and control of the cable lines; (2) if he had such power, he was not justified in exerting it under the conditions stated; and (3) as the result of the failure to provide adequate compensation, the taking of the cable lines was void for repugnancy to the Constitution. These propositions were based upon elaborate averments concerning the subject-matter. On motion of the defendant the bills were dismissed for want of equity. The court held that as under the facts admitted the first two propositions raised no question of power, but only charged a wrongful exercise of a discretion vested, they stated no ground for relief as the subject was not justiciable, and that as to the third proposition there was no equity in the bill because the provision made for compensation met the constitutional requirement.

[1] By appeals, the cases were brought here and were argued and submitted in March last. While they were under advisement the United States directed attention to the fact that by authority of the President all the cable lines with which the two corporations were concerned, and to which the bills related, had been turned over to and had been accepted by the corporations, and the Government hence had no longer any interest in the controversy. As the result of submitting an inquiry to counsel as to whether the cases had become moot, that result is admitted by the United States, but in a measure is disputed by the appellants for the following reasons: First, it is said that as the taking over of the lines by the President was wholly unwarranted and without any public necessity whatever, there is ground to fear that they may again be wrongfully taken unless these cases now proceed to a decree condemning the original wrong; and, second, that although it is true that during the operation of the property while under the control of the Government all the revenues derived from it were separately kept and have been returned to the owners of the property—a result which financially is satisfactory to them—nevertheless, unless there is a decree in this case, the owners can feel no certitude that the revenues may not be claimed from them by the United States in the future.

[2] But we are of opinion that these anticipations of possible danger afford no basis for the suggestion that the cases now present any possible subject for judicial action, and hence it results that they are wholly moot and must be dismissed for that reason. In

giving effect, however, to that conclusion, we are of opinion that the decree below, which in substance rejected the rights asserted by the complainants, ought not to be allowed to stand, but on the contrary, following the well established precedents (United States v. Hamburg-Amerikanische Co., 239 U. S. 466, 36 Sup. Ct. 212, 60 L. Ed. 387; United States v. American-Asiatic Steamship Co., 242 U. S. 537, 37 Sup. Ct. 233, 61 L. Ed. 479), the decrees below should be reversed and the cases remanded to the lower court, with directions to set aside the decrees and to substitute decrees dismissing the bills without prejudice and without costs, because the controversy which they involve has become moot and is no longer therefore a subject appropriate for judicial action.

And it is so ordered.

(250 U. S. 363)

LOUISVILLE & N. R. CO. v. WESTERN
UNION TELEGRAPH CO. (two cases).

(Argued Jan. 22 and 23, 1919. Decided June 9, 1919.)

Nos. 176, 248.

1. JUDGMENT $\S$ 28(1) — CONCLUSIVENESS
—STATE AND FEDERAL COURTS.

So far as bill in federal court by railroad company against telegraph company to have state judgments of condemnation decreed void alleges a failure to comply with state laws, decree against plaintiff in identical suit in state court between the parties is conclusive.

2. CONSTITUTIONAL LAW $\S$ 281 — EMINENT
DOMAIN $\S$ 167(2)—DUE PROCESS—HEARING
—CONDEMNATION PROCEEDING.

One whose property is sought to be condemned cannot complain of not being given a hearing on the right to condemn, because referred for that hearing, under state law, to a different suit from that in which the value of the property is fixed.

3. COURTS $\S$ 366(11) — FEDERAL COURTS —
RIGHTS UNDER STATE STATUTE.

Whether under a state law a right of way can be condemned for maintaining an existing telegraph line, theretofore maintained under a contract, which has terminated, or only for a new line, is for the state court to decide.

4. CONSTITUTIONAL LAW $\S$ 281—DUE PRO-
CESS — EMINENT DOMAIN PROCEEDINGS —
POSTPONING DISCUSSION.

No constitutional right under the Fourteenth Amendment is infringed when the state court in suit to have a judgment of condemnation for telegraph line along a railroad held void, on the ground that the state law allows condemnation only for a new line and that the company wanted the right for an old line, postpones discussion till attempt is made to use it for the old line; the judgment of condemnation being right on its face.

5. CONSTITUTIONAL LAW 281—DUE PROCESS—JUDGMENT—DESCRIPTION OF RIGHT CONDEMNED.

Description in judgment of condemnation for telegraph line along railroad right of way, satisfying the state law under state decisions, though not fixing exact location of line, the judgment allowing only one line, and requiring it to be where it will not interfere with use of railroad, and to be subject to agreement in petition to change its location if required by change in tracks, is not bad under the Fourteenth Amendment.

6. TELEGRAPHS AND TELEPHONES 11 — ALONG INTERSTATE RAILROADS—STATUTORY PERMISSION.

Assent to acquisition, by condemnation under state laws, of right for telegraph line along right of way of interstate railroad, as against objection of interference with interstate commerce, is given by Act July 24, 1866 (Comp. St. § 10072).

7. COURTS 522—PRIORITY OF JURISDICTION—INJUNCTION.

While it stands, injunction to maintain status quo, issued by district court of one circuit against railroad company interfering with telegraph wires, precludes contrary action in district court of another circuit.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

In Error to the Supreme Court of the State of Mississippi.

Two suits by the Louisville & Nashville Railroad Company against the Western Union Telegraph Company, one in state court, and the other in federal District Court. In the first case, on appeal to the Supreme Court of Mississippi, there was a decree for defendant (107 Miss. 626, 65 South. 650), and plaintiff brings error. In the second case, decree dismissing bill was affirmed by the Circuit Court of Appeals (233 Fed. 82, 147 C. C. A. 152), and plaintiff appeals. Affirmed.

*Messrs. Gregory L. Smith, of Mobile, Ala., and Henry L. Stone and Edward S. Jouett, both of Louisville, Ky., for appellant and plaintiff in error.

Mr. Rush Taggart, of Louisville, Ky., for appellee and defendant in error.

Mr. Justice HOLMES delivered the opinion of the Court.

These suits, the earlier begun in the District Court of the United States, the later in a court of the State of Mississippi, are bills in equity containing the same allegations and seeking the same relief. They both seek a decree that State judgments of condemnation by eminent domain, giving to the telegraph company the right to erect its poles along the railroad's right of way across the State of Mississippi, are void. The State case was decided first and was in favor of the defend-

ant in error. *Western Union Tel. Co. v. Louisville & N. R. Co.*, 107 Miss. 626, 65 South. 650. Then in the District Court the telegraph company pleaded the State decree as a conclusive adjudication and moved that the bill and a supplemental bill be dismissed. Against the supplemental bill it also set up an injunction in its favor granted by another Court of the United States, reported in *Western Union Tel. Co. v. Louisville & N. R. Co.* (D. C.) 201 Fed. 946, and 207 Fed. 1, 124 C. C. A. 573. The bills were dismissed upon both grounds. 233 Fed. 82, 147 C. C. A. 152. The constitutional questions raised are presented equally in the State case and as we shall deal with them under that, 107 Miss. 626, 65 South. 650, it may be assumed, subject to those questions, that the other decision was right, as we see no reason to doubt.

[1-4] The Mississippi proceedings in eminent domain are limited in their effect to determining the amount of damages to be paid. If the right to condemn is disputed that is left to be decided by a suit in equity. *Vinegar Bend Lumber Co. v. Oak Grove & Georgetown R. R. Co.*, 89 Miss. 84, 105-107, 110, 113, 43 South. 292. The railroad company resorted to such a bill in this case. So far as it alleged a failure to comply with the State laws the State decision is conclusive against it, and of course it cannot complain of not being given a hearing simply because it is referred for that hearing to a different suit from that in which the value of the property is fixed. The separation is familiar. *United States v. Jones*, 109 U. S. 513, 519, 3 Sup. Ct. 346, 27 L. Ed. 1015. Passing these matters by, the first contravention of the Fourteenth Amendment alleged is that under the Mississippi laws the right could be taken only for a new line, whereas the bill avers that the telegraph company wanted the right not for a new line but for the purpose of maintaining an existing line that it had maintained theretofore under a contract with the railroad now brought to an end. To this the Supreme Court replied that, the judgments being *right upon their face, if the telegraph company attempted to use them to maintain an existing line instead of a new one its rights could be determined when the attempt was made. The Fourteenth Amendment knows no difference between the two purposes, and the extent to which the telegraph company is confined to one of them under the State laws is for the State court to decide. No constitutional right is infringed when the State court postpones discussion until the attempt is made. The decree as well as the opinion saves the railroad's right in that event.

[5] It is argued that the judgments are void because they do not fix the exact location of the telegraph poles within the speci-

fied right of way. But they allow only one line of poles to be set up, and require it to be erected "in such manner and at such distance from defendant's (the railroad's) track as in no way to interfere with the operation of trains of said defendants, or with any proper and legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained." The petition contains an agreement that if, after the erection of the poles, etc., "it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use or occupy that portion of said right of way on which petitioner's poles are, or may be set, cross arms placed thereon and wires strung, your petitioner will, at its own expense upon reasonable notice from said defendants, remove said poles, cross arms and wires to such other point, or points, on said defendant's right of way as shall be designated by said defendant." This agreement is binding. *Mobile & Ohio R. R. Co. v. Postal Telegraph Cable Co.*, 76 Miss. 731, 752, 753, 26 South. 370, 45 L. R. A. 223. The description has been held to satisfy the requirements of State law and it would be extravagant to say that the Fourteenth Amendment made it bad.

[6] It is contended that the State had no power to condemn for the use of the telegraph company any part of the right of way of an interstate road or bridge over navigable waters. Support for the argument is sought in *Western Union Telegraph Co. v. Pennsylvania R. R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517. That case shows, to be sure, that the Act of July 24, 1866, c. 230, 14 Stat. 221, R. S. § 5263 (Comp. St. § 10072), purporting to grant to any telegraph company the right to construct and maintain lines along the post roads of the United States and to cross navigable streams, did not of itself give the right to appropriate private property. But it equally shows that

Congress gave its assent to the acquisition of such rights in post roads by any means otherwise proper, as against any objection that it was an interference with interstate commerce, and such is the implication of the cases. "State sovereignty under the Constitution is not interfered with." *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 12, 24 L. Ed. 708; *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160, 169, 32 Sup. Ct. 449, 56 L. Ed. 710; *Western Union Telegraph Co. v. Louisville & Nashville R. R. Co.*, 207 Fed. 1, 11, 12, 124 C. C. A. 573. The present decision is enough to establish that the condemnation followed the State law. See also *Cumberland Telephone & Telegraph Co. v. Yazoo & Mississippi Valley R. R. Co.*, 90 Miss. 686, 44 South. 166. No act of Congress prevents the State proceedings having their intended effect.

[7] We think it unnecessary to deal with the somewhat meticulous objections to the form in which the Mississippi decree was pleaded and proved in the District Court or to repeat the answer of the defendant in error to the contention that if proved it was not an adjudication. If the bill in the District Court had not been disposed of by the State decree it would be dismissed under our present decision. Two days before the answer setting up the State decree the railroad filed a supplemental bill alleging that the telegraph company had no longer any rights except under the condemnation proceedings but that it still was using its old line. The telegraph company pleaded in reply an injunction, mentioned above, granted by another Court of the United States, forbidding the railroad to interrupt the telegraph in the use of its wires upon the railroad's right of way, the declared purpose being to preserve the status quo for a certain time, or until the condemnation could be carried out. 207 Fed. 1, 5, 124 C. C. A. 573. If for any reason the supplemental bill does not fall with the bill this earlier action in the Sixth Circuit (while it stands, see 252 Fed. 29, 164 C. C. A. 141), properly was regarded as precluding contrary action in the Fifth.

Decrees affirmed.

(256 U. S. 501)

ODELL v. F. C. FARNSWORTH CO. et al.

(Submitted March 24, 1919. Decided June 9, 1919.)

No. 186.

COURTS — 290—JURISDICTION—SUIT ARISING UNDER PATENT LAWS.

Suit, as shown by bill, being merely for royalties based on contract, and not involving construction of patent laws, is not one arising under the patent laws, so as to give District Court jurisdiction under Judicial Code, § 24, par. 7 (Comp. St. § 991), though less than \$3,000 is claimed.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by William H. Odell against the F. C. Farnsworth Company and another. Bill dismissed (257 Fed. 101), and plaintiff appeals. Affirmed.

Mr. Samuel E. Darby, of New York City, for appellant.

Mr. Edmund H. Parry, of Washington, D. C., for appellees.

*Mr. Justice CLARKE delivered the opinion of the Court.

This is an appeal from a decree of the District Court for the Southern District of New York, dismissing plaintiff's (appellant's) bill for want of jurisdiction.

The District Court certifies: That the case was heard on the bill of complaint and a motion by the defendants to dismiss for want of jurisdiction, that the court ruled that the cause of action stated in the bill is an action on a contract and is not a suit arising under the patent laws of the United States, and that the bill was dismissed for want of jurisdiction, solely because it showed on its face that the matter in controversy is less than \$3,000.

The bill shows the requisite diversity of citizenship to give the court jurisdiction, but the amount claimed is only \$1,800, and therefore it did not have jurisdiction (Judicial Code [Act March 3, 1911, c. 231] § 24, par. 1, 36 Stat. 1091 [Comp. St. § 991]), unless the case is one arising under the patent laws of the United States.

The contention of the appellant is that the suit is one for infringement of a patent and arises under the patent laws, and that therefore the Court had jurisdiction, regardless of the amount involved, Judicial Code, § 24, par. 7.

The allegations of the bill are: That the plaintiff was an inventor of a new and useful "steam trap," upon which he was granted letters patent No. 837,711; that on September 8, 1914, he made a grant, in writing, to

one of the defendants, to which the other defendant succeeded, of the "sole and exclusive right to manufacture and sell all apparatus covered by the patent," * * * "during the whole term of said patent," and that on the same date the defendant, assignee of the patent, agreed in writing to pay plaintiff, in addition to the sum paid for the assignment, \$100 within six months, and a royalty thereafter of \$5 upon each "apparatus" sold until there should be received on account of such royalties the sum of \$1,800. It is further alleged that the defendants had sold a large number of patented "steam traps," but had accounted and paid for the sale of only five, and that they pretend that the others which they are manufacturing and selling are not covered by the letters patent granted to the plaintiff, and, finally, that the legal title to the patent involved is held by the defendants to use, and pay for the use of, the invention according to the terms of the written contract of September 8, 1914.

The prayer is for a discovery of the number of "steam traps" covered by the patent which the defendants have sold and for a decree that they "account for and pay over to your orator the amount of royalties thereon, which the defendants are required to do under the agreement herein referred to," and for the costs of suit.

Thus, neither the allegations nor the prayer of the bill aims at annulling or even modifying either the assignment of the patent or the contract on account of the breach of the latter, but, on the contrary, plainly, the case intended to be stated, is one to enforce the contract and collect the royalties stipulated in it. Infringement of the patent is not alleged, but, on the contrary, a completed grant and assignment of the legal title to it is pleaded, sufficient on its face, while unmodified, to disable the plaintiff from maintaining a suit for any infringement subsequent to the date of such assignment.

To constitute a suit under the patent laws the "plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction, of these laws." Pratt v. Paris Gaslight & Coke Co., 168 U. S. 255, 259, 18 Sup. Ct. 62, 64 (42 L. Ed. 458).

The party who brings suit is "master to decide what law he will rely upon," and the allegations of his bill are the evidence, or the expression, of his decision, upon which the courts must act in determining the question of their jurisdiction. The Fair v. Kohler Die & Specialty Co., 228 U. S. 22, 33 Sup. Ct. 410, 57 L. Ed. 716; Healy v. Sea Gull Specialty Co., 237 U. S. 479, 35 Sup. Ct. 658, 59 L. Ed. 1056.

It is too clear for discussion that the case stated in the bill is a suit for royalties based on the contract, and not at all involving the construction of any law relating to patents. It has been often decided by this court that such a suit is not one arising under the patent laws, and since less than the requisite jurisdictional amount is claimed the District Court did not err in dismissing the bill. *Wilson v. Sandford*, 10 How. 99, 13 L. Ed. 344; *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. 756, 31 L. Ed. 683; *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282, 22 Sup. Ct. 681, 46 L. Ed. 910; *Briggs v. United Shoe Machinery Co.*, 239 U. S. 48, 36 Sup. Ct. 6, 60 L. Ed. 138. The decree of the District Court must be affirmed.

(250 U. S. 478)

TEXAS & P. RY. CO. et al. v. LEATHERWOOD.

(Submitted March 19, 1919. Decided June 9, 1919.)

No. 249.

1. CARRIERS ⇐219(8) — INTERSTATE TRANSPORTATION—BILLS OF LADING.

Under the Carmack Amendment (Comp. St. §§ 8604a, 8604aa), a bill of lading on an interstate shipment of live stock issued by the initial carrier is binding on the shipper and all connecting carriers, just as the rate properly filed by the initial carrier is binding on them; so connecting carriers, though they insisted as a condition of carrying the shipment further that the shipper accept and sign a new bill of lading, may rely on a provision in the original bill of lading limiting the time for action, though the bills they issued contained no such limitation. (Per the Chief Justice, Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Day.)

2. CARRIERS ⇐218(1) — CARRIAGE OF LIVE STOCK—TIME FOR SUIT—LIMITATION.

A provision in a through bill of lading issued for the interstate shipment of live stock, barring any action for damages unless suit should be brought within six months after loss occurred, is reasonable and should be enforced. (Per the Chief Justice, Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Day.)

3. CERTIORARI ⇐71—COSTS—PRINTING UNNECESSARY MATTER IN RECORD.

Under rule 8, § 1 (32 Sup. Ct. vi), petitioner will be required to pay the entire expenses of printing a lengthy transcript, where most of the matter which was included in it at the instance of petitioner was clearly not required for proper presentation of the question submitted. (Per the Chief Justice, Mr. Justice Brandeis, Mr. Justice Holmes, and Mr. Justice Day.)

Mr. Justice McKenna, Mr. Justice Pitney, and Mr. Justice Clarke dissent, while Mr. Justice

McReynolds and Mr. Justice Van Devanter concur in the result, but do not assent to the grounds on which it is based.

On Writ of Certiorari to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

Action by B. Leatherwood against the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway of Texas. A judgment for plaintiff was affirmed by the Court of Civil Appeals, and that court having denied rehearing and declined to certify to the Supreme Court of Texas, defendants bring certiorari. Reversed.

*Messrs. George Thompson and J. H. Barwise, Jr., both of Ft. Worth, Tex., for petitioners.

Mr. D. T. Bomar, of Ft. Worth, Tex., for respondent.

Mr. Justice BRANDEIS announced the judgment of the Court, and delivered the following opinion:

Leatherwood made, in 1913, a shipment of horses from Watrous, N. M., to Waco, Tex., over four connecting railroads. The initial carrier gave him a through bill of lading which contained a provision barring any action for damages unless suit was brought within six months after the loss occurred. When the horses reached the lines of the Texas & Pacific Railway and of the Missouri, Kansas & Texas Railway, each of these companies insisted, as a condition of carrying them further, that Leatherwood accept and sign a new bill of lading covering the shipment over its line, and he did so.

In 1915 he brought suit in a state court of Texas for injury to the horses while in transit on the lines of those two companies. The bills of lading issued by them did not contain the provision requiring suit to be brought within six months; but the carriers set up as a defense the provisions to that effect contained in the original bill of lading, contending that under the Carmack Amendment (Act of June 29, 1906, c. 3591, 34 Stat. 584, 595 [Comp. St. §§ 8604a, 8604aa]) all connecting carriers were bound by its terms and that the later ones issued by themselves were of no legal effect.¹ The trial court denied this contention, and ruled as matter of law that the carriers could not rely upon the provision in the initial bill of lading. Judgment was entered for the plaintiff and affirmed by the Court of Civil Appeals. On June 2, 1917, that court denied a rehearing and declined to certify to the Supreme Court of Texas the questions involved. The case comes here on

¹ The rights of the parties are not affected by the Act of March 4, 1915, c. 176, 38 Stat. 1196, which prohibits a common carrier from providing by contract or otherwise for a shorter period than two years for the institution of suits.

writ of certiorari (245 U. S. 649, 38 Sup. Ct. 12, 62 L. Ed. 530) under section 237 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1156), as amended by Act of September 6, 1916, c. 448, § 2, 39 Stat. 726 (Comp. St. § 1214).

[1] The final decision below was rendered two days before the decision of this court in *Missouri, Kansas & Texas Ry. Co. v. Ward*, 244 U. S. 383, 37 Sup. Ct. 617, 61 L. Ed. 1213. There one of the same railroads had, as connecting carrier, issued a second bill of lading to shippers of live stock, who had received from the initial carriers a through bill of lading on an interstate shipment. But there the carriers relied for defense upon a clause in the second bill of lading, which was not contained in the first. We held that the second bill of lading was void, since under the Carmack Amendment the several carriers must be treated, not as independent contracting parties, but as one system; and that the connecting lines become in effect mere agents whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier, and that they are prevented by law from varying the terms of that contract. *Leatherwood* contends that the principle upon which the case was decided is not applicable here, because there the carriers sought to avail themselves of the second bill of lading, while here they seek to ignore it; and he insists that the carriers are, by their conduct, estopped from asserting its invalidity. As stated in *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 197, 36 Sup. Ct. 541, 60 L. Ed. 948, the parties to a bill of lading cannot waive its terms, nor can the carrier by its conduct give the shipper a right to ignore them. "A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed." The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. Each has in effect the force of a statute, of which all affected must take notice. That a carrier cannot be prevented by estoppel or otherwise from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled. A carrier has, for instance, been permitted to collect the legal rate, although it had quoted a lower rate and the shipper was ignorant of the fact that it was not the legal rate. *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Illinois Central Railroad Co. v. Henderson Elevator Co.*, 226 U. S. 441, 33 Sup. Ct. 176, 57 L. Ed. 290; *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed.

853, L. R. A. 1915E, 665; *Missouri, Kansas & Texas Ry. Co. of Texas v. Schnoutz*, 245 U. S. 641, 38 Sup. Ct. 221, 62 L. Ed. 527 (per curiam).

[2] The provision in the original bill of lading limiting to six months the time within which suit may be brought, not being unreasonable (*Missouri, Kansas & Texas Ry. Co. v. Harriman*, 227 U. S. 657, 672, 673, 33 Sup. Ct. 397, 57 L. Ed. 690), was valid; and as the original bill of lading remained binding, the lower courts erred in denying it effect. The judgment of the Court of Civil Appeals must therefore be reversed. *452

[3] The record occupies 213 printed pages. Most of the matter which was included in it at the instance of petitioners, was clearly not required for a proper presentation of the questions submitted here. Much useless expense has been incurred; and both court and counsel have been subjected to the burden of examining much that is irrelevant. Section 1 of rule 8 of this court (32 Sup. Ct. vi) specifically provides that if portions of the record unnecessary to a proper presentation of the case are found to have been incorporated into the transcript by either party, the court may order that the whole or any part of the clerk's fees for supervising the printing and the cost of printing the record be paid by the offending party. Under the circumstances of this case it seems appropriate that the whole of this expense be borne by the petitioners; and it is so ordered.

Judgment reversed.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice HOLMES, and Mr. Justice DAY concur in the above opinion.

Mr. Justice McKENNA, Mr. Justice PITNEY, and Mr. Justice CLARKE dissent.

Mr. Justice McREYNOLDS concurring.

I concur in the conclusion that the judgment below must be reversed. Circumstances disclosed by the record and not discussed in the opinion, I think, require this result. But the broad declaration that the parties to a bill of lading cannot waive its terms nor can the carrier, by its conduct, give the shipper the right to ignore them goes beyond what is necessary to the decision and I am not prepared to assent to it as a proposition of law.

*Sult was originally brought against the initial line (The Santa Fé) and connecting ones—*Texas & Pacific Ry. Co.*, and *Missouri, Kansas & Texas Railway*—the claim being based upon the implied obligation arising out of delivery and acceptance of the horses by the former for through interstate carriage. In his pleadings the shipper expressly denied validity of all bills of lading—one issued by the Santa Fé and one by each of the petitioners. Of course, under the rule approved in *Missouri, Kansas & Texas Ry. Co. v. Ward*, 244 U. S. 383, 37 Sup. Ct. 617, 61 L. Ed. 1213,

he could have relied upon the first bill; but it does not follow that if, during transit, a connecting carrier declined to recognize the original agreement for through transportation and refused to proceed thereunder, he had no power to acquiesce, take possession of the animals and re-ship under another contract with such carrier not subject to avoidance by it. And if, in the present cause, instead of repudiating the bills of lading issued by connecting roads he had relied upon them the question presented would be a very different one, decision of which is not now demanded.

Mr. Justice VAN DEVANTER joins in this opinion.

(250 U. S. 465)

ERIE R. CO. v. SHUART et al.

(Submitted April 25, 1919. Decided June 9, 1919.)

No. 342.

1. CARRIERS 218(3) — LIVE STOCK INTERSTATE SHIPMENT—LIMITATION OF LIABILITY—TIME FOR CLAIM.

A provision in a limited liability live stock contract or bill of lading for an interstate shipment, requiring presentation within five days from the time the stock is removed from the car or cars of claim for any loss or damage as a condition to recovery, is valid and controlling as to any liability of carrier arising from beginning to end of the transportation.

2. CARRIERS 218(10)—LIVE STOCK—LIMITATION OF LIABILITY—CLAIM—"TRANSPORTATION."

Though a car containing an interstate shipment of horses had arrived at its destination, and the consignees were proceeding to unload the animals through a cattle chute owned and operated by the carrier, the transportation was not complete, and, where the horses were injured when other cars were pushed against the one being unloaded, written claim of loss, made a condition to liability in bill of lading, must be given in order to support recovery against the carrier.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Transportation.]

Mr. Justice Clarke, Mr. Justice McKenna, Mr. Justice Brandeis, and Mr. Justice Day dissenting.

On Writ of Certiorari to the Supreme Court of the State of New York.

Action by John R. Shuart, Leo Shuart, and John R. Shuart, Jr., doing business under the name of John R. Shuart & Sons against the Erie Railroad Company. A judgment for plaintiffs (166 App. Div. 895, 150 N. Y. Supp. 1112) was affirmed (221 N. Y. 680, 117 N. E. 1084), and defendant brings certiorari. Reversed and remanded.

*Mr. Thomas Watts, of Middletown, N. Y., for petitioner.

Mr. Reeves T. Strickland, of Washington, D. C., for respondents.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Respondents delivered to the Toledo, St. Louis & Western Railroad, at East St. Louis, Ill., a carload of horses for transportation, under a limited liability live stock contract or bill of lading via petitioner's road, to themselves at Suffern, N. Y., their home. Among other things the contract provided:

"That the said shipper is at his own sole risk and expense to load and take care of and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same. * * * That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the general auditor of the said carrier at his office in the city of Chicago, Ill., within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier, on whose line the loss or injury occurs."

[1] Immediately after the car arrived at Suffern, petitioner placed it on a switch track opposite a cattle chute and left it in charge of respondents for unloading. By letting *down a bridge they at once connected the chute and car and were about to lead out four horses, when an engine pushed other cars against it and injured the animals therein. No written claim was made for the loss or damage as provided by the bill of lading; and when sued the carrier defended upon that ground. Respondents maintain that transportation had ended when the accident occurred and consequently no written claim was necessary. The courts below accepted this view.

Under our former opinions, the clause requiring presentation of a written claim is clearly valid and controlling as to any liability arising from beginning to end of the transportation contracted for. *Chesapeake & Ohio Ry. Co. v. McLaughlin*, 242 U. S. 142, 37 Sup. Ct. 40, 61 L. Ed. 207; *St. Louis, Iron Mt. & So. Ry. Co. v. Starbird*, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. Ed. 917; *Baltimore & Ohio R. R. Co. v. J. G. Leach*, 249 U. S. 217, 39 Sup. Ct. 254, 63 L. Ed. 570 (decided March 10, 1919); *Cleveland, Cincinnati, Chicago & St.*

Louis Ry. Co. v. Dettlebach, 239 U. S. 588, 593, 594, 36 Sup. Ct. 177, 60 L. Ed. 453; Southern Ry. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836.

[2] In *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Dettlebach* we pointed out that the Hepburn Act (Act June 29, 1906, c. 3591, 34 Stat. 584) enlarged the definition of "transportation" so as to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration, or icing, storage and hauling of property transported," and we said from this and other provisions of the act "it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as inter-state carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the act respecting reasonable rates and the like."

In the instant case, when injured, the animals were awaiting removal from the car through a cattle chute alleged to be owned, operated and controlled by the railroad. If its employes had then been doing the work of unloading there could be no doubt that transportation was still in progress; and we think that giving active charge of the removal to respondents, as agreed, was not enough to end the interstate movement. The animals were in the car; no adequate time for unloading had transpired. The carrier had not fully performed the services incident to final delivery imposed by law. These included the furnishing of fair opportunity and proper facilities for safe unloading although the shippers had contracted to do the work of actual removal. See *Hutchinson on Carriers*, §§ 711, 714, 715.

Petitioner's request for an instructed verdict in its behalf should have been granted. The judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice CLARKE dissenting.

I greatly regret that I cannot concur in the opinion and judgment of the court in this case, but I cannot consent to share in what seems to me a very strained construction of a definition in the Hepburn Act (34 Stat. 584, c. 3591, § 1 [Comp. St. § 8563]) which will result in keeping alive a bill of lading, with the effect of excusing the carrier

from liability for negligently damaging the live stock of a consignee, after it had been delivered, on the ground that a claim in writing for the damage, duly verified, had not been presented within five days.

*My reasons for dissenting, stated as briefly as may be, are as follows:

It is shown by the opinion of the court that the consignee, a partnership of three members, was bound by the bill of lading to unload the horses at destination.

The consignee, being notified by the carrier as to the probable time of the arrival of the car, on the day before it arrived, paid what was supposed to be the full amount of the freight charges, and two members of the partnership were at the station at 3 o'clock in the morning to receive and unload it.

When the train came, the senior member of the consignee stood in the cattle chute with the conductor, while the latter was placing the car for unloading and approved as satisfactory the position in which it was placed. Thereupon a brakeman set the brake, the engine was cut off and the conductor went away and left the car in the sole custody of the consignee, after saying to its representative, "You had better get them out as soon as you can as they have been on the road a good while and are tired and hungry." Two members of the partnership, consignee, went to work at once to unload the horses, but it was necessary to get some boards to make the bridge from the car to the chute safe, and in about half an hour, when the two were in the act of leading two horses from the car, other cars were negligently thrown against it and caused the damage sued for.

I dissent from the opinion of the court because I agree with the three New York courts that the undisputed facts thus stated show that the transportation was ended and the delivery of the stock was so completely made as to end all liability of the carrier under the bill of lading, before the negligence of the company occurred which caused the damage complained of.

What constitutes delivery of goods or of live stock by a carrier is usually a mixed question of law and fact, but *where, as here, the facts are not disputed, it is a question of law.

What more was there for the carrier to do,—what more could it have done—to make more complete the delivery necessary to fulfill its obligation as a carrier? The journey was ended, the freight charges were paid, and the car was placed on a side track in an appropriate place and position for unloading, which was approved by the consignee. It had been accepted by two members of the partnership, consignee, and had passed into their exclusive custody a full half hour before the accident. No assistance was asked for or needed after the conductor delivered the car and went away and thereafter the

carrier owed to the consignee only the duty which it owed to any property lawfully upon or near to its tracks—not to negligently or willfully injure it, and it was for violation of that duty, not for failure to discharge duties imposed by the bill of lading, that this suit was instituted. The case is one of side track delivery, the equivalent of the familiar delivery of a car to an "industrial track" or "team unloading track" of a railroad, with possession taken by the consignee before the damage was done.

To the weighty authority of the New York courts which decided in this case that the delivery was complete before the damage was done, may be added, a few from many, the decisions of the Supreme Courts—of Michigan, in a strikingly similar case, but with not so complete a delivery, in *Brown v. Pontiac, etc., R. R. Co.*, 133 Mich. 371, 94 N. W. 1050; of Illinois, in *Gratiot Street Warehouse Co. v. St. Louis, etc., R. R. Co.*, 221 Ill. 418, 77 N. E. 675; of North Carolina, in *Reid v. Southern Railway Co.*, 149 N. C. 423, 63 S. E. 112; of Georgia, in *Kenny Co. v. Atlanta, etc., R. R. Co.*, 122 Ga. 365, 50 S. E. 132; and see *Hedges v. Railroad Co.*, 49 N. Y. 223.

The definition of "transportation" in the Hepburn Act (34 Stat. 584), relied upon in the court's opinion, seems *to me quite irrelevant. That provision was incorporated into the act to prevent unjust discrimination by carriers in terminal delivery charges, as the context and the history of the act abundantly show. It defined "transportation," but did not define what should constitute delivery to a consignee; that was left untouched and is governed by the prior decisions of courts and by those which have been developed since.

Equally beside the question involved seems to me the decision in *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Dettlebach*, 239 U. S. 588, 593, 594, 36 Sup. Ct. 177, 60 L. Ed. 453, cited in the opinion of the court. The question there under consideration was, whether when goods carried to destination were lost, after they had been held more than a month uncalled for, the liability of the carrier was to be determined by the terms of the bill of lading or by the more limited liability of a warehouseman. Obviously there was no question in the case as to what constituted delivery, for there was no pretense of delivery, actual or constructive, and therefore the decision cannot be of service in determining this case.

The opinion of the court in this case concludes:

"The animals were in the car; no adequate time for unloading had transpired. The carrier had not fully performed the service incident to final delivery imposed by law. These included the furnishing of fair opportunity and proper facilities for safe unloading, although the shippers had contracted to do the work of actu-

al removal. See *Hutchinson on Carriers*, §§ 711, 714, 715."

I cannot find justification, in the sections cited, for such a statement of the law as is here made.

Section 711 deals with the obligation to unload carload freight, and, after saying that it is "the uniform rule and custom in this country" for the consignee to unload, the only other relevant statement of the writer is:

"All, therefore, that can be required of the railroad *company, is that it shall place the cars where they can be safely and conveniently unloaded."

This the carrier in the case before us had done to the satisfaction and acceptance of the consignee before the accident complained of.

Section 714 deals with the liability of the carrier pending removal (delivery) of the goods, and says:

"During this reasonable time [for delivery] the liability of the carrier remains unchanged; but so soon as it has elapsed he no longer stands in the relation of carrier to the goods, but in that of an ordinary bailee for hire."

The "reasonable time" here referred to is palpably that necessary for the carrier to wait before its obligation becomes that of a warehouseman when the consignee does not appear to claim the shipment; it is not applicable to the time for unloading after the property has been accepted by the consignee.

Section 715 declares that:

"If the consignee is bound to unload the goods himself from the car, it is the duty of the carrier to place the car where it can be unloaded with a reasonable degree of convenience and to furnish the consignee with safe and proper facilities for the purpose."

All of this the carrier in this case did, and the consignee not only approved as satisfactory, safe and proper, the position in which the car was placed and the facilities furnished for unloading it, but the delivery of the car was accepted and was in the actual possession and custody of the consignee for a very considerable time before the accident complained of happened. It was not in any attempt or effort on the part of the carrier to improve the unloading facilities or to assist the consignee that the damage was done, but it was the result of a tort, pure and simple—of a negligent switching operation, entirely independent of the delivery of the shipment, occurring a half hour after it had been accepted.

*The delivery having been completed and accepted by the consignee, the five-day limitation, so unreasonable in itself that it has been prohibited by congressional enactment (Act March 4, 1915, 38 Stat. 1196, c. 176, § 1

[Comp. St. § 8604a)], has, in my judgment, no applicability to this case, and to bottom the conclusion announced upon the definition of "transportation" in the Hepburn Act is to convert what was intended for the protection of shippers of property in interstate commerce, into an instrument of injury and injustice.

For the reasons thus stated I dissent from the opinion and judgment of the court.

Mr. Justice McKENNA and Mr. Justice BRANDEIS concur in this dissent. Mr. Justice DAY also dissents.

(250 U. S. 459)

AMERICAN MFG. CO. v. CITY OF ST. LOUIS.†

(Argued April 30, 1919. Decided June 9, 1919.)

No. 365.

1. COURTS ⇨366(5)—FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES.

The construction of a state statute made by the highest state court, in so far as it determines the meaning of the statute, is binding upon the federal Supreme Court.

2. COURTS ⇨366(5)—FEDERAL COURTS—CONSTRUCTION OF STATE STATUTE.

The question whether a state law or tax imposed thereunder deprives one of rights secured by federal Constitution depends, not upon the form of the act, nor upon how it is construed or characterized by the state court, but upon its practical operation and effect.

3. LICENSES ⇨5—OCCUPATION TAXES—AUTHORITY OF STATE.

Unless some particular interference with federal right is shown, the states are free to lay privilege and occupation taxes, and under such right a state or a city, acting under state authority, may impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city.

4. COMMERCE ⇨70—INTERSTATE COMMERCE—LICENSE TAXES—CORPORATE EARNINGS.

St. Louis ordinance enacted under Rev. St. Mo. 1909, § 9857, authorizing cities to license, tax, and regulate for local purposes the occupations of merchants and manufacturers, which in addition to an ad valorem property tax required every manufacturer to take out a license and to pay a license tax of \$1 on each \$1,000 of sales made, is not invalid under Const. art. 1, § 8, as a burden upon or regulation of interstate commerce, though the tax was collected for goods manufactured in St. Louis, but which were removed from the state before sale, for the tax under the construction of the ordinance by the highest Missouri court was limited to goods manufactured within St. Louis; time of payment merely being deferred until they should be sold.

5. CONSTITUTIONAL LAW ⇨287—DUE PROCESS—LICENSE TAXES.

St. Louis ordinance enacted under Rev. St. Mo. 1909, § 9857, which in addition to an ad valorem property tax required every manufacturer to take out a license and to pay a license tax of \$1 on each \$1,000 of sales made, is not invalid under amendment 14, as depriving a manufacturer, which maintained factories in other states of its property, without due process of law, though the tax was collected for goods manufactured in St. Louis, but which were removed from the state before sale.

In Error to the Supreme Court of the State of Missouri.

Action by the American Manufacturing Company against the City of St. Louis. A judgment for defendant was affirmed by the Missouri Supreme Court (270 Mo. 40, 192 S. W. 402; 198 S. W. 1183), and plaintiff brings error. Affirmed.

See, also, 250 U. S. —, 39 Sup. Ct. 493, 63 L. Ed. —.

*Messrs. S. Mayner Wallace and Shepard Barclay, both of St. Louis, Mo., for plaintiff in error.

Messrs. Everett Paul Griffin and Charles H. Daues, both of St. Louis, Mo., for defendant in error.

Mr. Justice PITNEY delivered the opinion of the Court.

The question is whether an ordinance of the city of St. Louis levying against manufacturers, especially as against plaintiff in error, a West Virginia corporation, a tax imposed as a condition of the grant of a license to carry on a manufacturing business in that city, but the amount of which is ascertained by and proportioned to the amount of sales of the manufactured goods, whether sold within or without the state, and whether in domestic or interstate commerce, is void as amounting to a regulation of commerce among the states and thus entrenching upon the power of the national Congress under article 1, § 8, of the Constitution, or as amounting to a taking of plaintiff's property without due process of law, in contravention of the Fourteenth Amendment.

A statute of the state (Rev. Stat. Mo. 1909, § 9857) authorizes cities to license, tax and regulate for local purposes the occupations of merchants and manufacturers and to graduate the amount of annual license imposed upon them in proportion to the sales made by such merchant or manufacturer during the year next preceding any fixed date. Pursuant to this authority the city, by the ordinance in question, in addition to an ad valorem property tax, requires every manufacturer in the city before doing or offering to do business as such to take out a license, and at a specified time to render a sworn

*461 statement of the aggregate amount of sales made by him during *the year next preceding the first Monday of June, and within a short time thereafter to pay a license tax of \$1 on each \$1,000 of sales made. Failure or refusal to deliver the required statement or to pay the license tax within the time specified is made a misdemeanor punishable by fine and the imposition of a double tax; making a false statement under oath is made punishable by forfeiture of the license in addition to a fine.

In a previous case (*Manufacturing Co. v. St. Louis*, 238 Mo. 267, 278, 142 S. W. 297), the Supreme Court of the state held that this tax did not apply to sales made of goods shipped from plaintiff's factory in the state of New York directly to purchasers in Texas, but only to sales from its St. Louis factory.

In the present case, which was a suit brought in a state court by plaintiff in error against the city to recover so much of a disputed tax as is measured by sales of goods manufactured by plaintiff in the city, afterwards removed to storage warehouses outside of the state, and later sold from these warehouses to purchasers in states other than Missouri, the trial court at first gave judgment in favor of plaintiff on this item, and this having been reversed by the Supreme Court of the state (270 Mo. 40, 192 S. W. 402), a new trial resulting in favor of the city, and the second judgment having been affirmed (Mo., 198 S. W. 1183), the case comes here on writ of error.

[1, 2] In construing the statute and ordinance and defining the nature and effect of the tax, the Supreme Court expressed itself as follows (270 Mo. p. 45, 192 S. W. 403):

*462 "It is not disputed that under the broad provision of its charter the city of St. Louis has the power to license and tax manufacturers within its limits; nor that the power includes the right to impose a tax upon the transaction of their business. Adopting substantially the definition we have quoted from the statute, it has, by ordinance, forbidden them to pursue their business within the city *without procuring a license, and has prescribed the additional tax they shall pay for that purpose, which is graduated to accord with the amount of business they shall carry to the point of realizing the profit or liquidating the loss by the sale of the product of their work. They may only buy and sell in pursuance of their business as manufacturers. That his right to pursue this business is the one thing he receives as compensation for this tax is evident; and that the method of fixing its amount by the amount that he realizes from the licensed activity is a just and equitable one is not disputed; nor is the inherent justness and fairness of postponing the payment until the realization of the result of the work. The tax is none the less a tax upon the business of manufacture pursued in the city of St. Louis under the protection of the laws of this state and the ordinances of the city. * * * We hold that the tax in ques-

tion is a tax upon the privilege of pursuing the business of manufacturing these goods in the city of St. Louis; that when the goods were manufactured the obligation accrued to pay the amount of the tax represented by their production when it should be liquidated by their sale by the manufacturer; that their removal from the city of St. Louis and storage elsewhere, whether within or without the state, worked no change in this obligation; that their sale by the respondent wherever they may have been stored at the time, whether it was done through its home office in New York or the office of its factory in St. Louis, should have been reported in its return to the license collector of the city of St. Louis and the amount included in fixing the amount payable on account of its license tax."

As a matter of construction, this, upon familiar principles, is conclusive upon us. But, as has been held very often, the question whether a state law or a tax imposed thereunder deprives a party of rights secured by the federal Constitution depends not upon the form of the act, nor *upon how it is construed or characterized by the state court, but upon its practical operation and effect. *St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350, 362, 35 Sup. Ct. 99, 59 L. Ed. 265; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294, 38 Sup. Ct. 126, 62 L. Ed. 295.

[3-5] The admitted facts show that the operation and effect of the taxing scheme now under consideration are correctly described in what we have quoted from the opinion of the state court. No tax has been, or is to be imposed upon any sales of goods by plaintiff in error except goods manufactured by it in St. Louis under a license conditioned for the payment of a tax upon the amount of the sales when the goods should come to be sold. The tax is computed according to the amount of the sales of such manufactured goods, irrespective of whether they be sold within or without the state, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the city of St. Louis.

There is no doubt of the power of the state, or of the city acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. Unless some particular interference with federal right be shown, the states are free to lay privilege and occupation taxes. *Clark v. Titusville*, 184 U. S. 329, 22 Sup. Ct. 382, 46 L. Ed. 569; *St. Louis v. United Railways Co.*, 210 U. S. 266, 276, 28 Sup. Ct. 630, 52 L. Ed. 1054.

The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should

come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. In order to mitigate the burden, and also perhaps, to bring merchants and manufacturers upon an equal footing in this regard, it has postponed ascertainment and payment of the tax until the manufacturer can bring the goods into market. A somewhat similar method of postponing payment has been pursued for many years by the federal government with respect to the internal revenue tax upon distilled spirits. Rev. Stat. §§ 3251, 3253 (Comp. St. §§ 5985, 5988); Act August 27, 1894, c. 349, § 48, 28 Stat. 509, 563 (Comp. St. § 5986).

To the suggestion that the tax burdens the mercantile rather than the manufacturing business, because it would be possible for one to manufacture goods to an unlimited extent and pay no tax unless they were sold, or to sell goods and be required to pay the tax although they were not manufactured by the seller, it is sufficient to say—answering the second point first—(a) that, according to the state law as laid down by the court of last resort in this case, a manufacturer has no right to sell goods except those of his own manufacture; and (b) it is not to be supposed that, for the purpose of evading a tax payable only upon the sale of his goods, a manufacturer would pursue the ruinous policy of making goods and locking them up permanently in warehouses. In the outcome the tax is the same in amount as if it were measured by the sale value of the goods but imposed upon the completion of their manufacture. The difference is that, for reasons of practical benefit to the taxpayer, the city has postponed payment until convenient means have been furnished through the marketing of the goods.

In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore it does not amount to a regulation of interstate commerce. And, for like reasons, it has not the effect of imposing a tax upon the property or the business transactions of plaintiff in error outside of the state of Missouri, and hence does not deprive plaintiff in error of its property without due process of law.

Our recent decisions cited in opposition to this view, *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 297, 38 Sup. Ct. 126, 62 L. Ed. 295, and *Looney v. Crane Co.*, 245 U. S. 178, 188, 38 Sup. Ct. 85, 62 L. Ed. 230, and other cases of the same kind referred to therein,

are so obviously distinguishable that particular analysis is unnecessary.

Judgment affirmed.

(250 U. S. 376)

DE GANAY v. LEDERER, Collector of Internal Revenue.

(Argued April 23, 1919. Decided June 9, 1919.)

No. 319.

1. STATUTES ⇨188—CONSTRUCTION—MEANING OF WORDS.

Unless the contrary appears, words of a statute are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them.

2. INTERNAL REVENUE ⇨7—INCOME TAX—"PROPERTY"—BONDS, MORTGAGES, AND STOCKS.

Within Act Oct. 3, 1913, § 2a, subd. 1, providing for tax on income from all property, bonds, mortgages, and certificates of stock are "property," and not mere evidences of ownership of interests which are property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

3. INTERNAL REVENUE ⇨7—INCOME TAX—"PROPERTY WITHIN UNITED STATES."

"Property within the United States," income from which, though it is owned by a nonresident alien, is subjected to tax by Act Oct. 3, 1913, § 2a, subd. 1, includes stocks and bonds of corporations organized under its laws, and bonds and mortgages secured on property in the state; the certificates of stock and the bonds and mortgages being in the state, with a company holding them under power of attorney, not only to collect interest and dividends, but to sell and reinvest, the maxim of "mobilia sequuntur personam" not applying to give the property situs at owner's domicile.

Certificate from the United States Circuit Court of Appeals for the Third Circuit.

Action by Emily R. De Ganay against Ephraim Lederer, Collector of Internal Revenue. There was a judgment for defendant, and the case was removed to the Circuit Court of Appeals, which certifies a question. Question answered in the affirmative.

Messrs. James Wilson Bayard and Frank P. Prichard, both of Philadelphia, Pa., for plaintiff.

Mr. Assistant Attorney General H. La Rue Brown, for defendant.

*Mr. Justice DAY delivered the opinion of the Court.

The Act of October 3, 1913, c. 16, § 2a, subd. 1, 38 Stat. 166, provides:

"That there shall be levied, assessed, collected and paid annually upon the entire net income

arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere."

Under this statutory provision a question arose as to the taxability of income from certain securities of Emily R. De Ganay, a citizen and resident of France. The District Court of the United States for the Eastern District of Pennsylvania held the income from the securities taxable. 239 Fed. 568. The case is here upon certificate from the Circuit Court of Appeals, from which it appears: That Emily R. De Ganay is a citizen of France, and resides in that country. That her father was an American citizen domiciled in Pennsylvania, and died in 1885, having devised one-fourth of his residuary estate, consisting of real property, to the Pennsylvania Company for Insurance on Lives and Granting Annuities, in trust to pay the net income thereof to her. She also inherited from her father a large amount of personal property in her own right free from any trust. This personal property is invested in stocks and bonds of corporations organized under laws of the United States and in bonds and mortgages secured upon property in Pennsylvania. Since 1885 the Pennsylvania Company has been acting as her agent under power of attorney, and has invested and reinvested her property, and has collected and remitted to her the net income therefrom. The certificates of stocks, bonds and mortgages had been and were in 1913 in the company's possession in its offices in Philadelphia. The company made a return of the income collected for the plaintiff for the year 1913 both from her real estate, which is not in controversy here, and her net income from corporate stocks and bonds and the bonds and mortgages held by her in her own right. The tax was paid under protest and recovery was sought by the proper action.

The question certified is limited to the net income collected by virtue of the power of attorney from the personal property owned by the plaintiff in her own right.

The power of attorney, which is attached to the certificate, authorizes the agent:

"To sell, assign, transfer any stocks, bonds, loans, or other securities now standing or that may hereafter stand in my name on the books of any and all corporations, national, state, municipal or private; to enter satisfaction upon the record of any indenture or mortgage now or hereafter in my name, or to sell and assign the same and to transfer policies of insurance, and

the proceeds, *also any other moneys to invest and reinvest in such securities as they may in their discretion deem safe and judicious to hold for my account; to collect and receipt for all interest and dividends, loans, stocks, or other securities now or hereafter belonging to me; to indorse checks payable to my order and to make or enter into any agreement or agreements they may deem necessary and best for my interest in the management of my business and affairs; also to represent me, and, in my behalf, to vote and act for me at all meetings connected with any company in which I may own stocks or bonds or be interested in any way whatever, with power also as attorney or attorneys under it for that purpose to make and substitute, and to do all lawful acts requisite for effecting the premises, hereby ratifying and confirming all that the said attorney or substitute or substitutes shall do therein by virtue of these presents."

[1-3] The question certified is:

"If an alien nonresident own stocks, bonds, and mortgages secured upon property in the United States or payable by persons or corporations there domiciled, and if the income therefrom is collected for and remitted to such nonresident by an agent domiciled in the United States, and if the agent has physical possession of the certificates of stock, the bonds and the mortgages, is such income subject to an income tax under the Act of October 3, 1913?"

The question submitted comes to this: Is the income from the stock, bonds, and mortgages, held by the Pennsylvania Company, derived from property owned in the United States? A learned argument is made to the effect that the stock certificates, bonds, and mortgages are not property, that they are but evidences of the ownership of interests which are property; that the property, in a legal sense, represented by the securities, would exist if the physical evidences thereof were destroyed. But we are of opinion that these refinements are not decisive of *the congressional intent in using the term "property" in this statute. Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them. To the general understanding and with the common meaning usually attached to such descriptive terms, bonds, mortgages, and certificates of stock are regarded as property. By state and federal statutes they are often treated as property, not as mere evidences of the interest which they represent. In *Blackstone v. Miller*, 188 U. S. 189, 206, 23 Sup. Ct. 277, 279 (47 L. Ed. 435), this court held that a deposit by a citizen of Illinois in a trust company in the city of New York was subject to the transfer tax of the state of New York and said:

"There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign Held Bonds*, 15 Wall. 300 [21 L. Ed. 179]. The taxation

in that case was on the interest on bonds held out of the state. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon v. Hooker*, 177 Mass. 335, 337 [58 N. E. 1078, 83 Am. St. Rep. 279]."

The Court of Appeals of New York, recognizing the same principle, treated such instruments as property in *People ex. rel. Jefferson v. Smith*, 88 N. Y. 576, 585:

"It is clear from the statutes referred to and the authorities cited and from the understanding of business men in commercial transactions, as well as of jurists and legislators, that mortgages, bonds, bills and notes have for many purposes come to be regarded as property and not as the mere evidences of debts, and that they may thus have a situs at the place where they are found like other visible, tangible chattels."

We have no doubt that the securities, herein involved, are property. Are they property within the United States? It is insisted that the maxim "*mobilia sequuntur personam*" *applies in this instance, and that the situs of the property was at the domicile of the owner in France. But this court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it, and that notes, bonds and mortgages may acquire a situs at a place other than the domicile of the owner, and be there reached by the taxing authority. It is only necessary to refer to some of the decisions of this court. *New Orleans v. Stemple*, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174; *Bristol v. Washington County*, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. Ed. 701; *Blackstone v. Miller*, supra; *State Board of Assessors v. Comptoir National d'Escompte*, 191 U. S. 388, 24 Sup. Ct. 109, 48 L. Ed. 232; *Carstairs v. Cochran*, 193 U. S. 10, 24 Sup. Ct. 318, 48 L. Ed. 596; *Scottish Union & National Ins. Co. v. Bowland*, 196 U. S. 611, 25 Sup. Ct. 345, 49 L. Ed. 619; *Wheeler v. New York*, 233 U. S. 434, 439, 34 Sup. Ct. 607, 58 L. Ed. 1030; *Iowa v. Slimmer*, 248 U. S. 115, 120, 39 Sup. Ct. 33, 63 L. Ed. 158. Shares of stock in national banks, this court has held, for the purpose of taxation may be separated from the domicile of the owner, and taxed at the place where held. *Tappan v. Merchants' National Bank*, 19 Wall. 490, 22 L. Ed. 189.

In the case under consideration the stocks and bonds were those of corporations organized under the laws of the United States, and the bonds and mortgages were secured upon property in Pennsylvania. The certificates of stock, the bonds and mortgages were in the Pennsylvania Company's offices in Philadelphia. Not only is this so, but the stocks, bonds and mortgages were held under a pow-

er of attorney which gave authority to the agent to sell, assign, or transfer any of them, and to invest and reinvest the proceeds of such sales as it might deem best in the management of the business and affairs of the principal. It is difficult to conceive how property could be more completely localized in the United States. There can be no question of the power of Congress to tax the income from such securities. Thus situated and held, and with the authority given to the local agent over them, we think the income derived is clearly from property *within the United States within the meaning of Congress as expressed in the statute under consideration. It follows that the question certified by the Circuit Court of Appeals must be answered in the affirmative.

So ordered.

Mr. Justice McREYNOLDS took no part in this case.

(250 U. S. 394)

CITY OF PAWHUSKA v. PAWHUSKA OIL & GAS CO. et al.

(Argued March 25, 1919. Decided June 9, 1919.)

No. 281.

1. CONSTITUTIONAL LAW — 135—IMPAIRMENT OF "CONTRACT" — "MUNICIPAL CORPORATION"—POWER TO REGULATE GAS RATES.

Municipal corporations are political subdivisions of the state, for the exercising of such governmental powers as may be intrusted to them, the nature and duration of which powers rest in the discretion of the state, and neither their charter nor any law conferring governmental powers constitutes a contract with the state within the meaning of the federal Constitution; therefore though an Oklahoma city gave a gas company a franchise to use the streets and alleys for its pipes, and, pursuant to Rev. Laws 1910, § 593, regulated charges, Laws 1913, c. 93, giving power to regulate rates to the Corporation Commission, and depriving the city of such authority, is not invalid as impairing the obligation of a contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract; Municipal Corporation.]

2. MUNICIPAL CORPORATIONS — 64—POWERS —LEGISLATIVE CONTROL.

A municipal corporation is a mere political division of the state, created as a convenient agency for exercising such governmental powers as may be intrusted to it, and the nature of such powers rests in the absolute discretion of the state.

In Error to the Supreme Court of the State of Oklahoma.

An order of the Oklahoma Corporation Commission made on petition of the Pawhuska Oil & Gas Company fixing the rates for

gas was, on appeal by the City of Pawhuska, affirmed by the Supreme Court of Oklahoma (166 Pac. 1058), and the City of Pawhuska brings error. Writ dismissed.

*395 *Mr. Preston A. Shinn, of Pawhuska, Okl., for plaintiff in error.

Mr. T. J. Leahy, of Pawhuska, Okl., for defendant in error.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

A city in Oklahoma is complaining here of an order of the corporation commission of the state, made in 1917, regulating the rates and service of a gas company engaged in supplying natural gas to the city and its inhabitants. The company has a franchise, granted by the city in 1909, which entitles it to have its pipe lines in the streets and alleys of the city and provides that the gas shall be supplied at flat or meter rates, at the option of the consumer, and that the rates shall not be in excess of fixed standards.

When the franchise was granted there was a provision in the state Constitution (article 18, § 7) reading:

"No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any municipality, shall divest the state, or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment. Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted."

And there also was a statutory provision (Rev. Stat. 1903, § 398; Rev. Laws 1910, § 593) declaring:

"All such grants shall be subject at all times to reasonable regulations by ordinance as to the use of streets and prices to be paid for gas or light."

*396 In 1913 the state Legislature adopted an act providing that the corporation commission "shall have general super*vision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services." Laws 1913, c. 93, § 2. It was under this act, and after a full hearing on a petition presented by the gas company, that the order in question was made. The order abrogates all flat rates, increases the meter rates, requires that the gas be sold through meters to be supplied and installed at the company's expense, and recites that the evidence produced at the hearing disclosed that the franchise rates had become inadequate and unremunerative and that supplying gas at flat rates was productive of wasteful use. On an appeal by the city the Supreme Court of the state affirmed the order. 166 Pac. 1058.

The city contended in that court—and it

so contends here—that at the time the franchise was granted it alone was authorized to regulate such charges and service within its municipal limits, that the Legislature could not transfer that authority to the Corporation Commission consistently with the Constitution of the state, and that in consequence the act under which the commission proceeded and the order made by it effected an impairment of the franchise contract between the city and the gas company in violation of the contract clause of the Constitution of the United States. Or, stating it in another way, the contention of the city was and is that the authority to regulate the rates and service, which concededly was reserved at the time the franchise was granted, was irrevocably delegated to the city by the Constitution and laws of the state, and therefore that the exertion of that authority by any other state agency, even though in conformity with a later enactment of the Legislature, operated as an impairment of the franchise contract.

Dealing with this contention the state court, while fully conceding that the earlier statute delegated to the city the authority claimed by it, held that this delegation was *to endure only "until such time as the state saw fit to exercise its paramount authority," *397 that under the state Constitution the Legislature could withdraw that authority from the city whenever in its judgment the public interest would be subserved thereby, and that it was effectively withdrawn from the city and confided to the corporation commission by the act of 1913. The claim that this impaired the franchise contract was overruled.

[1, 2] It is not contended, nor could it well be, that any private right of the city was infringed, but only that a power to regulate in the public interest theretofore confided to it was taken away and lodged in another agency of the state—one created by the state Constitution. Thus the whole controversy is as to which of two existing agencies or arms of the state government is authorized for the time being to exercise in the public interest a particular power, obviously governmental, subject to which the franchise confessedly was granted. In this no question under the contract clause of the Constitution of the United States is involved, but only a question of local law, the decision of which by the Supreme Court of the state is final.

"Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.

Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with *the state within the meaning of the federal Constitution." Hunter v. Pittsburg, 207 U. S. 161, 178, 28 Sup. Ct. 40, 46 (52 L. Ed. 151).

In *Dartmouth College v. Woodward*, 4 Wheat. 518, 629-630, 659-664, 668, 694, 4 L. Ed. 629, it was distinctly recognized that as respects grants of political or governmental authority to cities, towns, counties, and the like the legislative power of the states is not restrained by the contract clause of the Constitution; and in *East Hartford v. Hartford Bridge Co.*, 10 How. 511, p. 533 (13 L. Ed. 518), where was involved the validity of a state statute recalling a grant to a city, theretofore made and long in use, of power to operate and maintain a ferry over a river, it was said, that the parties to the grant did not stand—

"in the attitude towards each other of making a contract by it, such as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The Legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the Legislature as to this ferry must be considered rather as a public law than as contracts. They related to public interests. They changed as those interests demanded. The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the Legislature. * * * Hence, generally, the doings between them and the Legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes."

In *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, p. 91, 12 Sup. Ct. 142, p. 147 (35 L. Ed. 943), where a city, relying on the contract clause, sought a review by this court of a *judgment of a state court sustaining a statute so modifying the franchise of a waterworks company as to require the city to pay for water used for municipal purposes, to which it theretofore was entitled without charge, the writ of error was dismissed on the ground that no question of impairment within the meaning of the contract clause was involved. Some of the earlier cases were reviewed, and it was said:

"But further citations of authorities upon this point are unnecessary; they are full and conclusive to the point that the municipality, being a

mere agent of the state, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed, or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection. In this case the city has no more right to claim an immunity for its contract with the Waterworks Company than it would have had if such contract had been made directly with the state. The state, having authorized such contract, might revoke or modify it at its pleasure."

The principles announced and applied in these cases have been reiterated and enforced so often that the matter is no longer debatable. *Covington v. Kentucky*, 173 U. S. 231, 241, 19 Sup. Ct. 383, 43 L. Ed. 679; *Worcester v. Worcester Street Ry. Co.*, 196 U. S. 539, 548, 25 Sup. Ct. 327, 49 L. Ed. 591; *Braxton County Court v. West Virginia*, 208 U. S. 192, 28 Sup. Ct. 275, 52 L. Ed. 450; *Englewood v. Denver & South Platte Ry. Co.*, 248 U. S. 294, 296, 39 Sup. Ct. 100, 63 L. Ed. 253.

Writ of error dismissed.

(250 U. S. 454)

HANCOCK et al. v. CITY OF MUSKOGEE, OKL., et al.

(Submitted April 30, 1919. Decided June 9, 1919.)

No. 360.

1. COURTS ⇨366(5) — PRECEDENTS — CONSTRUCTION OF LOCAL STATUTES.

Decisions of the highest state court construing local statutes are conclusive on the federal courts.

2. CONSTITUTIONAL LAW ⇨290(3)—MUNICIPAL CORPORATIONS ⇨407(1) — DUE PROCESS OF LAW—ASSESSMENTS FOR MUNICIPAL IMPROVEMENTS—NOTICE.

Comp. Laws Okl. 1909, §§ 984-993, authorizing the mayor and councilmen in any municipality of not less than 1,000 inhabitants to establish a general sewer system, etc., having delegated the entire legislative power of the state with respect to the establishment of local sewer systems and the exercise of the taxing power in aid thereof to the municipalities, a municipal ordinance creating a sewer district and assessing the cost against property within the district is not invalid, as depriving property owners of their property without due process, in violation of Const. Amend. 14, because giving no notice to property owners or provision for hearing.

3. CONSTITUTIONAL LAW ⇨290(3)—DUE PROCESS OF LAW — MUNICIPAL IMPROVEMENT ASSESSMENTS.

Where the Oklahoma statutes relating to the establishment of sewer districts required the cost of the sewer to be distributed among

the different properties in the district in proportion to area, and the matter became one of mere computation, the fact an ordinance establishing a sewer district did not give property owners an opportunity to be heard as to the distribution of the costs of the sewer did not deprive property owners of their property without due process, in violation of the Fourteenth Amendment.

4. MUNICIPAL CORPORATIONS **495—ASSESSMENTS FOR IMPROVEMENTS—APPORTIONMENT—JUDICIAL SUPERVISION.**

Whether the entire amount, or a part only, of the cost of a local improvement, shall be imposed as a special tax upon the property benefited, and whether the tax shall be distributed upon a consideration of the particular benefit to particular lots, apportioned according to frontage, value, or area, is a matter of legislative discretion, subject to judicial relief in cases of actual abuse of power or substantial error in executing it.

In Error to the Supreme Court of the State of Oklahoma.

Suit by W. A. Hancock and others against the City of Muskogee, Okl., and others. A judgment for defendants was affirmed by the Oklahoma Supreme Court (168 Pac. 445), and complainants bring error. Affirmed.

Messrs. B. B. Blakeney and James H. Maxey, both of Tulsa, Okl., and Grant Foreman and James D. Simms, both of Muskogee, Okl., for plaintiffs in error.

Messrs. Nathan A. Gibson and Joseph L. Hull, both of Muskogee, Okl., for defendants in error.

* Mr. Justice PITNEY delivered the opinion of the Court.

Plaintiffs in error, owners of real estate in the city of Muskogee, brought suit in an Oklahoma state court seeking an injunction to restrain the city and its officials from encumbering their lands with a special assessment to pay for the construction of a sewer in sewer district No. 12 of that city, contending that the statutes of the state and the ordinances of the city under which the district was created and the cost of the sewers therein assessed against the property within the district were in violation of the Fourteenth Amendment, in that they deprived plaintiffs of their property without due process of law. The trial court refused relief, the Supreme Court of Oklahoma affirmed its judgment (168 Pac. 445), and the case comes here by writ of error.

The statutes, as they existed at the time the proceedings in question were had, are to be found in Snyder's Comp. Laws Okl. 1909, §§ 984-993. They authorize the mayor and councilmen in any municipal corporation having a population of not less than 1,000 to establish a general sewer system composed of public, district, and private sewers, and

also to cause district sewers to be constructed within districts having limits prescribed by ordinance; the cost of district sewers to be apportioned against all lots and pieces of ground in the district in proportion to area, disregarding improvements and excluding the public highways.

It is contended that the statute is void because it gives no notice to property owners and makes no provision for hearing them as to the formation of the district or its boundaries, the proposed plan or method of building the sewer, or the amount to be assessed upon property in the district. While it is conceded to have been established by previous decisions of this court that, where the Legislature *fixes by law the area of a sewer district or the property which is to be assessed, no advance notice to the property owner of such legislative action is necessary in order to constitute due process of law, it is insisted that in the present case the Legislature has not done this, and hence it is essential to the protection of the fundamental rights of the property owner that at some stage of the proceeding he have notice and an opportunity to be heard upon the question whether his property is erroneously included in the sewer district because it cannot be benefited by the sewer, or for any other reason is improperly subjected to assessment.

[1,2] But we find it to be settled by decisions of the Supreme Court of Oklahoma, which as to this are conclusive upon us, that in respect to the establishment and construction of local sewer systems and the exercise of the power of taxation in aid of this purpose, the entire legislative power of the state has been delegated to the municipalities. In *City of Perry v. Davis*, 18 Okl. 427, p. 445, 90 Pac. 865, p. 870, referring to this same legislation the court held:

"When the Legislature delegated the power to the mayor and councilmen of municipal corporations in this territory, having a bona fide population of not less than 1,000 persons, to establish a general sewer system, that delegation of power carried with it all the incidental powers necessary to carry its object into effect within the law. Of what utility would such a grant of power be if unaccompanied with sufficient power to carry it into effect? Under our system the power of taxation is vested exclusively in the legislative branch of the government but it is a power that may be delegated by the Legislature to municipal corporations, which are mere instrumentalities of the state for the better administration of public affairs. When such a corporation is created it becomes vested with the power of taxation to sustain itself with all necessary public improvements, unless the exercise of that *power be expressly prohibited. That the mayor and council of the city of Perry was authorized to establish and construct a necessary sewer system for the city, in the absence of prohibitive statutes, should not be questioned. The power to establish and construct a sewer system carried

with it the power to create indebtedness and taxation for its payment."

The court further held that the act constituted due process, and that the passage and publication of an ordinance establishing a sewer district constituted sufficient notice and conferred jurisdiction upon the city authorities to perform the work and provide payment therefor. This was followed in *City of Muskogee v. Rambo*, 40 Okl. 672, 680, 138 Pac. 567, and also in the present case.

So far, therefore, as the present ordinance determined that a district sewer should be constructed, and established the bounds of the district for the purpose of determining what property should be subjected to the special cost of constructing it, there was an authorized exercise of the legislative power of the state, which, according to repeated decisions of this court, was not wanting in due process of law because of the mere fact that there was no previous notice to the property owners or opportunity to be heard. The question of distributing or apportioning the burden of the cost among the particular property owners is another matter. *Spencer v. Merchant*, 125 U. S. 345, 355, 357, 8 Sup. Ct. 921, 31 L. Ed. 763; *Paulsen v. Portland*, 149 U. S. 30, 40, 13 Sup. Ct. 750, 37 L. Ed. 637; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 343, 21 Sup. Ct. 625, 45 L. Ed. 879; *Shumate v. Heman*, 181 U. S. 402, 21 Sup. Ct. 645, 45 L. Ed. 916, 922, affirming *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559; *Wagner v. Baltimore*, 239 U. S. 207, 218, 36 Sup. Ct. 66, 60 L. Ed. 230; *Withnell v. Ruecking Construction Co.*, 249 U. S. 63, 39 Sup. Ct. 200, 63 L. Ed. 479.

We do not mean to say that if in fact it were made to appear that there was an arbitrary and unwarranted exercise of the legislative power, or some denial of the equal protection of the laws in the method of exercising it, *judicial relief would not be accorded to parties aggrieved. The facts of this case raise no such question. See *Wagner v. Baltimore*, 239 U. S. 207, 220, 36 Sup. Ct. 66, 60 L. Ed. 230; *Houck v. Little River District*, 239 U. S. 254, 265, 36 Sup. Ct. 58, 60 L. Ed. 266; *Myles Salt Co. v. Iberia Drainage District*, 239 U. S. 478, 485, 36 Sup. Ct. 204, 60 L. Ed. 392, L. R. A. 1918E, 190; *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S. 55, 59, 36 Sup. Ct. 254, 60 L. Ed. 523.

The chief reliance of plaintiff in error is upon those decisions which have held that where the Legislature, instead of determin-

ing for itself what lands shall be included in a district or what lands will be benefited by the construction of a sewer, submits the question to some board or other inferior tribunal with administrative or quasi judicial authority, the inquiry becomes in its nature judicial in such a sense that property owners are entitled to a hearing or an opportunity to be heard before their lands are included. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 166, 167, 174, 175, 17 Sup. Ct. 56, 41 L. Ed. 369; *Parsons v. District of Columbia*, 170 U. S. 45, 52, 18 Sup. Ct. 521, 42 L. Ed. 943; *Embree v. Kansas City Road District*, 240 U. S. 242, 247, 36 Sup. Ct. 317, 60 L. Ed. 624. But they have no application to a case where, as in the case before us, full legislative power over the subject-matter has been conferred by the state upon a municipal corporation. Where that has been done, a legislative determination by the local legislative body is of the same effect as though made by the general Legislature. *Withnell v. Ruecking Construction Co.*, 249 U. S. 63, 70, 39 Sup. Ct. 200, 63 L. Ed. 479.

[3, 4] It is suggested further that the statutes and ordinances in question were wanting in due process, in that they afforded the property owner no opportunity to be heard as to the distribution of the cost of the sewer among the different properties in the district or the ascertainment of the amount of the assessment to be imposed upon the lands of plaintiffs in error. Respecting this, it is sufficient to say that as the Legislature itself has prescribed that the entire cost of a district sewer shall be apportioned against the lots in the district in proportion to area (excluding *the highways), there is no occasion for a hearing with respect to the mode in which the assessment shall be apportioned, since this is resolved into a mere mathematical calculation. And it is settled by the cases above cited that whether the entire amount or a part only of the cost of a local improvement shall be imposed as a special tax upon the property benefited, and whether the tax shall be distributed upon a consideration of the particular benefit to particular lots or apportioned according to their frontage upon the streets, their values, or their area, is a matter of legislative discretion, subject, of course, to judicial relief in cases of actual abuse of power or of substantial error in executing it, neither of which is here asserted.

Judgment affirmed.

(250 U. S. 383)

PENNSYLVANIA R. CO. v. MINDS.

SAME v. MINDS et al.

(Argued April 23, 1919. Decided June 9, 1919.)

Nos. 293 and 294.

1. COMMERCE ⚡94 — DISCRIMINATION — ACTIONS ON COMMISSION'S AWARDS — AMENDING DECLARATIONS.

Allowing in actions, tried together, on reparation awards by the Interstate Commerce Commission, one in favor of a partnership, the other in favor of its successor, but both against the same carrier, an amendment to correct mistake in the declarations, transposing the awards, *held* in court's discretion.

2. COMMERCE ⚡97 — DISCRIMINATION BY CARRIER — AWARD BY COMMISSION — INTEREST.

Shippers being, under Act to Regulate Commerce, § 8 (Comp. St. § 8572), entitled to full compensation for damages from discrimination by carrier in car distribution, neither allowance of interest as part of award by Interstate Commerce Commission nor instruction, in action on the award, that the jury might do so, is error, though recovery was less than amount of claim before Commission; the carrier never having offered any payment.

3. APPEAL AND ERROR ⚡216(6)—REVIEW—FAILURE TO CHARGE—CALLING COURT'S ATTENTION.

Failure to charge one of numerous requested points was waived, and cannot be reviewed; counsel, on statement of judge that he thought he had covered all the points submitted, and invitation to call attention to any point, not mentioning the point, but making another request, and excepting generally to refusal to charge requested points.

In Error to the United States Circuit Court of Appeals for the Third Circuit.

Two actions, one by James H. Minds, surviving partner, etc., and the other by James H. Minds and another, partners, both against the Pennsylvania Railroad Company. Judgments for plaintiffs were affirmed by the Circuit Court of Appeals (244 Fed. 53, 156 C. C. A. 481), and defendant brings error. Affirmed.

*Messrs. Francis I. Gowen, of Philadelphia, Pa., and Frederic D. McKenney, of Washington, D. C., for plaintiff in error.

Mr. James A. Gleason, of Du Bois, Pa., for defendants in error.

Mr. Justice DAY delivered the opinion of the Court.

These cases were tried together in the courts below and may be considered and disposed of in like manner here. *They were brought upon reparation orders made by the Interstate Commerce Commission based upon alleged discrimination against the plaintiffs in car distribution. Two periods were in controversy: In No. 293 from July 1, 1902,

to October 1, 1904; in No. 294 from October 1, 1904 to June 30, 1907. Verdicts and judgments were recovered in both cases against the company. The judgments were affirmed in the Circuit Court of Appeals. 244 Fed. 53, 156 C. C. A. 481.

During the first period James H. Minds and William J. Matz, trading as Bulah Coal Company, operated the mine alleged to have been subjected to unlawful discrimination. During the second period a partnership, composed of Minds and the widow of Matz, trading under the same name, operated the mine. Two proceedings for reparation were brought before the Interstate Commerce Commission. In the first an order of reparation in the sum of \$18,591.48 was awarded, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907. For the second period an award was made in the sum of \$31,715.57, with 6 per cent. interest from the same date. The verdicts of the jury were, for the first period, \$16,092.92; for the second period \$33,618.37.

[1] 1. The plaintiff in error complains of the allowance of an amendment correcting a mistake in the declarations transposing the awards. The mistake was first noticed by the court near the close of the trial. This amendment was so obviously just and within the court's discretion that we need only say that we think no error was committed in allowing it.

[2] 2. It is insisted that the court erred in allowing the jury to add interest not exceeding 6 per cent. on the damages found; this upon the theory that the recoveries were below the amounts claimed before the Commission which were so large as to be wholly unfair. But the defendants in error were entitled to full compensation for the damages *sustained as the result of the wrongful discrimination against them. Section 8 of the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [Comp. St. § 8572]). The Commission allowed interest as part of its award, and the District Court charged the jury that it might do so in making up its verdicts. We see no error in this. For years these claims have been contested, the company never offered any payment of the awards, and unless interest is to be allowed there seems to be no means of making the claimants whole for the wrongs sustained by violations of the statute.

3. It is contended that the court erred in fixing counsel fees, as only those are allowable which compensate for court services. *Meeker v. Railroad*, 236 U. S. 412, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691. But we are not prepared to say that the court abused its discretion in fixing the fees. There is nothing to warrant our interference with the judgments in this respect.

4. Error is alleged in the charge as to the cost of producing the coal which entered into

the computation of damages. Upon this point there was a conflict in the testimony, and an examination of the charge satisfies us that the question was fully and fairly left to the jury.

[3] 5. We come to the final and most serious complaint of error in the proceedings. As to the first period there was no contest over the amount of tonnage which the plaintiffs could have shipped, had the cars been fairly distributed during that period. As to the second period, the contention is that there was testimony tending to show that the Commission awarded reparation under a rule which violated its own final determination of the correct rule, in the same manner as was shown in *Penna. R. R. Co. v. Jacoby*, 242 U. S. 89, 37 Sup. Ct. 49, 61 L. Ed. 165, resulting in the reversal of the judgment in that case. There is no showing that the court gave a wrong rule in this respect in its charge to the jury. But here, as in the *Jacoby Case*, the company called an expert witness who testified that the *tables in a blueprint, put in evidence by the complainants before the Commission, were made upon a basis of car distribution, which, if applied to complainants, would result, as pointed out in the *Jacoby Case*, in giving to them the wrongful preference which had been awarded to favored companies. The witness testified that a computation showed that the Commission, in making its award, had followed this erroneous table and had used its percentages as the basis of its award. The record discloses that the company asked 18 special points to be given in charge to the jury, in 2 of which it requested charges which were based on this witness' testimony as to the inaccuracy of the tables, asking the court in substance to say to the jury that, if the Commission used such tables in making its computation, the awards were on a wrong basis and should be disregarded.

The Circuit Court of Appeals answered this contention by distinguishing the *Jacoby Case*—in that the recovery in that case was based wholly upon the award of the Commission and in precisely the same amount, whereas, in this case there was other testimony as to the damages, and the jury awarded a recovery in a sum much less than the amount fixed by the Commission. If these were all the grounds of distinction between this and the *Jacoby Case* we should be constrained to hold that the failure to give the company's special requests, based on the expert's testimony, was substantial error, requiring a reversal; but at the close of his charge the judge said:

"I think I have gone over the subject-matter of all the different points submitted to me. So far as they are affirmed in the general charge they are affirmed, and so far as not affirmed in the general charge they are disaffirmed, and counsel, if they choose, may call my attention to

any specific point which they would like to have specifically answered."

The court in its charge had not adverted to the effect *to be given to the testimony of the defendant's expert. The observations, just referred to, called upon counsel to direct the court's attention to points omitted. The plaintiff's counsel called the court's attention to some things. Counsel for the company said:

"In the first period, we do not dispute the lost tonnage, only the cost. In the second period, we dispute the correctness both of plaintiffs' cost figures and also the tonnage. We ask that the court so charge."

The court responded:

"Now, gentlemen, I want to make that clear. In the first period, there is no question of the tonnage raised. The defendant concedes the amount of the tonnage, and the difference is all over the cost. So you need not trouble yourselves there with any other question than the cost question. In the second period, the claim is questioned in two respects; the cost, just as it is in the first period, and the tonnage is also questioned. So, of course, you cannot determine the amount of damage until you have settled both of those questions.

"I understand that the parties have agreed that their respective statements of their positions may be sent out in order to save the jury the labor of making calculations. Is that correct?"

Counsel for the plaintiff and for the company each answered:

"Yes, sir."

"The Court: So, gentlemen, you will have the benefit of the figuring of the parties on each side, which will present their respective views. You will take the case and dispose of it. * * *

"Counsel for the defendant excepted to the refusal of the trial judge to charge as requested by them in such points as were not affirmed. (Exception noted for defendant by direction of the court.)"

We have, then, this situation: After a charge dealing with the general questions in the case, with numerous *special requests to charge "points" as they are called, the presiding judge expressed the view that he thought he had gone over the subjects embraced in the requests submitted. That he had omitted some is not surprising, for the court was dealing with an exceedingly difficult and complicated situation of car distribution, concerning which the Interstate Commerce Commission, the body primarily intrusted with the determination of such matters, had long deliberated before announcing the rule upon which it finally acted and made its award in the series of cases of which those now before us are a part. Upon the invitation of the trial judge the company's counsel made the request which we have quoted, and the judge at once complied

with it, and charged, as counsel desired, upon that particular subject, adding that he understood that the parties had agreed that the respective statements of their positions might go to the jury to save it the labor of making calculations. In this way the parties got before the jury the calculations showing their respective claims. This may have been and probably was the reason for the failure of counsel to call attention to the omission to answer the particular points requested concerning the effect to be given to the testimony of the defendant's witness, if credited by the jury. Apparently counsel were satisfied when the jury had before it the table showing the basis of their claims in the case. But, whatever the reason, the court, after a careful and painstaking charge, thinking he had answered the "points" of both sides, called upon counsel to suggest omissions as to particular points; then followed the proceedings already recited. We think counsel should have directed attention to the omission which it is evident was inadvertent. The case, in this aspect, is entirely unlike the Jacoby Case, where a specific request was made and refused, and a recovery had upon an award of the Commission which the testimony tended to show was made upon a wrong basis.

*This court has repeatedly held that objections to the charge of a trial judge must be specifically made in order that he may be given an opportunity to correct errors and omissions himself before the same are made the basis of error proceedings; this is the only course fair to the court and the parties. *McDermott v. Severe*, 202 U. S. 600, 610, 26 Sup. Ct. 709, 50 L. Ed. 1162; *Norfolk & Western Ry. Co. v. Earnest*, 229 U. S. 114, 120, 33 Sup. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172; *United States v. Fidelity Co.*, 236 U. S. 512, 529, 35 Sup. Ct. 298, 59 L. Ed. 696; *Jacobs v. Southern Ry.*, 241 U. S. 229, 236, 36 Sup. Ct. 588, 60 L. Ed. 970; *Guerini Stone Co. v. Carlin Co.*, 248 U. S. 334, 338, 39 Sup. Ct. 102, 63 L. Ed. 275. Parties may not rest content with the procedure of a trial, saving general exceptions to be made the basis of error proceedings, when they might have had all they were entitled to by the action of the trial court had its attention been seasonably called to the matter.

The trial court and the Court of Appeals have refused to disturb the amounts awarded by the jury as compensation for the clear violation of the Interstate Commerce Act, which these records disclose, and which was very much less than the sums awarded by the Commission when the allowance of interest is considered which under the court's instructions entered into the verdicts. We think the only serious ground upon which reversal may be asked is found in the failure to give the points, to which we have re-

ferred, and as to them, we are of the opinion that such failure was waived by the course of proceeding to which attention has been directed.

Affirmed.

(250 U. S. 483)

SOUTHERN PAC. CO. v. BOGERT et al.

(Argued April 17 and 21, 1919. Decided June 9, 1919.)

No. 305.

1. CORPORATIONS ⇨182—MAJORITY STOCK-HOLDERS—FIDUCIARY RELATION—PROPERTY OF CORPORATION.

While the owners of the majority of the shares in a corporation have the right to control it, they occupy a fiduciary relation to the minority, and if through that control a sale of the corporate property is made, and the property acquired by the majority, the minority may not be excluded from a fair participation in the fruits of the sale.

2. APPEAL AND ERROR ⇨1094(1)—REVIEW—FINDINGS—INTERMEDIATE COURTS.

The concurrent findings of fact by two lower courts will be accepted as correct by the Supreme Court where no adequate reason appears for challenging the correctness of such findings.

3. EQUITY ⇨71(4)—“LACHES”—LAPSE OF TIME—PREJUDICE.

The right of a complainant to maintain an effective suit is not barred by laches because of lapse of time alone, where there has been no prejudice from delay, and where complainant did not acquiesce in the situation, but maintained other suits, though mistaking his remedy; for the essence of “laches” is not mere lapse of time, but is acquiescence or lack of diligence in seeking a remedy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Laches.]

4. EQUITY ⇨82—LACHES—PENDENCY OF LEGAL PROCEEDINGS BY OTHERS—INTERVENTION.

Where a cause of action is of such a nature that a suit to enforce it would be brought on behalf, not only of the plaintiff but of all similarly situated, it is not necessary that each of such persons should intervene in order that he may be deemed thereafter free from the laches which bars those who sleep on their rights.

5. JUDGMENT ⇨570(9, 14)—CONCLUSIVENESS—PRIOR LITIGATION—DISMISSAL—WANT OF JURISDICTION—FORM OF REMEDY.

Where other suits begun by complainants or persons in like situation were dismissed for want of jurisdiction, or were decided adversely on appeal on the ground that the remedy which complainants finally invoked was widely at variance from the theory on which the cases were commenced and tried, such judgments are not conclusive adjudications barring complainants' right to recover in a suit where the appropriate remedy was seasonably invoked.

6. ELECTION OF REMEDIES ⇨12—ACTS CONSTITUTING ELECTION — INCONSISTENCY OF REMEDIES.

A fruitless attempt to recover by an unavailing remedy does not constitute an election which will deprive one of his rights properly recoverable by a different and appropriate remedy.

7. CORPORATIONS ⇨573(3)—REORGANIZATION — CONSTRUCTION OF AGREEMENT — UNDERWRITER OR BANKER.

Defendant, which through a subsidiary corporation controlled a third corporation in which complainants were minority shareholders, *held* not to have acted as underwriter or banker in reorganization scheme which, as carried out, deprived complainants of any participation in the proceeds of the sale; the entire stock of the reorganized corporation being obtained by defendant.

8. CORPORATIONS ⇨190—LIABILITY FOR ACTS OF CONTROLLED CORPORATION.

A corporation which through its control of another which held a majority of the stock of a third corporation caused the third to take action detrimental to the interests of its minority stockholders is liable therefor to the same extent as though it had been itself the holder of the controlling stock.

9. CORPORATIONS ⇨575—REORGANIZATION—MAJORITY SHAREHOLDERS—LIABILITY TO MINORITY SHAREHOLDERS.

Where defendant, which controlled the majority of the stock of a corporation, by means of a reorganization scheme prevented minority shareholders from participating in the distribution of the stock of the reorganized corporation, and obtained the whole for itself, relief cannot be denied on the ground that defendant was not guilty of fraud or mismanagement; the relief being based on breach of a fiduciary relation.

10. CORPORATIONS ⇨190 — SUITS BETWEEN SHAREHOLDERS—PARTIES.

To a suit by minority stockholders against the majority stockholder, based on the alleged misuse of its power as such, for its own benefit, and to the detriment of the minority stockholders, and in which no corporate right is asserted, the corporation is neither an indispensable nor necessary party.

11. CORPORATIONS ⇨575 — REORGANIZATION — RIGHTS OF MINORITY STOCKHOLDERS — PROVISION FOR FLOATING INDEBTEDNESS.

Where, pursuant to a reorganization scheme, the holder of the majority of the shares of a railroad corporation obtained all of the stock of the reorganized corporation, depriving the minority shareholders of participation in such stock, the fact that no provision was made for the floating indebtedness of the original corporation *held* no bar to relief in favor of the minority sought on the ground of breach of a fiduciary relation.

12. APPEAL AND ERROR ⇨1108—PROCEEDINGS AFTER REMAND — CHANGE OF CONDITIONS—DECREE INVOLVING HARDSHIP.

Where defendant, which controlled a majority of the shares of a railroad corporation,

in carrying out a reorganization scheme, deprived the minority shareholders of any participation in the shares of the reorganized company, and before they had asserted any claim to the stock in specie deposited such shares as collateral for a bond issue, *held* that, where financial conditions had greatly changed because of the World War, after entry of decree directing defendant to deliver to the minority shareholders certain shares, defendant should upon remand of the cause on other grounds be given an opportunity to show whether such decree would work an undue hardship.

13. CORPORATIONS ⇨575—REORGANIZATION—RIGHT TO STOCK—INDEBTEDNESS.

Where in a suit by minority stockholders to compel the delivery in specie of the proportionate number of the shares of a reorganized corporation which they should have received, had not defendant secured the whole issue by virtue of its control of a majority of the shares of the original corporation, *held*, that the contention that the minority stockholders should be compelled to bear their proportionate share of the floating indebtedness which was either paid by defendants, or was due to corporations subsidiary to it, was raised in time, and should be disposed of.

14. CORPORATIONS ⇨575 — REORGANIZATION — RIGHTS OF MAJORITY STOCKHOLDERS—INDEBTEDNESS.

Where defendant, which controlled a majority of the stock of a railroad corporation, acquired all of the stock upon reorganization and discharged floating indebtedness, some of which was due its subsidiary, *held*, that the minority stockholders, as a condition to compelling defendant to issue them in specie their proportionate number of shares, should be required to bear their proportionate expense of the floating indebtedness.

15. EQUITY ⇨114—INTERVENTION — DISCRETION OF COURT.

It was within the discretion of the trial court to allow other minority shareholders and representatives of a deceased minority stockholder to intervene in a suit by minority stockholders to compel defendant, which by its control of a majority of the shares acquired all of the stock of the corporation on reorganization, to deliver in specie the proportionate number of shares to which they were entitled.

16. CERTIORARI ⇨37—PARTIES — INTERVENTION.

Where on certiorari to the Supreme Court a decree in favor of minority stockholders against defendant, which, by virtue of its control of the majority of the stock of a corporation, acquired the whole of the stock on reorganization, was modified, and the cause remanded, *held*, that petitions for leave to intervene and to share in the benefits of the decree, filed in the Supreme Court by other minority stockholders, should be dismissed without prejudice to the right of such petitioners to apply to the lower court for leave to intervene.

Mr. Justice McReynolds, dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Suit by Henry L. Bogert and others, as executors under the last will and testament of Walter B. Lawrence, deceased, and others, against the Southern Pacific Company. A decree for complainants (226 Fed. 500) was affirmed by the Circuit Court of Appeals (244 Fed. 61, 15 C. C. A. 489), and defendant brings certiorari. Henry J. Chase and others filed separate petitions in the Supreme Court praying leave to intervene. Decree modified, and cause remanded for further proceedings; the petitions to intervene being denied without prejudice.

See, also, 250 U. S. —, 39 Sup. Ct. 492, 63 L. Ed. —.

Messrs. Lewis H. Freedman, Gordon M. Buck, and Arthur H. Van Brunt, all of New York City, for petitioner.

*Messrs. Charles E. Hughes and H. Snowden Marshall, both of New York City, for respondents.

Mr. Justice BRANDEIS delivered the opinion of the Court.

In 1888, and for some years prior thereto, the Southern Pacific Company dominated the Houston & Texas Central Railway Company, electing directors and officers through one of its subsidiaries, which owned a majority of the Houston Company stock. In 1888, pursuant to a reorganization agreement, mortgages upon the Houston Company properties were foreclosed, and these were acquired by the Houston & Texas Central Railroad Company; the old company's outstanding bonds were exchanged for bonds of the new; all the new company's stock was delivered to the Southern Pacific; its lines of railroad were incorporated in the transcontinental system of that corporation; and the minority stockholders of the old Houston Company received nothing. In 1913 the appellees, suing on behalf of themselves and other minority stockholders, brought this suit in the Supreme Court of New York to have the Southern Pacific declared trustee for them of stock in the new Houston Company and for an accounting. The plaintiffs below being citizens and residents of New York, and the Southern Pacific, a Kentucky corporation, it removed the case to the District Court of the United States for the *Eastern District of New York; and that court, after a hearing on the evidence, entered a decree for the plaintiffs. Bogert v. Southern Pacific Co., 226 Fed. 500. See, also, Bogert v. Southern Pac. Co. (D. C.) 215 Fed. 218, and Id. (D. C.) 211 Fed. 776. There had been issued by the old Houston Company 77,269 shares of stock, and by the new 100,000 shares. The decree declared that the Southern Pacific held for plaintiffs and other stockholders who intervened 24,347.9 shares in the new Houston

Company, directed that it should deliver to them these shares and also in cash the sum of \$702,336.61 (being the aggregate of all dividends paid thereon) and interest thereon from the times the several dividends were received, upon receiving from them 18,816 shares in the old Houston Company and also with each share of old stock delivered \$26¹ in cash and interest thereon from February 10, 1891. This decree was affirmed by the Circuit Court of Appeals (Bogert v. Southern Pac. Co., 244 Fed. 61, 156 C. C. A. 489); and the case comes here on certiorari (245 U. S. 668, 38 Sup. Ct. 190, 62 L. Ed. 539).

[1] In considering the many objections urged against the decree, it is important to bear constantly in mind the exact nature of the equity invoked by the bill and recognized by the lower courts. The minority stockholders do not complain of a wrong done the corporation or of any wrong done by it to them. They complain of the wrong done them directly by the Southern Pacific and by it alone. The wrong consists in its failure to share with them, the minority, the proceeds of the common property of which it, through majority stockholdings, had rightfully taken control. In other words, the minority assert the right to a pro rata share of the common property; and equity enforces the right by declaring the trust on which the Southern Pacific holds it and ordering distribution or compensation. The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it *occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors. If through that control a sale of the corporate property is made and the property acquired by the majority, the minority may not be excluded from a fair participation in the fruits of the sale.²

[2] The facts on which the decree is based are carefully set forth in the bill of complaint; and the decree declares in terms that every allegation contained in it is true. No adequate reason is shown for challenging, in any respect material for the purposes of this opinion, the correctness of this concurrent finding of the two lower courts; and it is accepted as correct. Baker v. Schofield, 243 U. S. 114, 118, 37 Sup. Ct. 333, 61 L. Ed. 626. The detailed facts and the evidence upon which they rest are fully recited in the opinions delivered below or in the earlier litigation hereafter referred to; and the facts will be recited here only so far as necessary

¹ The exact figure is \$26.026.

² Menier v. Hooper's Telegraph Works, L. R. 9 Ch. App. 350, 354; Ervin v. Oregon Ry. & Nav. Co. (C. C.) 20 Fed. 577; Id. (C. C.) 27 Fed. 625; Farmers' Loan & Trust Co. v. New York & Northern Ry. Co., 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; Sparrow v. E. Bement & Sons, 142 Mich. 441, 105 N. W. 881, 10 L. R. A. (N. S.) 725.

to an understanding of the several errors of law now insisted upon.

[3, 4] First. The Southern Pacific contends that plaintiffs are barred by laches. The reorganization agreement is dated December 20, 1887; the decree of foreclosure and sale was entered May 4, 1888; the sale was held September 8, 1888; and the stock in the new company was delivered to the Southern Pacific on February 10, 1891. This suit was not begun until July 26, 1913; and not until that time was there a proper attempt to assert the specific equity here enforced, namely, that the Southern Pacific received the stock in the new Houston Company as trustee for the stockholders of the old. More than 22 years had thus elapsed since the wrong complained of was committed. But the essence of laches is not merely lapse of time. It is essential that there be also acquiescence in the *alleged wrong or lack of diligence in seeking a remedy. Here plaintiffs, or others representing them, protested as soon as the terms of the reorganization agreements were announced; and ever since they have with rare pertinacity and undaunted by failure persisted in the diligent pursuit of a remedy as the schedule of the earlier litigation referred to in the margin demonstrates.³ Where the cause of action is of such a nature that a suit to enforce it would

be brought on behalf, not only of the plaintiff, but of *all persons similarly situated, it is not essential that each such person should intervene in the suit brought in order that he be deemed thereafter free from the laches which bars those who sleep on their rights. *Cox v. Stokes*, 156 N. Y. 491, 511, 51 N. E. 316. Nor does failure, long continued, to discover the appropriate remedy, though well known, establish laches where there has been due diligence, and, as the lower courts have here found, the defendant was not prejudiced by the delay.

[5, 6] Second. The Southern Pacific contends that adverse decisions in the earlier litigation are a bar either as an estoppel or by way of election of remedies; since the prosecution of some, if not all, of the earlier suits also was actively supported by the minority stockholders' committee, and the plaintiffs are bound as privies to the full extent to which the decrees therein constitute res judicata. But in none of these suits was the question here in issue decided. Except in so far as those cases were disposed of on objections to jurisdiction, they decided merely that the foreclosure could not be set aside as fraudulent; that the minority stockholders could not have the reorganization agreement declared fraudulent; and that they could not compel a reduction of the assessment made under it or enjoin distribution of the stock according to its terms. The minority stockholders sought, when presenting the case in the Court of Appeals of New York (*MacArdell v. Olcott*, 189 N. Y. 368, 372, 373, 82 N. E. 161), to have declared the trust which was later decreed in this suit; but that court refused to consider the contention, for the reason that this claim to relief was based upon a theory "widely at variance" with that upon which that action was commenced and tried. Because of such wide divergence the earlier decrees do not operate as res judicata. And there is no basis for the claim of estoppel by election; nor any reason why the minority, who failed in the attempt to recover on one theory because unsupported by the facts, should *not be permitted to recover on another for which the facts afford ample basis. *Wm. W. Bierce, Ltd., v. Hutchins*, 205 U. S. 340, 347, 27 Sup. Ct. 524, 51 L. Ed. 828; *Barnsdall v. Waltemeyer*, 142 Fed. 415, 420, 73 C. C. A. 515; *Standard Oil Co. v. Hawkins*, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739; *Henry v. Herrington*, 193 N. Y. 218, 86 N. E. 29, 20 L. R. A. (N. S.) 249.

[7] Third. The Southern Pacific challenges the claim for relief on the ground that it took the new Houston Company stock, not as majority stockholder, but as underwriter or banker under the reorganization agreement. The essential facts are these: While dominating the old company through control of a majority of its stock, the Southern Pacific entered into its reorganization, un-

³ The earlier litigation is summarized thus in the opinion of the District Court: *Carey v. H. & T. C. Ry. Co.* (C. C.) 45 Fed. 438 (1891), and 52 Fed. 671 (1892), C. C., E. D., Tex.; stockholders held not entitled to decree enjoining carrying out plan of reorganization or to have foreclosure set aside as fraudulent. *Carey v. H. & T. C. Ry. Co.*, 150 U. S. 170, 14 Sup. Ct. 63, 37 L. Ed. 104 (1893); appeal to Supreme Court from decree of Circuit Court dismissed. *Carey v. H. & T. C. Ry. Co.*, 9 C. C. A. 687, 13 U. S. App. 729 (1894); decree of Circuit Court affirmed by Circuit Court of Appeals for the Fifth Circuit. *Carey v. H. & T. C. Ry. Co.*, 161 U. S. 115, 16 Sup. Ct. 537, 40 L. Ed. 638 (1896); Appeal to Supreme Court from decree of Circuit Court of Appeals dismissed. *Gernsheim v. Olcott* (Sup.) 7 N. Y. Supp. 872 (1889), and 56 Hun. 644, 10 N. Y. Supp. 433 (1890), and *Gernsheim v. Central Trust Co.*, 16 N. Y. Supp. 127, 61 Hun. 625 (1891); stockholders held not entitled to reduction of assessment or to injunction against distribution of stock of new company under reorganization. *MacArdell v. Olcott*, 104 App. Div. 263, 93 N. Y. Supp. 799 (1905), and 189 N. Y. 368, 82 N. E. 161 (1907); action by stockholders to set aside foreclosure sale and annul reorganization agreement on ground of fraud dismissed. *MacArdell v. Olcott*, 62 App. Div. 127, 70 N. Y. Supp. 930 (1901); application of stockholder for leave to intervene denied for laches. *Lawrence v. Southern Pacific Co.* (C. C.) 165 Fed. 241 (1908), 177 Fed. 547 (1910), and 180 Fed. 822 (1910), C. C., E. D., N. Y.; action by stockholder for accounting and other relief; motions to remand denied and suit dismissed. *Bogart v. Southern Pacific Co.*, 228 U. S. 137, 33 Sup. Ct. 497, 57 L. Ed. 768 (1913); appeal to Supreme Court from decree of Circuit Court in *Lawrence v. Southern Pacific Co.*, supra, dismissed. *MacArdell v. Olcott*, N. Y. Court of Appeals, October 29, 1907, 189 N. Y. 368, 82 N. E. 161, affirming 104 App. Div., supra, with statements of limitations in the complaint. In the last-named case the court (two judges dissenting) did not attempt to consider the merits of this transaction, but expressly stated that the present form of action was not presented by that complaint.

der an agreement by which the minority stockholders of the old company could obtain stock in the new only upon payment in cash of a prohibitive assessment of \$71.40 per share (said to be required to satisfy the floating debt and reorganization expenses and charges), while the Southern Pacific was enabled to acquire all the stock in the new company upon paying an assessment of \$26 per share (said to be the amount required to satisfy reorganization expenses and charges). The Southern Pacific asserts that, unlike the minority stockholders, it assumed an underwriter's obligation to take the new company's stock not subscribed for by the minority, and also guaranteed part of the principal and all the interest on the new company's bonds, which were given in exchange for those of the old company. But the purpose of the Southern Pacific in assuming these obligations was in no sense to perform the function of banker. It was to secure the incorporation of the Houston Railroad into its own transcontinental system. And it was never called upon to pay anything under its guaranty.

[8] Fourth. The Southern Pacific contends that the doctrine under which majority stockholders exercising control are deemed trustees for the minority should not be applied here, because it did not itself own directly any *stock in the old Houston Company; its control being exerted through a subsidiary, Morgan's Louisiana & Texas Railroad & Steamship Company, which was the majority stockholder in the old Houston Company. But the doctrine by which the holders of a majority of the stock of a corporation who dominate its affairs are held to act as trustee for the minority does not rest upon such technical distinctions. It is the fact of control of the common property held and exercised, not the particular means by which or manner in which the control is exercised, that creates the fiduciary obligation.

[9] Fifth. Equally unfounded is the contention that the Southern Pacific cannot be held liable because it was not guilty of fraud or mismanagement. The essential of the liability to account sought to be enforced in this suit lies, not in fraud or mismanagement, but in the fact that, having become a fiduciary through taking control of the old Houston Company, the Southern Pacific has secured fruits which it has not shared with the minority. The wrong lay, not in acquiring the stock, but in refusing to make a pro rata distribution on equal terms among the old Houston Company shareholders.

[10] Sixth. The Southern Pacific also urges that the suit must fail because the old Houston Company is an indispensable party and has not been joined. The contention proceeds upon a misconception of the nature of the suit. Since its purpose is merely to hold the Southern Pacific as trustee for the plain-

tiffs individually of the property which it has received, the old Houston Company is in no way interested and would not be even a proper party.

[11] Seventh. The Southern Pacific also contends that the decree is erroneous because the effect is to give to the minority their pro rata share in the new Houston Company without their having made any contribution towards satisfying the floating indebtedness of the old; whereas the floating debt creditors had a claim against the property *prior in interest to that of the old company's stockholders. *Kansas City Southern Ry. Co. v. Guardian Trust Co.*, 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579; *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931. The fact that no provision was made for the floating indebtedness is not a bar to the minority obtaining relief. They did not come into court with unclean hands because there were floating debt creditors unpaid. If any floating debts creditors have been illegally deprived of rights, it was not by the minority's acts. Whether the terms on which relief should be granted the minority should be affected by the fact that the Southern Pacific had, through a subsidiary, a large interest in the unpaid floating debt, presents a more serious question, which will be considered later.

[12] Eighth. Objection is made by the Southern Pacific to the terms of the decree also on the ground that, in requiring distribution of stock in the old Houston Company to the minority stockholders instead of providing merely for an accounting and compensation in damages, the decree imposes upon it a heavy and unnecessary hardship. This, it is said, will result from the fact that all the stock of the new Houston Company (except 17 shares to qualify directors) has been pledged by the Southern Pacific as part collateral for an issue of 35-year 4 per cent. bonds to the amount of 250,000,000 francs, and that by reason of a clause in the collateral agreement by which the Southern Pacific covenants that it is the lawful owner of the securities, and that they "are not subject to any prior pledge, charge, or equity," a decree requiring distribution of stock to the minority stockholders may conceivably entitle the trustee for these bonds to declare them due, that such default might preclude it from withdrawal of the stock and from substituting other collateral, and that, in any event, if substitution of collateral is permissible, additional securities will have to be deposited, because the agreement provides that in case of withdrawal of any *securities upon request made after September, 1911, those "offered in substitution and those remaining on deposit (in each instance) shall be equal in value, as appraised or reappraised, at the time of such proposed substitution, to one hundred and twenty per centum (120%) of the amount of bonds then

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outstanding hereunder," and that there had been a heavy depreciation in such other securities since the time of their deposit. The alleged hardship involved in requiring a delivery to plaintiffs of new Houston Company stock in specie was made by the interlocutory decree a subject of investigation by the special master; and his report that the requirement would not impose undue hardship appears to have been carefully considered before entry of the final decree; but neither of the lower courts set forth the reasons which led to the rejection of the Southern Pacific's contention. The final decree was entered in the District Court on October 5, 1916. Since then the World War and the participation in it of the United States have greatly affected financial conditions and security values, especially those involving transportation properties. It may be that the clause in the collateral agreement requiring reappraisal of all securities upon the withdrawal of any might now prove very burdensome. The pledge was made in 1911; and, as the Southern Pacific contends, it was justified then in depositing this stock as collateral, because up to that time the minority stockholders had not made any claim to stock in specie. For reasons hereinafter stated, the case must be remanded to the District Court for further proceedings with a view to modifying the terms of the decree in other respects. It seems to us proper that the Southern Pacific should also have liberty to present to that court reasons, if any, for believing that the decree as framed will under then existing conditions impose undue hardship upon it.

*495 [13, 14] Ninth. The Southern Pacific objects to the terms of the decree also on the ground that, if the minority stockholders are held entitled to a pro rata share of the new company stock, it should be upon payment, not merely of the \$26 per share required to meet reorganization expenses and charges, but also of the additional sum required to discharge the floating indebtedness. At the time of the reorganization there was outstanding a large floating indebtedness for which on May 17, 1889, judgments were recovered: by the Lackawanna Iron & Coal Company in the sum of \$555,914.25; by Morgan's Louisiana & Texas Railroad & Steamship Company in the sum of \$1,795,570.81; and by the Southern Development Company in the sum of \$858,133.15. The last two companies held as collateral for their claims \$880,000 of bonds of the old Houston Company, for which they later received in exchange bonds of a new company to be applied at their par value toward payment of the debts for which judgment had been recovered. The reorganization agreement provided in substance that the whole \$10,000,000 of stock of the new company, if not taken by the old company's stockholders, should be di-

vided pro rata among such of the floating debt creditors as should provide the cash required to pay the floating indebtedness and reorganization expenses and charges; but no floating debt creditor took advantage of this provision, and all were thus wiped out in the reorganization.

The Southern Pacific asserts that the Morgan Company was and still is its subsidiary; that it owned and now owns a large part of the stock of that corporation; and that through such stock ownership it is, in effect, a large floating debt creditor of the old Houston Company. It suggests also that it has paid out moneys to protect the property of the new company from other floating indebtedness. If the Southern Pacific had been allowed to retain all the stock in the new Houston Company, it would obviously lose nothing by the wiping out of its interest in the floating indebtedness of the old company; and any money expended by it in protecting the property of the new company would be fully reflected in the increased value of the stock therein, if it owned all. But, if part of the new company stock is taken from it and distributed among the minority stockholders, the Southern Pacific will lose and the minority stockholders will gain the pro rata increase in value of the new company stock, due to wiping out of the Southern Pacific's share in the floating debt and to its expenditures made for wiping out other indebtedness. *496

The Circuit Court of Appeals recognized that there was great force in this contention of the Southern Pacific, but overruled it because it "was never raised in the case by pleading or otherwise until an exception was taken to the report of the special master" and because "there is nothing in the record to show what, if anything, the Southern Pacific Company did give up." The memorandum filed by the district judge on settlement of the interlocutory decree indicates that some such contention was made then. At all events it was clearly made before entry of the final decree; and it does not appear that the minority stockholders were in any way prejudiced by the failure to make the exact contention earlier. There is no reason to believe that the parties cannot determine now, as easily as they might have done a few years ago, to what extent the floating indebtedness due the Morgan Company represents money in effect expended by the Southern Pacific for the benefit of the old Houston Company and to what extent the wiping out of any indebtedness and any expenditure made by the Southern Pacific in connection therewith will inure to the benefit of such of the minority stockholders of the old company as receive stock in the new. Some adjustment should obviously be made so as to compensate the Southern Pacific for any contribution made at its expense to the value of

*497 the stock in the new company of which the minority stockholders may get the benefit. The purpose of this proceeding is not to punish the Southern Pacific, but to declare and enforce its obligation as trustee. The minority stockholders who seek equity should do equity; and a court of chancery has power in granting relief to prevent unjust enrichment of the minority stockholders at the expense of the Southern Pacific. To determine the amount of such contribution by the Southern Pacific and of such benefit to the minority stockholders further investigation by the trial court will be necessary; and the judgments on the floating indebtedness entered in 1889 against the old company should not be held a bar to any inquiry into relevant facts. Whether this compensation shall be made by way of addition to the assessment of \$26 per share provided for in the decree, or whether it can and should be made by requiring the minority stockholders to consent to the creation in favor of the Southern Pacific of some charge against or interest in the new company which would have priority over the 100,000 shares of stock outstanding, as, for instance, an income bond or preferred stock, or whether the compensation should be made in some other manner, should also be determined in the first instance by the District Court where all the relevant facts can be ascertained. The final decree must be set aside and the interlocutory decree be modified so as to provide for the necessary inquiry; and, when all the relevant facts shall have been ascertained, a final decree should be entered which will embody such terms as shall be found to be appropriate to afford to the Southern Pacific appropriate compensation for its contribution.

*498 [15] Tenth. The Southern Pacific objects to the orders permitting Gernsheim and the estate of Minzesheimer to intervene after the entry of the interlocutory decree, and objects also to the final decree in so far as it declares these interveners entitled to the relief granted other minority stockholders. The suit was brought on behalf of all stockholders of the old Houston Company, situated similarly to the plaintiffs. The court found on competent evidence that these parties were such. If they could not have intervened as of right, it was at least within the discretion of the court to permit them to do so; and no reason is shown for questioning the exercise of its discretion. It is also urged that the earlier litigation by Gernsheim bars his claim to relief on the grounds of estoppel or of inconsistency of remedy; but that contention has already been shown to be unfounded.

[16] Eleventh. The certiorari and return were filed May 3, 1918. On October 8, 1918, separate petitions were filed in this court by Henry J. Chase, by Fergus Reid, by Albert M. Polack, by Francis P. O'Reilly, and

by the Corn Exchange Bank, alleging that they were respectively owners of stock in the old Houston Company and praying leave to intervene, and that they be permitted to share in the benefits of the decree, or, in the alternative, that they be permitted to make such application to the District Court. Action on these petitions was postponed to the hearing of the case on the merits. As the case must be remanded to the District Court for further proceedings as above stated, we deny these several petitions without expressing any opinion on their merits and without prejudice to the right to apply to the District Court for leave to intervene and to share in the benefits of the decree.

Decree modified, and cause remanded to the District Court for further proceedings in conformity with this opinion; the costs in this court to be equally divided between the parties.

The CHIEF JUSTICE took no part in the consideration or the decision of this case.

* Mr. Justice McREYNOLDS dissenting. *499

It seems to me quite clear that the judgment below is wholly wrong. Respondents' complaint should be dismissed.

This suit was brought in 1913, some 25 years after those who complain came into possession of all material facts. During that period they were parties or privies to suit after suit—the first begun in 1889 and all unsuccessful—which sought to upset what petitioner had done because of its actual fraud.

The original bill of complaint in the present cause alleges:

"As soon as the terms of the said reorganization agreement were announced and published [1888], S. W. Carey, Cornelius MacArdell, Walter B. Lawrence, plaintiffs' testator, and other stockholders of the railway company protested against the terms of the said agreement, claiming that it practically gave the railway company to the Southern Pacific Company in fraud of the individual stockholders." "Immediately after the entry of the said consent decree of May 4, 1888, the said Carey, MacArdell, Lawrence, and other stockholders of the said railway company formed a committee of stockholders to protect themselves from the frauds committed and proposed to be committed by the Southern Pacific Company under the said reorganization agreement and consent decree, and said committee of stockholders employed as counsel Frederick R. Coudert, Edward M. Shepard, and A. J. Dittenhoefer, of New York City, Jefferson Chandler, of St. Louis, and later on H. Snowden Marshall, Russell H. Landale, and David Gerber, and from the commencement of their first suit [December, 1889] hereinafter mentioned, to the present day, the firm of Dittenhoefer, Gerber & James has been their attorneys of record."

Having long emphatically condemned, attacked, and sought without success to annul

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petitioner's action, respondents finally come before a court of equity saying in effect: Although represented by counsel of great eminence, we have not heretofore known the law; notwithstanding all solemnly declared to the contrary, we now maintain that petitioner was really acting for us, our trustee indeed; and we wish to share in the plan which it has carried to success against our persistent opposition. Such a claim exhales a very bad odor; and I think the parties presenting it should be dismissed, burdened with an appropriate bill of costs, for two very simple reasons:

First. They are barred by laches. Rational men are presumed to know the law; knowledge of consequent rights and appropriate means of asserting them is necessarily implied from full acquaintance with the facts. Respondents' attempt to rely upon an alleged belated discovery of a well-known remedy after years of litigation conducted in full view of all the circumstances affronts both established principles and common experience. And this is emphasized by the names of distinguished counsel who have continuously represented the minority stockholders since 1888.

"Nothing can call a court of equity into activity but conscience, good faith, and reasonable diligence; and when a party with full knowledge of the facts, acquiesces in a transaction, and sleeps upon his rights, equity will not aid him." *Hayward v. Eliot National Bank*, 96 U. S. 611, 24 L. Ed. 855.

Due diligence in asserting a constructive trust is incompatible with persistent denial of such relationship after full knowledge of all the circumstances and a furious chase for 25 years in the opposite direction by the soi-disant beneficiary.

Second. Certainly the petitioner never consciously undertook to act as respondents' trustee—for years nobody seems to have thought any such relation existed. When the latter obtained full information of the real facts *(1888), at most, their option was promptly to treat petitioner as their constructive trustee, or to reject that view. And I had supposed in such circumstances, under an elementary rule, failure affirmatively to ratify, approve, or adopt the alleged fiduciary's action within a reasonable time amounted to disapproval. A potential cestui que trust may not indefinitely speculate on the outcome. In the present case respondents not only failed promptly to approve the action whose benefits they now seek; they deliberately engaged in a long series of actions inconsistent with their present claim; and while they did so petitioner, supposing its title absolute and unquestioned, dealt with the stock accordingly and as it probably would not have done if the present claim had been asserted.

1. COURTS ⇨334—PRACTICE—CONFORMITY ACT.

Conformity Act June 1, 1872, § 5 (Comp. St. § 1537), was intended to bring about uniformity in the law of procedure in the state and federal courts after many of the states had supplanted the common-law procedure by the Code practice.

2. TRIAL ⇨139(1)—DIRECTION OF VERDICT—PROPRIETY.

In the federal courts, whenever in the trial of a civil case it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court.

3. COURTS ⇨352—CONFORMITY TO STATE PRACTICE—DIRECTION OF VERDICT—PROPRIETY.

The rule as to the direction of verdicts in federal courts is not subject to modification by state statutes or Constitutions.

4. DISMISSAL AND NONSUIT ⇨5—RIGHT TO NONSUIT—COMMON-LAW PRACTICE.

At common law, as generally understood and applied, a nonsuit could be taken freely at any time before verdict, if not, indeed, before judgment.

5. COURTS ⇨352—RIGHT TO NONSUIT—COMMON-LAW PRACTICE.

The right to take a nonsuit is substantial, and when and how it may be asserted are questions relating directly to practice and mode of proceeding, within the intendment of the Conformity Act.

6. COURTS ⇨352—CONFORMITY ACT—RIGHT TO DISMISSAL.

While the federal courts may in proper cases direct a verdict, it was improper, in view of Code Va. 1904, § 3387, etc., relating to nonsuits and demurrers to evidence, which are made applicable by the Conformity Act (Comp. St. § 1537), for a federal District Court for Virginia to deny an application for leave to take a nonsuit after the court had announced that it would direct a verdict for defendant, but before verdict had been actually directed; there having been no demurrer to the evidence or joinder therein.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Action by S. D. Barrett against the Virginian Railway Company. A judgment for defendant on a directed verdict was affirmed by the Circuit Court of Appeals (244 Fed. 397, 157 C. C. A. 23), and plaintiff brings certio-

*474 **rari. Reversed and remanded, with directions.**

* **Mr. W. L. Welborn, of Roanoke, Va., for petitioner.**

Messrs. G. A. Wingfield and H. T. Hall, both of Roanoke, Va., for respondent.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Claiming under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. §§ 8657-8665]), petitioner sued the Virginian Railway Company in the United States District Court, Western District of Virginia, for damages on account of personal injuries suffered by him July 27, 1915.

At conclusion of the testimony the railway company moved for a directed verdict; after consideration the trial judge read to counsel an opinion giving reasons and announced his purpose to grant the motion.

"And thereupon the plaintiff, by counsel, moved the court to be permitted to take a voluntary nonsuit, which motion was opposed by counsel for defendant. And as the court is of opinion that the motion comes too late, it is overruled, and to this action of the court the plaintiff, by counsel, excepted. And thereupon the court directed the jury to find a verdict for the defendant, and to this action of the court the plaintiff, by counsel, excepted. And thereupon the jury rendered and returned the following verdict: 'We, the jury, by direction of the court, find for the defendant.'"

Judgment thereon was affirmed by the Circuit Court of Appeals. 244 Fed. 397, 157 C. C. A. 23. Petitioner there urged that the trial court erred (1) in directing a verdict for the defendant, and (2) in denying the plaintiff's request to take a voluntary nonsuit. Both claims were denied and are renewed here.

*We think refusal to permit the requested nonsuit was error and for that reason the judgment below must be reversed. This makes it unnecessary to consider the other point.

[1] The Act of June 1, 1872—the Conformity Act (R. S. § 914, c. 255, § 5, 17 Stat. 197 [Comp. St. § 1537])—provides:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

Construing the statute in *Nudd et al. v. Burrows, Assignee* (1875) 91 U. S. 426, 441, 442 (23 L. Ed. 286), this court said:

"The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in

the law of procedure in the federal and state courts of the same locality. It had its origin in the Code enactments of many of the states. While in the federal tribunals the common-law pleadings, forms, and practice were adhered to, in the state courts of the same district the simpler forms of the local Code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes. The remedy was complete. The personal administration by the judge of his duties while sitting upon the bench was not complained of. * * * The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, *neither practice, pleading, nor a form nor mode of proceeding within the meaning of those terms as found in the context."

See, also, *Indianapolis & St. Louis R. R. Co. v. Horst*, 93 U. S. 291, 300, 23 L. Ed. 898.

[2, 3] "It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice." *Bowditch v. Boston*, 101 U. S. 16, 18, 25 L. Ed. 980; *Pleasants v. Fant*, 22 Wall. 116, 122, 22 L. Ed. 780; *Oscanyan v. Arms Co.*, 103 U. S. 261, 265, 26 L. Ed. 539; *Randall v. Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 482, 3 Sup. Ct. 322, 27 L. Ed. 1003; *District of Columbia v. Moulton*, 182 U. S. 576, 582, 21 Sup. Ct. 840, 45 L. Ed. 1237; *Hepner v. United States*, 213 U. S. 103, 113, 29 Sup. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960. And this rule is not subject to modification by state statutes or Constitutions. *Indianapolis & St. Louis R. R. Co. v. Horst*, supra; *St. Louis, Iron Mt. & Southern Ry. v. Vickers*, 122 U. S. 360, 363, 7 Sup. Ct. 1216, 30 L. Ed. 1161; *Lincoln v. Power*, 151 U. S. 436, 442, 14 Sup. Ct. 387, 38 L. Ed. 224.

[4, 5] At the common law, as generally understood and applied, a nonsuit could be taken freely at any time before verdict if not indeed before judgment. *Confiscation Cases*, 7 Wall. 454, 457, 19 L. Ed. 196; *Derick v. Taylor*, 171 Mass. 444, 445, 50 N. E. 1038; *Bac. Abr. Nonsuit* (D). And see *Pleasants v. Fant*, supra, 22 Wall. 122, 22 L. Ed. 780. The right is substantial. When and how it may

be asserted we think are questions relating directly to practice and mode of proceeding within intendment of the Conformity Act.

[6] Section 3387 Virginia Code (1904) provides:

"A party shall not be allowed to suffer a nonsuit, unless he do so before the jury retire from the bar."

*477 Prior to this provision, a plaintiff there had the absolute right to take a *voluntary nonsuit at any time before verdict. *Harrison v. Clemens*, 112 Va. 371, 373, 71 S. E. 538. Chapter 27, Va. Acts 1912, directs:

"That in no action tried before a jury shall the trial judge give to the jury a peremptory instruction directing what verdict the jury shall render."

And chapter 42, *Idem*, provides:

"In all suits or motions hereafter, when the evidence is concluded before the court and jury, the party tendering the demurrer to evidence shall state in writing specifically the grounds of demurrer relied on, and the demurree shall not be forced to join in the said demurrer until the specific grounds upon which the demurrant relies are stated in writing; nor shall any grounds of demurrer not thus specifically stated be considered, except that the court may, in its discretion, allow the demurrant to withdraw the demurrer; may allow the joinder in demurrer to be withdrawn by the demurree, and new evidence admitted, or a nonsuit to be taken until the jury retire from the bar."

Citing *Parks v. Ross*, 11 How. 362, 373, 13 L. Ed. 730, and *Richardson v. City of Boston*, 19 How. 263, 15 L. Ed. 639 (see also *Schuchardt v. Allen*, 1 Wall. 359, 370, 17 L. Ed. 642), petitioner maintains that in the federal courts the practice of directing verdicts has superseded the demurrer to evidence and should be controlled by the same general principles. Therefore, it is said, the statutory rule which gives the judge discretion to allow or refuse a nonsuit after joinder in such a demurrer applies when there is a motion for directed verdict.

*478 Obviously the laws of Virginia recognize a marked distinction between demurrer to evidence and direction of a verdict—the former is permitted; the latter is expressly prohibited. And the different nature and effect of the two things has been pointed out in *Oscanyan v. Arms Co.*, supra, 103 U. S. 264, 26 L. Ed. 539; *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 39, 11 Sup. Ct. 478, 35 L. Ed. 55; and *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, 388, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029. The conclusion announced in *Parks v. Southern Ry. Co.*, 143 *Fed. 276, 277, 74 C. C. A. 414, that, because federal courts may in proper cases direct verdicts, therefore, in the exercise of sound discretion, they may deny an application for leave to take a nonsuit and

direct verdict for defendant, is not well founded.

Under the Virginia statute, in the absence of a demurrer to the evidence and joinder therein, the plaintiff may take a nonsuit at any time before submission of the case to the jury and their retirement. The conformity statute gives the same right in federal courts. This conclusion accords with opinions by the Circuit Courts of Appeals for the Sixth, Seventh, and Eighth Circuits. *Knight v. Illinois Central R. R. Co.*, 180 Fed. 368, 103 C. C. A. 514; *Meyer v. National Biscuit Co.*, 168 Fed. 906, 94 C. C. A. 335; *Chicago, M. & St. P. Ry. Co. v. Metalstaff et al.*, 101 Fed. 769, 41 C. C. A. 669.

The judgment below must be reversed, and the cause remanded to the District Court, with direction to set aside the judgment in favor of respondent and sustain motion to enter a nonsuit. *Knight v. Illinois Central R. R. Co.*, supra, 180 Fed. 374, 103 C. C. A. 514; *Harrison v. Clemens*, supra, 112 Va. 374, 375, 71 S. E. 538.

Reversed.

(250 U. S. 383)

T. H. SYMINGTON CO. v. NATIONAL MALLEABLE CASTINGS CO. et al.

MINER v. T. H. SYMINGTON CO.

(Argued April 19 and 22, 1918. Decided June 9, 1919.)

Nos. 31, 24.

1. PATENTS ⇐174 — IMPROVEMENT — CONSTRUCTION—SPECIFICATION.

Where a patent for an improvement in draft rigging for railroad cars called for a pocket or housing to hold the other parts in place, and there was nothing in the claims indicating that the pocket was to be integral while the specification stated that it might be cast in a single piece, the claims are not limited to an integral part.

2. PATENTS ⇐62 — PRIOR INVENTION—EVIDENCE.

Oral testimony tending to show prior invention as against existing letters patent is, in the absence of models, drawings, or some kindred evidence, open to grave suspicion, particularly if the testimony be taken after the lapse of years from the time of the alleged invention.

3. PATENTS ⇐16—INVENTION.

A conception of the mind is not an invention until represented in some physical form, and unsuccessful experiments or projects abandoned by the inventor are equally destitute of that character.

4. PATENTS ⇐62—INFRINGEMENT—PREVIOUS INVENTION—EVIDENCE.

In an infringement suit, oral evidence held insufficient to show prior invention as against existing letters patent, at most disclosing only a mental conception in the process of develop-

ment which was occasionally outlined on scraps of paper, and then committed to the wastebasket, and was roughly worked into a wooden model with a penknife.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Suit by the National Malleable Castings Company and another against the T. H. Symington Company. A decree for defendant was reversed on complainants' appeal (230 Fed. 821, 145 C. C. A. 131, 234 Fed. 343, 148 C. C. A. 245), and defendant brings certiorari. Suit by the T. H. Symington Company against William H. Miner, in which a decree for complainant was affirmed (229 Fed. 730, 144 C. C. A. 140), and defendant brings certiorari. Decree in the first case affirmed, and in the second reversed.

* Messrs. George I. Haight and Charles C. Linthicum, both of Chicago, Ill., for Miner.

Mr. Charles Neave, of Boston, Mass., for National Castings Co.

Messrs. Melville Church, Gilbert P. Ritter, and Ernest F. Mechlin, all of Washington, D. C., for T. H. Symington Co.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

These cases are so related that they may be disposed of together. Each is a suit to enjoin the infringement of a patent. One was begun in the district of Maine and is based on letters patent granted May 7, 1901, to Jacob J. Byers on an application filed April 21, 1900. The other was begun in the Northern District of Illinois and is based on letters patent granted February 18, 1902, to William H. Emerick on an application filed May 24, 1901. Both patents cover an improvement in draft rigging for railroad cars. In each suit it became necessary to compare the patents, determine whether the invention of one was anticipated by the other, and ascertain which of the patentees was the original and first inventor. Ultimately the suits reached the Circuit Courts of Appeal for the circuits in which they were brought. In the Maine suit the court held that Byers was the prior inventor and that *claims 3, 5, and 6 of the patent to him were valid and infringed. National Malleable Castings Co. v. T. H. Symington, 230 Fed. 821, 145 C. C. A. 131; 234 Fed. 343, 148 C. C. A. 245. In the Illinois suit the court held that Emerick was the prior inventor and that claims 1, 2, 3, and 4 of the patent to him were valid and infringed. 229 Fed. 730, 144 C. C. A. 140. These conflicting decisions led to the allowance of the present writs of certiorari.

While the discussion at the bar and in the briefs has taken a wide range, only two points need be considered.

[1] One of the elements called for by the claims in the Byers patent which were sustained is a "pocket" or housing, which is to hold other parts in place. The corresponding element of the Emerick patent is described as "counterpart castings" and is in two parts. Whether the Byers pocket was to be integral or might be in two or more parts is a matter about which the two courts differed. In the Maine suit it was held that the claims were not limited to an integral pocket, but in the Illinois suit the ruling was the other way. The former view, as it seems to us, is the right one. There is nothing in Byers' claims which were sustained indicating that the pocket is to be integral, while there is a distinct call for such a pocket in claim 9. The difference in terms points persuasively to a difference in purpose, and the specification does even more, for it says "the pocket may be cast in a single piece." This is the common form of designating an admissible alternative in such instruments. Of course, the other alternative is casting it in a plurality of pieces. When this is done and the pieces are assembled, they form a pocket and serve in the same way as if there were but one.

The courts differed also as to who was the prior inventor. Presumptively it was Byers, for his application and patent were both prior to Emerick's application. Recognizing this, the parties claiming under Emerick sought by proof to carry his invention back to an earlier date, and to that end produced the testimony of three *witnesses, Emerick being one. All three testified in both suits, their testimony being substantially the same in both. In the Maine suit the court pronounced this testimony too equivocal and uncertain to establish priority as against Byers' application and patent, but in the Illinois suit the court, although regarding the testimony as hardly satisfactory, gave effect to it. On reading it we are persuaded that it was clearly insufficient.

[2-4] This court has pointed out that oral testimony tending to show prior invention as against existing letters patent is, in the absence of models, drawings, or kindred evidence, open to grave suspicion, particularly if the testimony be taken after the lapse of years from the time of the alleged invention. Deering v. Winona Harvester Works, 155 U. S. 286, 300, 15 Sup. Ct. 118, 39 L. Ed. 153. And it has said:

"A conception of the mind is not an invention until represented in some physical form, and unsuccessful experiments or projects, abandoned by the inventor, are equally destitute of that character." Clark Thread Co. v. Willimantic Co., 140 U. S. 481, 489, 11 Sup. Ct. 846, 849 (35 L. Ed. 521).

Here the evidence was oral. No model, drawing, or kindred exhibit was produced. Fifteen years had elapsed since the date as

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of which invention was being claimed. The testimony was not direct and strong, but weak and uncertain and in some respects contradictory. At most it only disclosed a mental conception in process of development which occasionally was outlined on scraps of paper and then committed to the waste basket and was roughly worked into a wooden model four or five inches long with a pen knife. The first real model or drawing was made about the time of the actual application for a patent and there was no attempt at reduction to practice until after the patent was issued. Such proof under the rule just stated does not suffice.

Decree in No. 31 affirmed.

Decree in No. 24 reversed.

(250 U. S. 355)

F. VITELLI & SON v. UNITED STATES.

(Argued April 24, 1919. Decided June 9, 1919.)

Nos. 67, 68.

**1. CUSTOMS DUTIES —81—EVIDENCE —83
(1)—RELICQUIDATION AFTER YEAR—FRAUD—
BURDEN OF PROOF—PRESUMPTION FROM OF-
FICIAL ACTION.**

Act June 22, 1874, § 21 (Comp. St. § 5714), providing that when customs duties have been liquidated and paid, and the imported goods delivered to the importer, such settlement shall after a year, in the absence of fraud, be final and conclusive, being remedial to circumscribe the prior unlimited power to reliquidate, the presumption of correctness of official action of the collector, in reliquidating the duties after expiration of the year, cannot obtain, with the result of placing on the importer the burden of showing there was no fraud, and this though the importer pays the reliquidated duties under protest, and appeals; such proceeding being appropriate to resist the result of the reliquidation.

**2. CUSTOMS DUTIES —85—RELICQUIDATION—
APPEAL—REVERSAL AND REMAND.**

The holding of the Board of General Appraisers, affirmed by the Court of Customs Appeals, that a reliquidation of customs duties was valid, having been under a mistaken construction of statute as to presumption and burden of proof as to fraud, should not be sustained, though there was sufficient evidence, but the question of fraud should be passed on by such tribunals freed from such mistaken construction.

On Writ of Certiorari to the United States Court of Customs Appeals.

Reliquidations of duties on imports by F. Vitelli & Son were sustained by the Board of General Appraisers and by the Court of Customs Appeals (7 Ct. Cust. App. 243), and the importers appeal. Reversed and remanded.

Mr. Albert M. Yuzzolino, of New York City, for petitioners.

Mr. Assistant Attorney General Hanson, for the United States.

*Mr. Chief Justice WHITE delivered the opinion of the Court.

The petitioners, Vitelli & Son during the years 1905-1907, made entry at the port of New York of 19 different lots of dutiable merchandise, that is, chestnuts and garlic, and these entries were liquidated and the duties paid. About five years after the last of these payments, the collector of the port of New York, declaring that evidence had been produced to his satisfaction showing that 14 of the 19 entries referred to were fraudulent, because of the incorrect weights upon which they were based, canceled the previous liquidations relating to them and directed a reliquidation to be made on the basis of the corrected weights. Vitelli & Son, denying the existence of fraud and disputing the power to make the reliquidation, protested against the claim of duty which resulted from the reliquidation, and, paying the same under protest, prosecuted an appeal to the Board of General Appraisers.

Before the Board the collector made no affirmative proof of the commission of fraud, and submitted the validity of the reliquidation upon the basis of the official papers pertaining to it—that is, the certificates of weight, etc.—upon which he had acted. The petitioners, not taking upon themselves the burden of showing that there was an absence of fraud, stood upon their protest as to the want of power to make the reliquidation. The Board sustained the protest. It held that as under the conditions disclosed the existence of power in the collector to make the reliquidation after one year depended upon the fact of fraud, that the burden was upon the collector to establish that which was necessary to sustain his authority to act, and having failed to do so the reliquidation was erroneous and the protest was well founded. Appeal was prosecuted to the Court of Customs Appeals, where the action of the Board was reversed. United States v. Vitelli & Son, 5 Ct. Cust. App. *151. The court held that although it was true that, as applied to the case before it, the existence of fraud was essential to confer upon the collector the power which he had exerted, as he had exercised the authority, the presumption of the correctness of official action was sufficient, without proof of fraud to sustain the reliquidation. In reaching this conclusion it was expressly decided that, in view of the presumption of power indulged in, the effect of section 21 of the Act of June 22, 1874, c. 391, 18 Stat. 190 (Comp. St. § 5714), was to cast upon the importer the burden of establishing a negative, that is, that there had

been no fraud. The case was remanded for reconsideration to the Board of General Appraisers.

While the protest concerning the 14 entries was pending, the collector had, for like alleged fraud, ordered a reliquidation of the remaining 5 of the 19 entries, and by protest and payment of duties the action of the collector as to those entries was before the Board of General Appraisers for consideration. They were heard by the Board along with the entries which the Board had under consideration by virtue of the remanding order of the Court of Customs Appeals. The Board held, in view of the ruling of the Court of Customs Appeals as to the presumption of power and burden of proof, that the reliquidation in both cases was valid and that the protests were consequently without merit. Both cases were then appealed to the Court of Customs Appeals, which in an elaborate opinion reiterated and applied its previous ruling (7 Ct. Cust. App. 243), and the cases are here on the allowance of a certiorari.

[1] Obviously the whole case turns upon the significance of section 21 of the Act of 1874, the text of which is as follows (18 Stat. 186, 190):

*358 "Whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and *such goods, wares, and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties."

Indisputable also is it, as stated by the Court of Customs Appeals and long previously pointed out in *United States v. Phelps et al.*, 17 Blatchf. 312, Fed. Cas. No. 16039, that the remedy intended to be accomplished by the section in question was to prevent the right to reliquidate, which had previously been exerted without limit, from being exercised except in the particular conditions stated, and thus in the interest of the citizen to circumscribe the power to the instances specified in order that uncertainty as to the finality of customs entries might be removed and the security of commercial transactions be safeguarded. But from this premise we are of opinion that the error of the construction given to the statute below becomes at once apparent, since, in the first place, by a presumption of power it virtually removes the limitation as to the exercise of the power which the statute created, and further, as the necessary result of the onus

of proof which the construction sustained, the remedial purposes of the statute were either wholly negated or in any event greatly perverted.

It is indeed true that in the opinion on the first hearing below and in the argument at bar a suggestion was made that as in the particular instance the importer had become an actor seeking to question the reliquidation, he thereby, as an actor, assumed the burden of proof as to the absence of fraud which would not have rested upon him under the statute had he refused to pay the duty resulting from the reliquidation and awaited action taken against him by the United States to enforce it. But as the court below expressly declared that the proceeding taken *was appropriate to resist the result of the reliquidation, if illegal, it cannot be that the right to correct the wrong was lost by resort to the remedy appropriate for its correction.

Moreover the proposition can alone rest upon the assumption that the limitation on power which the statute imposed was ephemeral while from the text it is certain that it was permanent and controlling. The cogency of this conclusion stands out in bold relief when it is considered that the remedial purpose of the statute was to protect the citizen from the unlimited power to reliquidate and the uncertainties affecting commercial transactions resulting from the existence of such power. The inevitable result of the argument is to cast upon the citizen the perpetual burden of showing that he had not been guilty of wrong as the only means of escaping the exercise against him of the unlimited power to reliquidate which it was the purpose of the statute to prevent.

[2] It is contended that although it be admitted that the statute was wrongly construed below, nevertheless the reliquidation should be now sustained because there was adequate proof in the record to show the existence of fraud which justified the reliquidation order without reference to the presumption upon which the court below based its conclusion. We do not, however, think this view can be sustained, since the erroneous ruling as to the statute dominates the entire situation and exacts that the question of the existence of the fraud necessary to give rise to the power to reliquidate should be disposed of by the tribunals peculiarly competent to consider such question, disembarassed from any mistaken construction as to the presumption created by the statute.

It follows that the judgment of the Court of Customs Appeals must be and it is reversed and the cases remanded to the Board of General Appraisers for further proceedings not inconsistent with this opinion.

And it is so ordered.

(250 U. S. 387)

NORTHERN PAC. RY. CO. et al. v. McCOMAS.

(Argued Jan. 22, 1919. Decided June 9, 1919.)

No. 172.

1. PUBLIC LANDS ⇨91 — SWAMP LAND — RAILROAD GRANT—CONFLICT.

The pendency of a claim by the state of Oregon under the swamp land grant made by Act Sept. 28, 1850 (Comp. St. §§ 4958-4960), and Act March 12, 1860, to lands which would otherwise pass to the Northern Pacific Railroad as parts of odd-numbered sections within the place limits of land grant made by Act July 2, 1864, prevented such lands from passing under the grant as place lands, regardless of whether the swamp land claim was well grounded.

2. PUBLIC LANDS ⇨116—PATENT—EFFECT.

Where, through mistake in the Land Department, lands which were claimed by the state of Oregon as swamp lands under Act Sept. 28, 1850 (Comp. St. §§ 4958-4960) and Act March 12, 1860, were erroneously patented as place lands under the grant made to Northern Pacific Railroad by Act July 2, 1864, such patents carried the legal title, but the United States was entitled to a reconveyance, and in equity remained the true owner.

3. ADVERSE POSSESSION ⇨7(2) — PRESCRIPTIVE TITLE—ACQUISITION.

No prescriptive title can be obtained to public lands belonging to the United States, nor can a prescriptive title be obtained where the Land Department erroneously conveyed to a railroad company lands as to which there were conflicting claims, and the company in less than the prescriptive period reconveyed the same to the United States, which remained the owner in equity.

4. PUBLIC LANDS ⇨82—RAILROAD GRANTS—LIEU LAND SELECTIONS.

Pending lieu land selections by Northern Pacific Railroad in place of lands excluded from the primary grant because mineral require the approval of the Secretary of the Interior to make them effective.

5. PUBLIC LANDS ⇨103(4) — PENDING CLAIMS—AUTHORITY TO ADJUDICATE.

Where full title to land was in the United States, and there were conflicting pending claims, the courts may not take up the adjudication of such claims, but must await the decision of the land officers and the issue of patents in regular course.

6. PUBLIC LANDS ⇨103(4)—POSSESSION—AUTHORITY OF COURT.

Pending the final action of the Land Department on conflicting claims, the courts may protect the possession lawfully acquired or restore one wrongfully interrupted, for that is a matter not confided to the Land Department, and may be dealt with by the courts in the exercise of their general powers.

7. PUBLIC LANDS ⇨108—RAILROAD GRANT—LIEU LAND SELECTION.

Whether lieu lands selected by railroad company in place of those primarily granted were, when the selections were tendered, so occupied and appropriated as not to be properly subject to acquisition, is a question for determination by the Secretary of the Interior, whose approval or disapproval involves an exercise of sound, but not arbitrary, discretion, and makes it permissible for him, where a selection is proffered for land which a bona fide occupant, misunderstanding his rights, has reclaimed, to reject the selection and hold title in the United States until the occupant may be enabled, within the limits of existing law or by special act, to obtain title.

8. PUBLIC LANDS ⇨120—PATENTS—PATENT OF OCCUPIED LAND.

Where, at the time a patent was issued to a railroad under a lieu land selection, the parcel of land was so occupied or appropriated that it properly could not be selected and patented in place of land found to be mineral, that may afford basis for suit by the United States to cancel the patent, or basis for holding the railroad company as trustee of title for the occupant.

9. PUBLIC LANDS ⇨117—PATENTS—ATTACK.

That land selected by railroad company in lieu of its primary grant was so occupied or appropriated that it properly could not be selected and patented does not entitle the occupant to complain on behalf of the United States, or assail the patent collaterally.

On Writ of Certiorari to the Supreme Court of the State of Oregon.

Suit to quiet title by E. W. McComas against the Northern Pacific Railway Company and others. A judgment for plaintiff, which was affirmed by Supreme Court of Oregon (82 Or. 639, 161 Pac. 562), was subsequently modified on rehearing (82 Or. 639, 162 Pac. 862), and defendants bring certiorari. Reversed and remanded.

* Messrs. Charles Donnelly, of St. Paul, Minn., Charles H. Carey, James B. Kerr, and Charles A. Hart, all of Portland, Or., and C. W. Bunn, of St. Paul, Minn., for petitioners.

Mr. Harvey M. Friend, of Washington, D. C., for respondent.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is a suit to quiet title in the plaintiff to five small tracts of land in Umatilla county, Oregon, the right to such relief being predicated solely on adverse possession under color of title for ten years, the period prescribed in a local statute. The plaintiff obtained a judgment, which at first was affirmed by the Supreme Court of the state and then on a petition for rehearing was modified as to two of the tracts. *McComas v. North-*

ern Pac. R. Co., 82 Or. 639, 161 Pac. 562, 162 Pac. 862. The case is here on writ of certiorari.

There was substantial testimony tending to show that McComas, the plaintiff, and his predecessors had been in undisputed possession of the lands for ten years when the suit was brought and that during that period they had been cultivating the lands and claiming the same under the deeds from the state hereinafter mentioned and had put improvements thereon costing more than \$10,000. The other facts are set forth in a stipulation found in the record.

*329 The lands are all parts of odd-numbered sections within the primary or place limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365. At the date of that act they were public lands of the United States and they continued to be such at the time the line of road opposite which they lie was definitely located, save as their status was affected by a pending claim of the state under the swamp-land grant made by the Act of September 28, 1850, c. 84, 9 Stat. 519 (Comp. St. §§ 4958-4960), and the Act of March 12, 1860, c. 5, 12 Stat. 3. This claim was shown by a swamp land selection list filed in the Land Department November 23, 1872, and was still pending in that department in 1892 and 1895. In those years the state, without waiting for a determination of its claim by the department executed deeds for the lands to persons who in turn executed deeds therefor to the plaintiff. As to three of the tracts the swamp land claim was examined and rejected by the department some time before this suit was begun, and as to the other two it was still pending at that time.

[1, 2] The definite location of the line of road opposite which the lands lie was effected by a map filed in the Land Department and approved June 29, 1883. The grant to the railroad company was of all the odd-numbered sections of public land within designated limits on either side of the line of road as so located, with an express exception of such lands as at the time of definite location were reserved, sold, etc., or were not "free from pre-emption or other claims or rights." There was also an express exclusion of all mineral lands and a provision that "in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road may be selected" under the direction of the Secretary of the Interior. By reason of the pendency of the swamp land claim at the time of the definite location all the tracts in question were expected from the grant of lands in place, and this whether the claim was well grounded or otherwise; that is to say, the fact that the claim was pending and undetermined prevented the lands from pass-

ing under the grant as place lands. *Whitney v. Taylor*, 158 U. S. 85, 92, 94, 15 Sup. Ct. 796, 39 L. Ed. 906; *Northern Pacific R. R. Co. v. Sanders*, 166 U. S. 620, 630, 17 Sup. Ct. 671, 41 L. Ed. 1139; *Northern Pacific R. R. Co. v. Musser-Sauntry Co.*, 168 U. S. 604, 609, 18 Sup. Ct. 205, 42 L. Ed. 596. But through some mistake in the Land Department three of the tracts were erroneously patented to the railroad company as place lands between 1906 and 1909. Without doubt the patents passed the legal title, but the United States was entitled to a reconveyance from the railroad company and in equity remained the true owner. *Germania Iron Co. v. United States*, 165 U. S. 379, 17 Sup. Ct. 337, 41 L. Ed. 754. The two tracts not patented as place lands were selected by the railroad company in 1908 and a succeeding year in lieu of other lands in place excluded from the grant by reason of being mineral. These selections were received by the local land office and were awaiting action by the Secretary of the Interior at the time of the trial.

This suit was brought September 25, 1912. Shortly thereafter the railroad company, recognizing that the patents theretofore issued to it for three of the tracts had been erroneously issued, reconveyed the title to the United States and subsequently selected those tracts in lieu of other tracts in place excluded from the grant by reason of being mineral. These selections were received by the local land office; one was approved by the Secretary of the Interior and passed to patent, and the other two were at the time of the trial pending before that officer.

The plaintiff made no effort by pleading or evidence to show that the swamp land claim was well grounded or that he, his predecessors or the state, had in any way become entitled to receive the title from the United States.

[3, 4] With some hesitation the trial court concluded that the lands were not excepted from the grant of lands in place by reason of the existence of the swamp land claim at the date of the definite location, and therefore that on the definite location, by which the place limits were identified, the title passed to the railroad company, the grant being one in present as respects place lands falling within its terms and not within its excepting or excluding clauses, and the provision for patents being intended only to give further assurance. *Deseret Salt Co. v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. 158, 35 L. Ed. 999; *Toltec Ranch Co. v. Cook*, 191 U. S. 532, 24 Sup. Ct. 166, 48 L. Ed. 291. On that theory a decree was entered quieting the title in the plaintiff as to all the tracts.

But the court should have held that the swamp land claim pending, as it was, at the date of the definite location prevented these lands from passing under the grant of lands in place. The decisions of this court before

cited leave no room for doubt on this point. The cases of *Iowa R. Land Co. v. Blumer*, 206 U. S. 482, 27 Sup. Ct. 769, 51 L. Ed. 1148, and *Missouri Valley Land Co. v. Wiese*, 208 U. S. 234, 28 Sup. Ct. 294, 52 L. Ed. 466, relied on by the plaintiff, are not apposite. The lands there in question were within the place limits and at the time of definite location were free from other claims; so they were not excepted from the grant, as here, but passed from the government on the definite location. It follows that as to the three tracts erroneously patented as before shown the railroad company had no title, legal or equitable, prior to the issue of the patents. Up to that time the title was in the United States, and of course no prescriptive right was acquired against it under the local statute. Besides, the title received through those patents was turned back to the United States before the trial and this operated to restore the three tracts to their prior status as public lands. The title under those patents—and it was merely the naked legal title—did not remain in the railroad company for anything like the period named in the local statute, if that be material. As to the other two tracts the railroad company up to the time the suit was brought had nothing *more than pending lieu land selections which required the approval of the Secretary of the Interior to make them effective (*Wisconsin Central R. R. Co. v. Price County*, 133 U. S. 496, 512, 10 Sup. Ct. 341, 33 L. Ed. 687), but as yet they had not received his approval.

[5, 6] The situation then at the time the case was heard in the trial court was this: The railroad company had neither the legal nor the equitable title to four of the tracts. Instead, the full title was in the United States and all existing claims to them arising under the land grants and other public land laws were pending in the Land Department, whose officers were specially charged by law with their examination and determination and with the disposal of the title accordingly. It is settled that in such a situation the courts may not take up the adjudication of the pending claims, but must await the decision of the land officers and the issue of patents in regular course. *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 592, 594, 18 Sup. Ct. 208, 42 L. Ed. 591; *Brown v. Hitchcock*, 73 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 315, 23 Sup. Ct. 692, 24 Sup. Ct. 860, 47 L. Ed. 1064; *Humbird v. Avery*, 195 U. S. 480, 502, 25 Sup. Ct. 123, 49 L. Ed. 286. There is, however, a related jurisdiction which the courts may exercise pending the final action of those officers; they may protect a possession lawfully acquired or restore one wrongfully interrupted, for that is a matter which is not confided to the Land Department and may be dealt with

by the courts in the exercise of their general power. *Gauthier v. Morrison*, 232 U. S. 452, 461, 34 Sup. Ct. 384, 58 L. Ed. 680.

[7] Whether the tracts as to which the swamp land claim is still pending were such as came within the terms of the swamp land grant is a question of fact the decision of which is expressly committed to the Land Department; and this also is true of the question whether the tracts covered by the railroad company's lieu land selections were when the selections were tendered so occupied and appropriated as not properly to be subject to acquisition *in that way. The approval or disapproval by the Secretary of the Interior of such lieu selections is not merely a formal act. It involves an exercise of sound, but not arbitrary, discretion and makes it admissible for him, where a selection is proffered for land which a bona fide occupant, misinformed and misunderstanding his rights, has reclaimed and improved at large cost, to reject the selection and hold the title in the United States until, as this court has said, "within the limits of existing law or by special act of Congress," the occupant may be enabled to obtain title from the United States. *Williams v. United States*, 138 U. S. 514, 524, 11 Sup. Ct. 457, 461 (34 L. Ed. 1026).

[8, 9] As to the fifth tract the railroad company at the time of the trial held a patent issued pending the suit on a lieu land selection but recently initiated; so the prescriptive right asserted by the plaintiff could not possibly include that tract. If, as he asserts, the tract was so occupied or appropriated that it properly could not be selected and patented in lieu of land in place found to be mineral, that may afford an adequate basis for a suit by the United States to cancel the patent (*Diamond Coal & Coke Co. v. United States*, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936), or afford a basis for holding the railroad company as a trustee of the title for him if, notwithstanding the silence of the present record on the subject, he was entitled to a patent for the tract (*Svor v. Morris*, 227 U. S. 524, 529, 530, 33 Sup. Ct. 385, 57 L. Ed. 623); but it does not enable him to complain on behalf of the United States or to assail the patent collaterally (*Hoofnagle v. Anderson*, 7 Wheat. 212, 214, 215, 5 L. Ed. 437; *Smelting Co. v. Kemp*, 104 U. S. 636, 647, 26 L. Ed. 875; *Bohall v. Dilla*, 114 U. S. 47, 51, 5 Sup. Ct. 782, 29 L. Ed. 61; *Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428; *Fisher v. Rule*, 248 U. S. 314, 318, 39 Sup. Ct. 122, 63 L. Ed. 263).

The Supreme Court of the state in its final opinion came nearer the views here expressed than did the trial court, but it assumed that the reconveyance by the railroad company to the United States was not accepted by the latter and so was of no effect. In this the court was mis*taken, for it affirmatively ap-

appears not only that the land officers after the reconveyance entertained the lieu selections of the same tracts, but also that they approved one of those selections and passed it to patent. Besides, the ultimate judgment entered by the court departs somewhat—possibly through a clerical inadvertence—from its final opinion.

The judgment must be reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

Judgment reversed.

(250 U. S. 504)

BOWERMAN v. HAMNER.

(Argued April 28 and 29, 1919. Decided June 9, 1919.)

No. 289.

1. BANKS AND BANKING ⚡253—NATIONAL BANKS—LIABILITY OF DIRECTORS.

While, in a suit for damages against national bank directors, based solely upon a violation of duty imposed by the National Bank Act, it is not enough to show a negligent violation of the act, but something more, in effect an intentional violation, must be shown to justify a recovery, yet the National Bank Act does not relieve directors from the common-law duty to diligently and honestly manage the affairs of the association.

2. BANKS AND BANKING ⚡254—NATIONAL BANKS—LIABILITY OF DIRECTORS—BILL.

In a suit against national bank directors, a bill may be framed so as to charge, not only a violation of the duty imposed by the National Bank Act, but a violation of their common-law obligations.

3. BANKS AND BANKING ⚡253—NATIONAL BANKS—DIRECTORS—LIABILITY.

Where a director of a national bank resided some 200 miles distant from the site of the bank, and during the entire period of his directorate did not attend a directors' meeting or give any attention to the affairs of the bank, which were so mismanaged that failure resulted, he is liable for breach of his common-law duty to honestly and diligently administer the affairs of the bank, even though he cannot be held liable because the officers in charge made loans in excess of the limit imposed by Rev. St. § 5200 (Comp. St. § 9761).

4. APPEAL AND ERROR ⚡1177(6)—REVIEW—DETERMINATION.

Where a bank director construed a bill by the receiver as relying solely on a breach of statutory duty and declined to offer any evidence, *held*, that he must be charged with notice that in equity decision is subject to review on both law and facts, and in view of the hardship that it would work upon the receiver of the insolvent bank the director is not entitled to an opportunity to produce evidence on the question of his common-law liability, where the appellate court, on appeal from a decision in his favor,

found that he was guilty of a breach of his common-law liability.

5. COURTS ⚡347—FEDERAL COURT PRACTICE—DENIALS.

Affirmative allegations of defense in an answer filed in an equity suit must be deemed denied, under equity rule 31 (198 Fed. xxvii, 115 C. C. A. xxvii).

6. BANKS AND BANKING ⚡254 — NATIONAL BANKS—CONTINUATION IN OFFICE.

As Rev. St. § 5145 (Comp. St. § 9683), declares that directors shall hold office for one year and until their successors are elected and qualify, one who was elected and duly qualified as director of a national bank in 1910 must, in the absence of evidence that he resigned or refused to qualify when reelected in the following year, be treated as a director during the year 1911, in which the bank failed, where the only evidence as to his status was a letter bearing on mismanagement written by the director to the president after failure.

Mr. Justice McKenna and Mr. Justice Reynolds dissenting.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Suit by Frank R. McCormick, as receiver of the First National Bank of Salmon, against Guy E. Bowerman and others. A decree for the named defendant was reversed by the Circuit Court of Appeals (McCormick v. King, 241 Fed. 737, 154 C. C. A. 439), and said defendant appeals; C. D. Hamner, who succeeded Frank R. McCormick as receiver, being substituted in his stead. Affirmed.

*Messrs. Oliver O. Haga and James H. Richards, both of Boise, Idaho, for appellant.

Mr. James M. Stevens, of Pocatello, Idaho, for appellee.

Mr. Justice CLARKE delivered the opinion of the Court.

This is a suit, commenced in the United States District Court for the District of Idaho, Eastern Division, by the receiver of the First National Bank of Salmon, against the former executive officers and directors of the bank, to obtain an accounting and decree for money lost by the alleged unlawful and negligent management of the affairs of the bank.

*The sole appellant, Bowerman, was a director, but not an executive officer of the bank, from its organization in January, 1906, until its failure in August, 1911, and, as owner of \$10,000 of the capital stock, he was the largest stockholder but one.

The bank was located in a small town in Idaho. It had a capital stock of only \$25,000, which was increased in February, 1910, to \$50,000, and it had a book surplus of \$15,000—\$5,000 of which was improperly carried to the surplus account in July, 1910, when the capital was certainly impaired.

When the plaintiff rested, the appellant moved that the bill be dismissed as to him, announcing that he would not introduce any evidence in his own behalf, and at the conclusion of the trial the District Court granted his motion. On appeal the Circuit Court of Appeals reversed this judgment, found Bowerman liable, and in the decree, which we are reviewing, remanded the case to the District Court, with direction to enter a decree in conformity with the views expressed in its opinion.

The amended bill, on which the case was tried, is framed in fact, though not in form, in the alternative, averring, first, that the executive officers made, and that the directors negligently permitted them to make, three designated loans, each in excess of one-tenth part of the paid-in and unimpaired capital stock and surplus of the bank, in violation of section 5200 of the Revised Statutes of the United States (Comp. St. § 9761). It then proceeds to allege: That, beginning with January, 1910, the affairs of the bank were grossly mismanaged by the executive officers, with the negligent permission of appellant and other directors; that of the three designated loans, on which large losses were sustained, the first was made to the Salmon Lumber Company, a corporation without financial resources to justify such a loan without security, and with its capital stock owned principally by members of the family of the president of the *bank; that the two other designated loans were negligently made to persons without financial standing and without security sufficient to justify the making of them; that overdrafts aggregating large amounts were permitted to be made by many persons, in violation of the by-laws of the association, and that a dividend on the capital stock was declared and paid in July, 1910, when the capital stock and surplus of the bank had been much impaired and its assets greatly depreciated. This gross mismanagement, it is averred, caused the failure of the bank and the loss for which recovery is prayed.

With respect to appellant, Bowerman, it is specifically alleged that, in disregard of his oath as a director to diligently and honestly administer the affairs of the bank, he negligently and willfully failed to attend a single meeting of the board of directors, to at any time examine, or cause to be examined, the books and papers of the bank, to ascertain its condition, or to in any manner inform himself as to the loans and overdrafts that were being made during the long period of mismanagement by the executive officers. It is alleged that the exercise by him as a director of a proper supervision of the affairs of the bank would have prevented the mismanagement complained of, and the loss which resulted from it.

Appellant's answer to the bill is substantially a general denial.

The evidence applicable to the allegations against Bowerman may be summarized as follows:

He was a director during the entire 5½ years of the existence of the bank, but never attended a single directors' meeting, regular or special. The only justification or excuse he offers for such conduct is that he lived about 200 miles from the town in which the bank was located, and that communication between the two places was difficult.

In a letter, which is in evidence, written by him to the *president of the bank in 1911, after the failure, he refers to himself as "a nominal director," and says that, prompted by a published statement of the bank, which he had seen in 1910, he began writing to the president, warning him of the consequences if the "very hazardous manner of conducting the bank" was not changed, "various matters corrected, more of the notes collected, and the reserve kept up." In this letter he says that he had never been "consulted as to the management of the bank, its business transactions, or its policy," and that he had never received a statement of its condition, either the usual published statement or one for his personal use, without making request for it, and that in some cases he had been obliged to write several times before one was sent to him. The record, however, does not show that any communication of the kind described in this letter was ever written by him prior to the failure.

The only certified copies in evidence of the oath taken by Bowerman as a director are for the years beginning in January, 1909, and in January, 1910. They are in the form prescribed by statute, that the affiant will "diligently and honestly administer the affairs of the association, and that he will not knowingly violate or willingly permit to be violated any of the provisions" of the statutes of the United States under which the association was organized.

The by-laws of the bank are in evidence, and they require "that regular meetings of the directors shall be held on the first Tuesday of each month"; that a "loans committee," to be composed of the president, cashier, and one director, shall make a report to each meeting of the board of directors of all bills, notes, and other evidences of debt discounted and purchased since its last previous report; that no officer or clerk shall pay any check drawn upon the bank, unless the drawer at the time of its presentation had sufficient funds on deposit to meet it; that a committee of three directors shall examine the affairs of the bank *every month, to see whether it is in sound and solvent condition, and to recommend changes which may seem desirable in the manner of doing business.

In addition to these, there was a special by-law adopted on January 18, 1910, upon the suggestion of the Comptroller of the Treasury, requiring that—

"The board of directors of the bank, shall, at each monthly meeting, or oftener, examine and approve all loans and discounts, and such approval shall be recorded in a book to be kept for that purpose."

Some of these by-laws were flagrantly disobeyed for years before the failure, and the others were observed in a manner so perfunctory as to amount to a disobedience of them. The three large loans complained of were never reported to the board of directors, except fragmentarily from time to time, when indistinguishably incorporated with other overdrafts, although they were gradually accruing during many months.

When the bank failed its liabilities were \$273,719.14 and its assets, nominally \$325,624.12, from which, assuming that the stockholders' liability was not included in them (as to which the record is not clear), there was realized about \$220,000, thus showing a shrinkage of approximately \$100,000 in the resources of a bank with a capital and surplus of \$60,000.

The District Court, with the full record before it, found the aggregate of the three excessive loans at the time the bank failed to be \$35,700. Each of these loans was made up by allowing unsecured overdrafts to accumulate over a considerable period of time and then permitting them to be converted into unsecured notes.

Without going more into the details, there can be no doubt that the business of the bank was surrendered wholly to the president and cashier, and was grossly mismanaged after January, 1910, in utter disregard of the national banking laws and of the by-laws of the association, and that this mismanagement was of such a character that even slight care in the discharge of his duties as a director must have led Bowerman, an experienced banker, to discover the trend of the management and to have prevented the greater part, if not all, of the losses which resulted in the failure.

[1-3] The appellant relies chiefly upon the assignment of error that there is no evidence in the record to show that he knowingly consented to the making of the three loans in excess of the limit imposed by R. S. § 5200 (Comp. St. § 9761), and therefore he argues that under the rule prescribed in *Yates v. Jones National Bank*, 206 U. S. 153, 27 Sup. Ct. 638, 51 L. Ed. 1002; and *Jones National Bank v. Yates*, 240 U. S. 542, 36 Sup. Ct. 429, 60 L. Ed. 788; the decree of the Circuit Court of Appeals holding him liable is erroneous and should be reversed.

While the cited cases hold that, in a suit for damages against national bank directors, based solely upon a violation of duty imposed by the National Bank Act, it is not enough to show a negligent violation of the act, but that something more, in effect an intentional violation, must be shown to justify a recovery, and that this is the exclusive

rule for measuring the responsibility of directors as to such violations, yet, it is expressly pointed out in the opinion of the court, that the act does not relieve such directors from the common-law duty to be honest and diligent, as is shown by the oath which they are required to take "to diligently and honestly administer the affairs of the association" as well as not "to knowingly violate or willingly permit the violation of any of the provisions of this title"—the National Bank Act (Act June 3, 1864, c. 106, 13 Stat. 99).

The rule thus announced would perhaps be applicable if the bill were limited to the charge of liability based solely upon the statutory prohibition of excessive loans, for it is reasonably clear that Bowerman did not have actual knowledge of the making of the loans, or of anything else connected with the conduct of the bank. He deliberately avoided acquiring knowledge of its affairs and wholly abdicated the duty of supervision and control which rested upon him as a director.

The National Bank Act imposes various specific duties on directors, other than those imposed by the common law, and it is obviously possible that a director may neglect one or more of the former, and not any of the latter, or vice versa. For example, in this case we have the gross negligence of the appellant, in failing to discharge his common-law duty to diligently administer the affairs of the bank, made the basis for the contention that he did not "knowingly" violate his statutory duty by permitting the excessive loans to be made. While the statute furnishes the exclusive rule for determining whether its provisions have been violated or not, this does not prevent the application of the common-law rule for measuring violations of common-law duties. And there is no sound reason why a bill may not be so framed that, if the evidence fails to establish statutory negligence, but establishes common-law negligence, a decree may be entered accordingly, and thus the necessity for a resort to a second suit avoided.

The bill in this case is given, as we have seen, this broader scope, and contains the charge of statutory as well as common-law negligence on appellant's part, resulting in the loss complained of. Such pleading was accepted as proper practice in *Briggs v. Spaulding*, 141 U. S. 132, 142, 165, 11 Sup. Ct. 924, 927 (35 L. Ed. 662) in which a bill thus "framed upon the theory of a breach by the defendants as directors of their common-law duties as trustees of a financial corporation and of breaches of special restrictions and obligations of the national banking act" was under consideration by this court, and, upon a full review of the decisions, the rule for determining the common-law liability of directors of such banks was twice stated, once on page 152 of 141 U. S., on page 931 of 11 Sup. Ct. (35 L. Ed. 662):

*513 "In any view the degree of care to which these defendants were bound is that which ordinarily prudent and *diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact, to be determined under all the circumstances."

And again, in the final summing up, on page 165 of 141 U. S., on page 935 of 11 Sup. Ct. (35 L. Ed. 662):

"Without reviewing the various decisions on the subject, we hold that the directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figureheads. They are entitled under the law to commit the banking business as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention."

In an earlier case, *Martin v. Webb*, 110 U. S. 7, 15, 3 Sup. Ct. 428, 433 (28 L. Ed. 49) it was said:

"Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time, to elect officers of the bank, and to make declaration of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

*513 This latter statement of the rule is made in a case dealing only with borrowers from the bank, but there is no *good reason why it should not be applied for the protection of depositors and stockholders.

While the rule as thus formulated in *Briggs v. Spaulding*, supra, has been thought by some state courts of last resort to be an understatement of the law of the duty of bank directors, it is amply broad, without restatement, for the disposition of the case before us.

That ordinarily prudent and diligent men, accepting election to membership in a bank directorate, would not willfully absent themselves from directors' meetings for years together, as Bowerman did, cannot be doubted; that a director who never makes, or causes to be made, any examination whatever of the books or papers of the bank to determine its condition, and the way in which it is being conducted, does not exercise ordinary care and prudence in the management of the

affairs of the bank, is equally clear; and that Bowerman, when guilty of neglect in both of these respects, did not exercise the diligence which prudent men would usually exercise in ascertaining the condition of the business of the bank, or a reasonable control and supervision over its affairs and officers, is likewise beyond discussion. He cannot be shielded from liability because of want of knowledge of wrongdoing on his part, since that ignorance was the result of gross inattention in the discharge of his voluntarily assumed and sworn duty.

Bowerman was a banker, and the letter, from which we have quoted, written to the president of the bank which failed, shows he so understood the business of banking, and what was necessary for the safe conduct of it, that even slight care on his part in the discharge of his duty as a director must have discovered and arrested what he himself characterized as a hazardous manner of conducting its affairs. He was a man of such importance and reputation that the use of his name must have contributed to securing the confidence of the community and of *de-
*514
positors for the bank, and it would be a reproach to the law to permit his residence at a distance from the location of the bank, a condition which existed from the time he first assumed the office of director, to serve as an excuse for his utter abdication of his common-law responsibility for the conduct of its affairs and for the flagrant violation of his oath of office when it resulted in loss to others.

[4] It is argued that the decree of the Circuit Court of Appeals should be reversed, and the cause remanded for a new trial for the reason that the trial in the District Court was on the theory that only the charge of statutory liability was involved and to be met by the appellant, and that he should have an opportunity to produce evidence, if he desires, on the issue of common-law liability.

At his peril the appellant put the construction on the pleadings which, for the reasons stated in this opinion, was erroneous. The suit was in equity, and he was charged with notice that the decision of the trial court was subject to review on both the law and the facts, and, although he was present in court during the trial, he neither took the stand to testify in his own behalf nor offered any evidence upon the question of his liability. The interests represented by the receiver are entitled to consideration, as well as those of the appellant, and the contention cannot be allowed.

[5, 6] It is also urged that the appellant resigned his office as director some time before the bank failed, and that the decree of the Circuit Court of Appeals renders him liable for transactions after his resignation.

The only showing on this subject in the

*518 record is the averment in appellant's answer that he was not a director of the bank after about the 1st day of July, 1910, and that he refused to qualify when notified of his re-election in January, 1911. These allegations must be deemed denied under the thirty-first equity rule (198 Fed. xxvii, 115 C. C. A. xxvii). The only evidence in the record on the subject is the oath of office taken by appellant in January, 1910, and the testimony of the receiver that the letter from the appellant to the president of the bank, from which we have quoted, was the only letter from him which he found, among the papers which came into his possession as receiver, bearing on the mismanagement of the bank, and that letter was written after the failure. Section 5145 of the Revised Statutes (Comp. St. § 9683) provides that directors shall hold office for one year and until their successors are elected and have qualified. In the absence of evidence that the appellant resigned or refused to qualify when re-elected in January, 1911, we must agree with the Circuit Court of Appeals in the conclusion reached, with the full record before it, that he continued to be a director "from the organization of the bank until the receiver took charge."

Other claims of error, chiefly technical, have been pressed upon our attention, and have all been considered and found to be without substantial merit. Conduct such as this appellant was so palpably guilty of is not to be weighed in the scales of an apothecary. The decree of the Circuit Court of Appeals must be

Affirmed.

Mr. Justice McKENNA and Mr. Justice McREYNOLDS dissent.

(250 U. S. 400)

ARIZONA COPPER CO., Limited, v.
HAMMER. No. 20.

SAME v. BRAY. No. 21.

RAY CONSOL. COPPER CO. v. VEAZEY.
No. 232.

INSPIRATION CONSOL. COPPER CO. v.
MENDEZ. No. 332.

SUPERIOR & PITTSBURG COPPER CO.
v. TOMICH. No. 334.

(20 and 21, Argued Jan. 25, 1918. 232, Argued Jan. 28, 1918. 332, Argued April 25, 1919. 334, Submitted April 24, 1919. Decided June 9, 1919.)

1. CONSTITUTIONAL LAW §70(3) — PROVINCE OF COURTS—WISDOM OF LEGISLATIVE ACTS.

Attacks on the Arizona Employers' Liability Act, which with the Workmen's Compulsory

Compensation Law provides an extensive scheme for compensating injured employes, based on the novelty, wisdom, and policy of the acts, cannot be considered by the courts; that being a matter for the Legislature.

2. MASTER AND SERVANT §11 — REGULATION—LIABILITY FOR INJURIES TO SERVANT.

The rules of law governing employers' responsibility for injuries to employes arising in course of the employment may be altered by the Legislature in public interest; such rules as the fellow servant rule and the doctrine of assumption of risk being subject to change.

3. CONSTITUTIONAL LAW §105 — VESTED RIGHTS—WHAT CONSTITUTE.

No person has a vested right, entitling him to have unchanged the existing rules of law concerning an employer's responsibility for personal injury or death of an employe.

4. MASTER AND SERVANT §11 — REGULATION—LIABILITY FOR INJURIES.

If the changes are not arbitrary and unreasonable, liability may be imposed on an employer without fault for injury or death of an employe arising in the course of the employment.

5. CONSTITUTIONAL LAW §245 — EQUAL PROTECTION OF LAWS—EMPLOYERS' LIABILITY ACT.

The Arizona Employers' Liability Act, enacted pursuant to Const. Ariz. art. 18, which designated specified employments as inherently dangerous, and imposed liability on the employer for accidental injury or death of employes not caused by their own negligence, is not, though it changed the common-law rules as to liability of masters, invalid, as denying to them the equal protection of the law, in violation of Const. Amend. 14.

6. CONSTITUTIONAL LAW §301—DUE PROCESS OF LAW—EMPLOYERS' LIABILITY.

In view of the interest of the state in the welfare of its citizens, the Arizona Employers' Liability Act, which makes employers in specified occupations designated as inherently dangerous, liable for the accidental injury or death of servants not themselves negligent, regardless of the employer's fault, is not invalid, as depriving employers of their property without due process of law, in violation of Const. Amend. 14.

7. CONSTITUTIONAL LAW §48 — UNCONSTITUTIONALITY OF STATUTE — BURDEN OF PROOF.

Those attacking the Arizona Employers' Liability Act on the ground that it is in violation of Const. Amend. 14, have the burden of demonstrating that it is clearly unreasonable and arbitrary, so as to bring it within the constitutional inhibitions.

8. CONSTITUTIONAL LAW §301—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY WITHOUT.

The Arizona Employers' Liability Act, providing that employes in occupations designated as inherently dangerous, who are injured without their own negligence, may recover the proximate damages resulting from the injury, to

be assessed by a jury, is not invalid, as depriving employers of their property without due process of law, on the ground that the damages were unlimited, for the act, as construed by the highest Arizona court, limited recovery to the actual damages, and the fact that damages were to be assessed by a jury is certainly no ground for asserting a denial of due process of law.

9. CONSTITUTIONAL LAW ⚡42 — **RIGHT TO RAISE CONSTITUTIONAL QUESTION.**

An employer cannot question the validity of the Arizona Employers' Liability Act, on the ground that damages awarded an injured employé, or the representatives of a deceased employé, are not distributed by installment payments.

10. CONSTITUTIONAL LAW ⚡42 — **PERSONS ENTITLED TO RAISE.**

The constitutionality of the Arizona Employers' Liability Act is not open to attack on grounds that might possibly arise, but which do not affect the employers who were questioning its constitutionality.

11. CONSTITUTIONAL LAW ⚡38 — **VALIDITY OF STATUTE — POSSIBILITY OF IMPROPER CONSTRUCTION.**

As the Arizona Employers' Liability Act, making employers liable though without fault, imposes liability only for accidental injuries attributable to inherent dangers of the occupation, it cannot be deemed unconstitutional, on the theory that it might be extended by construction to nonhazardous industries, for it is obvious that employers in such industries are in little danger from the act.

12. CONSTITUTIONAL LAW ⚡38 — **CONSTITUTIONALITY OF STATUTE—POSSIBILITY OF IMPROPER CONSTRUCTION BY STATE COURTS.**

As the highest court of Arizona has construed the Employers' Liability Act to limit recovery to compensatory damages, it cannot be assumed, where its constitutionality was questioned in the federal Supreme Court, that its benefits might be extended in case of death claims to those not nearly related to or dependent on the deceased employé, etc., for it would be improper for the Supreme Court to assume that the state court would place such a construction on the act as to render it obnoxious to the federal Constitution.

13. CONSTITUTIONAL LAW ⚡249, 305—**DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS—ELECTION OF REMEDIES.**

Though an Arizona employé, who suffers injuries, has an election, and may proceed either under the Employers' Liability Act, if he is not guilty of negligence, or, if guilty, under the Workmen's Compulsory Compensation Law, or, if the employer is at fault, under the common law, relieved of certain defenses, such right of election does not deprive employers of their property without due process of law, or deny them the equal protection of the law, in violation of Const. Amend. 14.

14. MASTER AND SERVANT ⚡11—**VALIDITY OF REGULATIONS—LIABILITY ACT.**

That the Arizona Employers' Liability Act allows compensation to be made as in tort cases,

so that an injured workman may recover for pain suffered, does not render the act invalid, for pain is as much a part of the workman's loss as the loss of a limb or other member, and, while the actual pain may not be shifted, it may be compensated for. (Per Mr. Justice Holmes, Mr. Justice Clarke, and Mr. Justice Brandeis.)

The Chief Justice, Mr. Justice McKenna, Mr. Justice McReynolds, and Mr. Justice Van Devanter dissenting.

In Error to the District Court of the United States for the District of Arizona.

In Error to the Supreme Court of the State of Arizona.

Action by Joseph B. Hammer against the Arizona Copper Company, Limited. There was a judgment in the United States District Court for plaintiff, and defendant brings error. Action by Richard Bray against the Arizona Copper Company, Limited. There was a judgment for plaintiff in the United States District Court, and defendant brings error. Action by Dan Veazey against the Ray Consolidated Copper Company. There was a judgment for plaintiff in the United States District Court, and defendant brings error. Action by Ceferino Mendez against the Inspiration Consolidated Copper Company. A judgment for plaintiff was affirmed by the Supreme Court of Arizona (19 Ariz. 151, 166 Pac. 278), and defendant brings error. Action by Frank Tomich, sometimes known as Frank Thomas, against the Superior & Pittsburg Copper Company. A judgment for plaintiff was affirmed by the Supreme Court of Arizona (19 Ariz. 182, 165 Pac. 1101), and defendant brings error. The cases were consolidated in the Supreme Court, and the judgments for the several plaintiffs affirmed.

Cases Nos. 20 and 21:

Messrs. Ernest W. Lewis, of Phoenix, Ariz., John A. Garver, of New York City, and William C. McFarland, of Douglas, Ariz., for plaintiff in error.

Messrs. Frank E. Curley, of Tucson, Ariz., L. Kearney, of Clifton, Ariz., and Frank H. Hereford, of Tucson, Ariz., for defendants in error.

Case No. 232:

Messrs. William H. King, of New York City, and Alex Britton, Evans Browne, and F. W. Clements, all of Washington, D. C., for plaintiff in error.

Mr. Edward W. Rice, of Globe, Ariz., amicus curiæ.

Case No. 332:

Messrs. Edward W. Rice, of Globe, Ariz., and Harvey M. Friend, of Washington, D. C., for plaintiff in error.

Mr. Graham Foster, of New York City, for defendant in error.

Case No. 334:

Mr. C. T. Knapp, of Bisbee, Ariz., for plaintiff in error.

Mr. Samuel Herrick, of Washington, D. C., for defendant in error.

*417 *Mr. Justice PITNEY delivered the opinion of the Court.

In each of these cases, a workman in a hazardous industry in the state of Arizona, having received in the course of his employment a personal injury through an accident due to a condition or conditions of the occupation, not caused by his own negligence or so far as appears by that of his employer or others, brought action under the Employers' Liability Law of Arizona, and recovered compensatory damages against the employer ascertained upon a consideration of the nature, extent, and disabling effects of the injury in each particular case. And the question is raised whether the statute referred to, as applied to the facts of these cases, is repugnant to that provision of the Fourteenth Amendment which declares that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Article 18 of the Constitution of the state of Arizona is entitled "Labor," and contains, among others, the following sections:

"Section 4. The common-law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.

"Section 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

"Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

*418 "Section 7. To protect the safety of employes in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an employers' liability law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employé in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employé shall not have been caused by the negligence of the employé killed or injured.

"Section 8. The Legislature shall enact a workmen's compulsory compensation law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workmen from any accident arising out of, and in the

course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employé, or employes, to exercise due care, or to comply with any [law?] affecting such employment: Provided, that it shall be optional with said employé to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

Pursuant to section 7 the Employers' Liability Law was enacted (chapter 89, Laws 1912, Reg. Sess.; Arizona Rev. Stat. 1913, pars. 3153-3162); pursuant to section 8 a Workmen's Compulsory Compensation Law was enacted (chapter 14, Laws 1912, 1st Spec. Sess.; Arizona Rev. Stat. 1913, pars. 3163 et seq.).

In two of the present cases the former law was sustained by the Supreme Court of Arizona against attacks based upon the Fourteenth Amendment. *Inspiration Consol. Copper Co. v. Mendez*, 19 Ariz. 151, 166 Pac. 278, 1183; *Superior & Pittsburg Copper Co. v. Tomich*, 19 Ariz. 182, 165 Pac. 1101, 1185. In the other three cases it was sustained by the United States District Court for that district. And the resulting judgments in favor of the injured workmen are brought under our review by writs of error.

[1] Some of the arguments submitted to us assail the wisdom and policy of the act because of its novelty, because of its one-sided effect in depriving the employer of defenses while giving him (as is said) nothing in return, leaving the damages unlimited, and giving to the employé the option of several remedies, as tending not to obviate but to promote litigation, and as pregnant with danger to the industries of the state. With such considerations this court cannot concern itself. Novelty is not a constitutional objection, since under constitutional forms of government each state may have a legislative body endowed with authority to change the law. In what respects it shall be changed, and to what extent, is in the main confided to the several states; and it is to be presumed that their Legislatures, being chosen by the people, understand and correctly appreciate their needs. The states are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts.

[2-4] We have been called upon recently to deal with various forms of workmen's compensation and employers' liability statutes. *Second Employers' Liability Cases*, 223 U. S. 1, 47-53, 32 Sup. Ct. 169, 56 L. Ed. 327, 33 L. R. A. (N. S.) 44; *New York Central R. R. Co. v. White*, 243 U. S. 188, 196, et seq., 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; *Hawkins v. Bleak*

ly, 243 U. S. 210, 37 Sup. Ct. 255, 61 L. Ed. 678, Ann. Cas. 1917D, 637; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; *Middleton v. Texas Power & Light Co.*, 249 U. S. 152, 39 Sup. Ct. 227, 63 L. Ed. 527. These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employé arising in the course of the employment are not beyond alteration by legislation in *the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employé for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change.

[5] The principal contention is that the Arizona Employers' Liability Law deprives the employer of property without due process of law, and denies to him the equal protection of the laws, because it imposes a liability without fault, and, as is said, without equivalent protection. The statute, in respect of certain specified employments designated as inherently hazardous and dangerous to workmen—and reasonably so described—imposes upon the employer, without regard to the question of his fault or that of any person for whose conduct he is responsible, a liability in compensatory damages, excluding all such as are speculative or punitive (*Arizona Copper Co. v. Burciaga*, 177 Pac. 29), for accidental personal injury or death of an employé arising out of and in the course of the employment and due to a condition or conditions of the occupation, in cases where such injury or death of the employé shall not have been caused by his own negligence. This is the substance of paragraphs 3154 and 3158, and they are to be read in connection with paragraph 3156, which declares what occupations are hazardous within the meaning of the law. By paragraph 3160, contracts and regulations exempting the employer from liability are declared to be void.

In effect, the statute requires the employer, instead of the employé, to assume the pecuniary risk of injury or death of the employé attributable to hazards inherent in the employment and due to its conditions and not to the negligence of the employé killed or injured. In deter*mining whether this departure from the previous rule is so arbitrary or inconsistent with the fundamental rights of the employer as to render the law repugnant to the Fourteenth Amendment, it is to be borne in mind that the matter of the assumption of the risks of employment and the consequences to flow therefrom has been regulated time out of mind by the common law,

with occasional statutory modifications. The rule existing in the absence of statute, as usually enunciated, is that all consequences of risks inherent in the occupation and normally incident to it are assumed by the employé and afford no ground of action by him or those claiming under him, in the absence of negligence by the employer; and even risks arising from or increased by the failure of the employer to take the care that he ought to take for the employé's safety are assumed by the latter if he is aware of them or if they are so obvious that any ordinarily prudent person under the circumstances could not fail to observe and appreciate them; but if the employé, having become aware of a risk arising out of a defect attributable to the employer's negligence, makes complaint or objection and obtains a promise of reparation, the common law brings into play a new set of regulations requiring the employer to assume the risk under certain circumstances, the employé under others. *Seaboard Air Line v. Horton*, 233 U. S. 492, 504, 505, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; s. c., 239 U. S. 595, 598, 599, 36 Sup. Ct. 180, 60 L. Ed. 458, and cases cited.

But these are no more than rules of law, deduced by the courts as reasonable and just, under the conditions of our civilization, in view of the relations existing between employer and employé in the absence of legislation. They are not placed, by the Fourteenth Amendment, beyond the reach of the state's power to alter them, as rules of future conduct and tests of responsibility, through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably, and in *defiance of natural justice, with the right of employers and employés to agree between themselves respecting the terms and conditions of employment.

We are unable to say that the Employers' Liability Law of Arizona, in requiring the employer in hazardous industries to assume—so far as pecuniary consequences go—the entire risk of injury to the employé attributable to accidents arising in the course of the employment and due to its inherent conditions, exceeds the bounds of permissible legislation or interferes with the constitutional rights of the employer. The answer that the common law makes to the hardship of requiring the employé to assume all consequences, both personal and pecuniary, of injuries arising out of the ordinary dangers of the occupation, is that the parties enter into the contract of employment with these risks in view, and that the consequences ought to be, and presumably are, taken into consideration in fixing the rate of wages. *Chicago, Milwaukee R. R. v. Ross*, 112 U. S. 377, 383, 5 Sup. Ct. 184, 28 L. Ed. 787; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, 647, 6 Sup. Ct. 590, 29 L. Ed. 755; *New York Cen-*

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tral R. R. Co. v. White, 243 U. S. 188, 199, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; Farwell v. Boston & Worcester R. R. Corp., 4 Metc. (Mass.) 49, 57, 38 Am. Dec. 339. In like manner the employer, if required—as he is by this statute in some occupations—to assume the pecuniary loss arising from such injury to the employé, may take this into consideration in fixing the rate of wages; besides which he has an opportunity, which the employé has not, to charge the loss as a part of the cost of the product of the industry.

There is no question here of punishing one who is without fault. That, we may concede, would be contrary to natural justice. But, as we have seen, the statute limits the recovery strictly to compensatory damages. And there is no discrimination between employer and employé except such as necessarily arises from their different relation to the common undertaking. Both are essential *to it, the one to furnish capital, organization, and guidance, the other to perform the manual work; both foresee that the occupation is of such a nature, and its conditions such, that sooner or later some of the workmen will be physically injured or maimed, occasionally one killed, without particular fault on anybody's part. See 243 U. S. 203, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629. The statute requires that compensation shall be paid to the injured workman or his dependents, because it is upon them that the first brunt of the loss falls; and that it shall be paid by the employer, because he takes the gross receipts of the common enterprise, and by reason of his position of control can make such adjustments as ought to be and practically can be made, in the way of reducing wages and increasing the selling price of the product, in order to allow for the statutory liability. There could be no more rational basis for a discrimination; and it is clear that in this there is no denial of the "equal protection of the laws."

[6] Under the "due process" clause, the ultimate contention is that men have an indefeasible right to employ their fellow men to work under conditions where, as all parties know, from time to time some of the workmen inevitably will be killed or injured, but where nobody knows or can know in advance which particular men or how many will be the victims, or how serious will be the injuries, and hence no adequate compensation can be included in the wages; and to employ them thus with the legitimate object of making a profit above their wages if all goes well, but with immunity from particular loss if things go badly with the workmen through no fault of their own, and they suffer physical injury or death in the course of their employment. In view of the subject-matter, and of the public interest involved, we cannot assent to the proposition that the rights

of life, liberty, and property guaranteed by the Fourteenth Amendment prevent the states from modifying that rule of the common law *which requires or permits the workman to take the chances in such a lottery.

The act—assuming, as we must, that it be justly administered—adds no new burden of cost to industry, although it does bring to light a burden that previously existed, but perhaps was unrecognized, by requiring that its cost be taken into the reckoning. The burden is due to the hazardous nature of the industry, and is inevitable if the work of the world is to go forward. What the act does is merely to require that it shall be assumed, to the extent of a pecuniary equivalent of the actual and proximate damage sustained by the workman or those near to him, by the employer—by him who organizes the enterprise, hires the workmen, fixes the wages, sets a price upon the product, pays the costs, and takes for his reward the net profits, if any.

The interest of the state is obvious. We declared in the White Case, 243 U. S. 207, 37 Sup. Ct. 254, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629:

"It cannot be doubted that the state may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be 'natural and inalienable'; and the authority to prohibit contracts made in derogation of a lawfully established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear.

* * * This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employés arising out of the employment bear so close a relation to the protection of the lives and safety of those *concerned that they properly may be regarded as coming within the category of police regulations" (citing cases).

And in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 239, 37 Sup. Ct. 260, 265 (61 L. Ed. 685, Ann. Cas. 1917D, 642) it was said:

"Certainly, the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern."

Having this interest, the state of Arizona reasonably might say:

"The rule of the common law requiring the employé to assume all consequences of personal injuries arising out of the ordinary dangers and normal conditions of a hazardous occupation,

and to secure his indemnity in advance in the form of increased wages, is incompatible with the public interest because—assuming that workmen are on an equality with employers in a negotiation about the rate of wages—the probability of injury occurring to a particular employé, and the nature and extent of such injury, are so contingent and speculative that it is impracticable for either employer or employé approximately to estimate in advance how much allowance should be made for them in the wages; and even were a proper allowance made, experience demonstrates that under our conditions of life it is not to be expected that the average workingman will set aside out of his wages a proper insurance against the time when he may be injured or killed. Hence, recognizing that injuries to workmen constitute a part of the unavoidable cost of hazardous industries, we will require that it be assumed by the one in control of the industry as employer, just as he pays other items of cost; so that he shall not take a profit from the labor of his employés while leaving the injured ones, and the dependents of those whose lives are lost, through accidents due to the conditions of the occupation, to be a burden upon the public."

[7] Whether this or similar reasoning was employed, we *have no means of knowing; whether, if employed, it ought to have been accepted as convincing, is not for us to decide. It being incumbent upon the opponents of the law to demonstrate that it is clearly unreasonable and arbitrary, it is sufficient for us to declare, as we do, that such reasoning would be pertinent to the subject and not so unfounded or irrational as to permit us to say that the state, if it accepted it as a basis for changing the law in a matter so closely related to the public welfare, exceeded the restrictions placed upon its action by the Fourteenth Amendment.

[8, 9] It is objected that the responsibility of the employer under this statute is unlimited; but this is not true except as it is true of every action for compensatory damages where the amount awarded varies in accordance with the nature and extent of the damages for which compensation is made. It is said that in actions by employés against employers juries are prone to render extravagant verdicts. The same thing has been said, and with equal reason, concerning actions brought by individuals against railroad companies, traction companies, and other corporations. In this, as in other cases, there is a corrective in the authority of the court to set aside an exorbitant verdict. And it amounts to a contradiction of terms to say that in submitting a controversy between litigants to the established courts, there to be tried according to long-established modes and with a constitutional jury to determine the issues of fact and assess compensatory damages, there is a denial of "due process of law."

Much stress is laid upon that part of our opinion in the White Case, where, after citing numerous previous decisions upholding the authority of the states to establish by legislation departures from the fellow servant rule and other common-law rules affecting the employer's liability for personal injuries to the employé, we said (243 U. S. 201, 37 Sup. Ct. 252, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629):

"It is true that in the case of the statutes thus *sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employé, without providing a reasonably just substitute. * * * No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place," etc.

In spite of our declaration that no opinion was intimated, this is treated as an intimation that a statute such as the one now under consideration, creating a new and additional right of action and allowing no defense (if the conditions of liability be shown) unless the accident was caused by the negligence of the injured employé, would be regarded as in conflict with the due process clause. We cannot, however regard this statute as anything else than a substitute for the law as it previously stood; whether it be a proper substitute was for the people of the state of Arizona to determine; but we find no ground for declaring that they have acted so arbitrarily, unreasonably, and unjustly as to render their action void. They have resolved that the consequences of a personal injury to an employé attributable to the inherent dangers of the occupation shall be assumed, not wholly by the particular employé upon whom the personal injury happens to fall, but, to the extent of a compensation in money awarded in a judicial tribunal according to the ordinary processes of law, shall be assumed by the employer; leaving the latter to charge it up, so far as he can, as a part of the cost of his product, just as he would charge a loss by fire, by theft, by bad debts, or any other usual loss of the business; and to make allowance for it, so far as he can, in a reduced scale of wages. And they have come to this resolution, we repeat, not in a matter of in*difference, or upon a question of mere economics, but in the course of regulating the conduct of those hazardous industries in which human beings—their own people—in the pursuit of a livelihood must expose themselves to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the work-

man or those dependent upon him. The statute says to the employer, in effect:

"You shall not employ your fellow men in a hazardous occupation for gain, you being in a position to reap a reward in money through selling the product of their toil, unless you come under an obligation to make appropriate compensation in money in case of their death or injury due to the conditions of the occupation."

The rule being based upon reasonable grounds affecting the public interest, being established in advance and applicable to all alike under similar circumstances, there is, in our opinion, no infringement of the fundamental rights protected by the Fourteenth Amendment.

Some expressions contained in our opinion in the White Case, 243 U. S. 203, 204, 205, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, are treated in argument as if they were equivalent to saying that if a state, in making a legislative adjustment of employers' liability, departs from the common-law system of basing responsibility upon fault, it must confine itself to a limited compensation, measured and ascertained according to the methods adopted in the compensation acts of the present day. Of course nothing of the kind was intended. In a previous part of the opinion (243 U. S. 196-200, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629) it had been shown that the employer had no constitutional right to continued immunity from liability in the absence of negligence, nor to have the fellow servant rule and the rules respecting contributory negligence and assumption of risk remain unchanged. The statutory plan of compensation for injured workmen and the dependents of those fatally injured—an additional feature at variance with the common law—was then upheld; but, of course, without saying that no other would be constitutional. For if, as we held in that case, the novel statutory scheme of awarding compensation according to a prearranged scale is sustainable, it follows, perhaps a fortiori, that the Arizona method of ascertaining the compensation according to the facts of each particular case—substantially the common-law method—is free from objection on constitutional grounds. Indeed, if a state recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the state itself to determine. Whether the compensation should be paid in a single sum after judgment recovered as is required by the Arizona Employers' Liability Law just as under

the common-law system in the case of a judgment based upon negligence, or whether it would be more prudent to distribute the award by installment payments covering the period of disability or of need, likewise is for the state to determine, and upon this the plaintiffs in error can raise no constitutional question.

[10, 11] To the suggestion that the act now or hereafter may be extended by construction to nonhazardous occupations, it may be replied: First, that the occupations in which these actions arose were indisputably hazardous, hence plaintiffs in error have no standing to raise the question (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544, 34 Sup. Ct. 359, 58 L. Ed. 713; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576, 35 Sup. Ct. 167, 59 L. Ed. 364; *Hendrick v. Maryland*, 235 U. S. 610, 621, 35 Sup. Ct. 140, 59 L. Ed. 385; *Middleton v. Texas Power & Light Co.*, 249 U. S. 152, 157, 39 Sup. Ct. 227, 63 L. Ed. 527); and, secondly, it hardly is necessary to add that employers in nonhazardous industries are in little danger from the act, since it imposes liability only for accidental injuries attributable to the inherent dangers of the occupation.

[12] *To the objection that the benefits of the act may be extended, in the case of death claims, to those not nearly related to or dependent upon the workman, or even may go by escheat to the state, it is sufficient to say that no such question is involved in these records; in *Arizona Copper Co. v. Burciaga*, 177 Pac. 29, a case of personal injuries not fatal, the Supreme Court of Arizona interpreted the act as limiting the recovery to compensatory damages; it reasonably may be so construed in its application to death claims; and it would be improper for this court to assume in advance that the state court will place such a construction upon the statute as to render it obnoxious to the federal Constitution. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546, 34 Sup. Ct. 359, 58 L. Ed. 713; *St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350, 369, 35 Sup. Ct. 99, 59 L. Ed. 265.

[13] It is insisted that the Arizona system deprives employers of property without due process of law and denies them equal protection because it confers upon the employé a free choice among several remedies. In *Consolidated Arizona S. Co. v. Ujack*, 15 Ariz. 382, 384, 139 Pac. 465, 466, the Supreme Court of the state said:

"Under the laws of Arizona, an employé who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const. §§ 4, 5, art. 18.

(2) Employers' Liability Law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const. § 7, art. 18. (3) The Compulsory Compensation Law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const. § 8, art. 18."

It is said by counsel that the Compensation Act, because it limits the recovery, *never is resorted to in practice unless the employé has been negligent, and hence is debarred of a remedy under the Liability Act. But it is thoroughly settled by our previous decisions that a state may abolish contributory negligence as a defense, and election of remedies is an option very frequently given by the law to a person entitled to an action; an option normally exercised to his own advantage, as a matter of course.

Other points are suggested, but none requiring particular discussion.

Judgments affirmed.

Mr. Justice HOLMES concurring.†

The plaintiff (the defendant in error) was employed in the defendant's mine, was hurt in the eye in consequence of opening a compressed air valve and brought the present suit. The injury was found to have been due to risks inherent to the business and so was within the Employers' Liability Law of Arizona, Rev. Stats. 1913, Title 14, Ch. 6. By that law as construed the employer is liable to damages for injuries due to such risks in specified hazardous employments when guilty of no negligence. Par. 3158. There was a verdict for the plaintiff, judgment was affirmed by the Supreme Court of the State, 19 Ariz. 151, 166 Pac. 278, 1183; and the case comes here on the single question whether, consistently with the Fourteenth Amendment, such liability can be imposed. It is taken to exclude "speculative, exemplary and punitive damages," but to include all loss to the employé caused by the accident, not merely in the way of earning capacity, but of disfigurement and bodily or mental pain. See *Arizona Copper Co. v. Burciaga*, 177 Pac. 29, 33.

There is some argument made for the general proposition that immunity from liability when not in fault is a right inherent in free government and the obiter dicta of Mr. Justice Miller in [*Citizen's Savings &*] *Loan Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455, are referred to. But if it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know of nothing to hinder. A man employs a servant at the peril of what that servant may do in the course of his employment and there is nothing in the Constitution to limit

the principle to that instance. *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1, 22, 17 Sup. Ct. 243, 41 L. Ed. 611; *Chicago, Rock Island & Pacific Ry. Co. v. Zernecke*, 183 U. S. 582, 586, 22 Sup. Ct. 229, 46 L. Ed. 339; *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281, 295, 28 Sup. Ct. 616, 52 L. Ed. 1061. See *Guy v. Donald*, 203 U. S. 399, 406, 27 Sup. Ct. 63, 51 L. Ed. 245. There are cases in which even the criminal law requires a man to know facts at his peril. Indeed the criterion which is thought to be free from constitutional objection, the criterion of fault, is the application of an external standard, the conduct of a prudent man in the known circumstances, that is, in doubtful cases, the opinion of the jury, which the defendant has to satisfy at his peril and which he may miss after giving the matter his best thought. *The Germanic*, 196 U. S. 589, 596, 25 Sup. Ct. 317, 49 L. Ed. 610; *Nash v. United States*, 229 U. S. 373, 377, 33 Sup. Ct. 780, 57 L. Ed. 1232; *Eastern States Retail Lumber Dealers' Association v. McBride*, 234 U. S. 600, 610, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788; *Miller v. Strahl*, 239 U. S. 426, 434, 36 Sup. Ct. 147, 60 L. Ed. 364. Without further amplification so much may be taken to be established by the decisions. *New York Central R. R. Co. v. White*, 243 U. S. 188, 198, 204, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 336, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642.

[14] I do not perceive how the validity of the law is affected by the fact that the employé is a party to the venture. There is no more certain way of securing attention to the safety of the men, an unquestionably constitutional object of legislation, than by holding the employer liable *for accidents. Like the crimes to which I have referred they probably will happen a good deal less often when the employer knows that he must answer for them if they do. I pass, therefore, to the other objection urged and most strongly pressed. It is that the damages are governed by the rules governing in action of tort—that is, as we have said, that they may include disfigurement and bodily or mental pain. Natural observations are made on the tendency of juries when such elements are allowed. But if it is proper to allow them of course no objection can be founded on the supposed foibles of the tribunal that the Constitution of the United States and the States have established. Why, then, is it not proper to allow them? It is said that the pain cannot be shifted to another. Neither can the loss of a leg. But one can be paid for as well as the other. It is said that these elements do not constitute an economic loss, in the sense of diminished power to produce. They may. *Ball v. Wil-*

†This concurrence is in case No. 332, *Inspiration Consol. Copper Co. v. Mendez*.

liam Hunt & Sons, Ltd., [1912] A. C. 496. But whether they do or not they are as much part of the workman's loss as the loss of a limb. The legislature may have reasoned thus. If a business is unsuccessful it means that the public does not care enough for it to make it pay. If it is successful the public pays its expenses and something more. It is reasonable that the public should pay the whole cost of producing what it wants and a part of that cost is the pain and mutilation incident to production. By throwing that loss upon the employer in the first instance we throw it upon the public in the long run and that is just. If a legislature should reason in this way and act accordingly it seems to me that it is within Constitutional bounds. *Matter of Erickson v. Preuss*, 223 N. Y. 365, 119 N. E. 555. It is said that the liability is unlimited, but this is not true. It is limited to a conscientious valuation of the loss suffered. Apart from the control exercised by the judge it is to be hoped that juries would realize that unreasonable verdicts would tend to *make the business impossible and thus to injure those whom they might wish to help. But whatever they may do we must accept the tribunal, as I have said, and are bound to assume that they will act rightly and confine themselves to the proper scope of the law.

It is not urged that the provision allowing twelve per cent. interest on the amount of the judgment from the date of filing the suit, in case of an unsuccessful appeal, is void. *Fidelity Mutual Life Association v. Mettler*, 185 U. S. 308, 325-327, 22 Sup. Ct. 662, 46 L. Ed. 922; *Consaul v. Cummings*, 222 U. S. 262, 272, 32 Sup. Ct. 83, 56 L. Ed. 192.

Mr. Justice BRANDEIS and Mr. Justice CLARKE concur in this statement of additional reasons that lead me to agree with the opinion just delivered by my Brother PITNEY.

Mr. Justice MCKENNA dissenting.

I find myself unable to concur, yet reluctant to dissent. The case is of the kind that, once pronounced, will be a rule in like or cognate cases forever—indeed, may even be extended. It is said to rest on the cases sustaining the Workmen's Compensation Law of New York, 243 U. S. 203, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, and its associated cases in the same volume upholding like laws of other states. The present case certainly comes after those cases and has that symptom of being their sequence. They cannot be said to have been easy of judgment against the contentions and conservatism which opposed them, and there was, at least to me, no prophecy of their extent, and therefore to me the present case is a step beyond them. I

hope it is something more than timidity, dread of the new, that makes me fear that it is a step from the deck to the sea—the metaphor suggests a peril in the consequences.

But let me in a more concrete way make application of this comment. I may assume that the purpose and principle and general extent of Workmen's Compensation Laws *are known. I must rest on that assumption, for even an epitome of them or the reasons for them would unduly extend this dissent. The Arizona law has no resemblance to them. It is a direct charge of liability upon the employer for death or injury incurred in his employment, he being without fault. Its remedies are the ordinary legal remedies; its measure of relief, however, has in it something more than the ordinary measures of relief, certainly not those of the Compensation Laws, nor is it as considerate and guarded as they. If its validity, therefore, can be deduced from the cases explanatory of those laws, it can only be done by bringing its instances and theirs under the same generalization; that is, that it is competent for government to charge liability and exempt from responsibility according as one is employer or employé, there being no other circumstance than that relation. Of this there can be no disguise. It may be confused by argument and attempt at historical analogies and deductions, but to that comprehensive principle the case must come at last. All else is adventitious, and puts out of view the relation of the factors of production. It puts out of view that employers are as necessary to production as employes and subjects to peril the voluntary conduct of the former and leaves out of account as an element the voluntary conduct of the latter. In other words, there is a clear discrimination, a class distinction with its legal circumstances and, I may say, invidious circumstances, in view of some of the reasons adduced in its justification. And these effects cannot be concealed under any camouflage nor given the plausible and attractive gloss of public policy, justified by the different conditions of employer and employé. Unquestionably there is a difference—it constitutes the life of the relation. But the question is: Who shall compensate the injury that may result from the relation, voluntarily assumed by both, urged by their respective interests and a calculation of advantage?

*But I pass this discrimination and return to the law as a violation of the employer's rights considered absolutely and abstractly. It seems to me to be of the very foundation of right—of the essence of liberty as it is of morals—to be free from liability if one is free from fault. It has heretofore been the sense of the law and the sense of the world, pervading the regulations of both, that there can be no punishment where there is no blame; and yet the court now by its

decision erects the denial of these postulates of conduct into a principle of law and governmental policy. In other words, it is said to be a benefit to government to put the exact discharge of duty under the menace of penalty and invert the conceptions of mankind of the relation of right and wrong action. If the legislation does not punish without fault what does it do? The question is pertinent. Consider what the employer does: He invests his money in productive enterprise—mining, smelting, manufacturing, railroading—he engages employes at their request and pays them the wages they demand; he takes all of the risks of the adventure. Now there is put upon him an immeasurable element that may make disaster inevitable. I find it difficult to answer the argument advanced to support or palliate this effect, or independently of it to justify the interference with rights. It is a certain impeachment of some rights to assume that they need justification, and a betrayal of them to make them a matter of controversy. There are precepts of constitutional law, as there are precepts of moral law, that reach the conviction of aphorisms and are immediately accepted by all who understand them, and comment is considered as confusing as unnecessary. I say this, not in dogmatism, but in expression of my vision of things, and I say it with deference to the contrary judgment of my Brethren of the majority.

* 437 Of course, reasons may be found for the violation of rights, advantage to somebody or something in that viola^{*tion}. Tyranny even may find pretexts, and seldom boldly bids its will avouch its acts, and certainly there can be no accusation of barefaced power in the Arizona law. Its motives and purposes are worthy, and it requires some resolution of duty to resist them. It must be seen, and is seen, however, that the difference between the position of employer and employe, simply considering the latter as economically weaker, is not a justification for the violation of the rights of the former, and that individual rights cannot be made to yield to philanthropy, and therefore the welfare of the government is brought forward and displayed. The law saves the government, is the comment, from the burden of paupers, its administration and peace from the disturbance of criminals. The answer, I think, is immediate. Government, certainly constitutional government, cannot afford to infringe, indeed, betrays its purpose if it infringes, a right of anybody upon money considerations or for ease in the exercise of its faculties.

But, granting that there is something in the argument, what shall be the limits of its application? Will it extend the principle of the present case to nonhazardous employments? If not, why not? The Arizona law stops with certain occupations which it calls "hazardous"; but it includes in the descrip-

tion "manufacturing," without qualifying words. In the New York Compensation Law passed on in New York Central Railroad v. White, 243 U. S. 203, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, there were 42 groups of hazardous occupations. In 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642, the court had quite a struggle with the provisions of the Washington Compensation Law, which was so far different from those of the other cases as to incur the dissent of members of the court. It is now, I think, of pertinent inquiry whether the quality of being hazardous is an inherent and necessary element of legality or a matter of legislative definition and policy. Besides, if there can be *liability without fault in one occupation, and that can be a principle of legislation, why not in any other? Who is to determine the application, court or Legislature? If the latter, a court may not even express apprehension of its exercise, and yet it cannot put out of view the drift of events and in blind fatalism await their incidence when called upon to consider the legality of such exercise. We know things are in change—have changed—and a mark of it is that the drift of public opinion, and of legislation following opinion, is to alter the relation between employer and employe, and to give to the latter a particular distinction, relieve him from a responsibility which would seem to be, and which until lately it has been the sense of the world to be, as much upon him as upon his employer, not in dependence, not as a mark of subservience, but as an obligation of his freedom, and therefore, as a consequence, that where he has liberty of action he has responsibility for action. In a word, the drift of opinion and legislation now is to set labor apart and to withdraw it from its conditions, and from the action of economic forces and their consequences, give it immunity from the pitilessness of life. And there are appealing considerations for this drift of opinion and inevitable sympathy with it, as with many other conditions, but which the law cannot relieve by a sacrifice of constitutional rights. In what legislation the drift (it is persuasion in some) may culminate cannot now be predicted, but it is very certain that, whatever it be, the judgment now delivered will be cited to justify it. Will it not be said that, if one right of an employer can be made to give way, why not another?—made a condition "upon economic or other grounds" of his enterprise. Indeed, may not the question be made more general, and if in supposed benefit to a particular class, and through benefit to them to the public, there may be constraint upon or the imposition of burden upon one right of a citizen, why not upon another? There is, therefore, I *think, menace in the present judgment to all rights, subjecting them unreservedly to conceptions of public policy. If, however, this general apprehen-

sion be not justified, there is threat enough in the judgment of the court to the interest of employers generally as a result of the difference in conditions.

A rather curious argument is used to support the Arizona law. It is said, in justification of its discrimination between employer and employé, that the employer may, in relief from it and rescue from its burdens, pass them to the consumers of his products, as he does or may do in the case of other expenses of his venture, and in the long run their incidence is, as it is said it should be, on the public, and that the Legislature in so considering was reasoning within constitutional bounds. There is attractive speciousness in the argument. The individual employer seems to be divested of grievance, and the problem the law presents to be one of economics and governmental policy—is a kind of taxation, an expense of government, the burden of which is properly laid upon the public, and over which a court can have but limited power.

If it is intended by the argument to express no more than a tendency, while it has no relevancy, I think, upon the validity of the law, there may be no danger in it. If it is intended to be erected into a principle, there is danger in it. It is certainly facile and comprehensive. What burden can be put upon industry or the activities of men that may not be justified by it?

Of course, there will be no production unless all of its costs be reimbursed by the price of the articles produced. And by costs, I mean as well the burdens of government as profit to the employer—his inducement to enterprise, and the wages of employé—their inducement to labor. Without such reimbursement there will be no production, and cannot be beyond a certain extent and for a certain time; and there is no way to effect it but through the consuming public. But recourse to such consumption as a rescue from the law is not a justification for the law, and it is very doubtful if it had any conscious influence in the enactment of the law.

Indeed, in the present case what could have been its influence, and to what extent can it have an ameliorating effect? An employer in the indicated industries can have no relief except in the home market. If his products (where there are products) go beyond—go to other states—they will meet the competition of unburdened products. But this is obvious and needs no comment.

The CHIEF JUSTICE, Mr. Justice VAN DEVANTER and Mr. Justice McREYNOLDS concur in this dissent.

Mr. Justice McREYNOLDS dissenting.

While I earnestly join in the dissent written by Mr. Justice McKENNA, it seems not inappropriate to state my own views some-

what more fully. The important and underlying question is common to the five cases. No. 232 is typical and to detail certain facts and circumstances disclosed by the record therein may aid the discussion.

Basing his claim upon the Arizona Employers' Liability Law, Dan Veazey sued plaintiff in error in the United States District Court to recover damages for personal injuries received by him February 10, 1916, while engaged as millwright and carpenter in constructing a "flotation system" at the company's mill or reduction works in Gila county, Ariz., "wherein steam, electricity, or other mechanical power was then and there used to operate machinery." He alleged that while exercising due care he "suffered severe personal and bodily injuries by an accident arising out of and in course of such labor, service, and employment, and due to a condition or conditions of such occupation or employment," which injuries were *not caused by his negligence, but were sustained in the manner following:

"Plaintiff in the due course of his said labor, service, and employment was standing upon a certain timber or joist incorporated in said 'flotation system,' engaged in bolting and fastening together the timbers thereof. That the said timber or joist upon which plaintiff was then and there standing was then and there elevated above the ground or floor of said mill or reduction works a distance of approximately 10 feet. That while so engaged as aforesaid, plaintiff slipped from said timber or joist and fell to the ground * * * with great force and violence, * * *" was permanently injured, and will forever remain sick, sore, lame, and crippled.

No charge of negligence or failure to perform any duty was made against the company. It unsuccessfully set up and relied upon invalidity of the Employers' Liability Law because in conflict with the Fourteenth Amendment; judgment went against it; and the cause is here by writ of error to the trial court. Judicial Code (Act March 3, 1911, c. 231) § 237, 36 Stat. 1156 (Comp. St. § 1214).

Article 18 of the Arizona Constitution provides:

"Section 4. The common-law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master, is forever abrogated.

"Section 5. The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.

"Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

"Section 7. To protect the safety of employé in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Leg-

*442 legislature shall enact an Employers' Liability Law, by the terms of which any employer *whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employé in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employé shall not have been caused by the negligence of the employé killed or injured.

"Section 8. The Legislature shall enact a Workmen's Compulsory Compensation Law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employé, or employés, to exercise due care, or to comply with any law affecting such employment: Provided, that it shall be optional with said employé to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

Obedying the constitutional mandate, the Legislature enacted the "Employers' Liability Law," approved May 24, 1912 (chapter 89, Laws of Ariz. 1912, p. 491; Rev. Stat. Ariz. 1913, §§ 3153-3162), which provides:

*443 That to protect the safety of workmen at manual or mechanical labor in many occupations declared hazardous and enumerated in section 4—among them all work in or about mines and in mills, shops, plants and factories where steam or electricity is used to operate machinery—every employer, whether individual, association, or corporation, "shall be liable for the death or injury, caused by any *accident due to a condition or conditions of such occupation, of any employé in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employé shall not have been caused by the negligence of the employé killed or injured."

"Sec. 6. When in the course of work in any of the employments or occupations enumerated in section 4 of this act, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employé shall not have been caused by the negligence of the employé killed or injured, then the employer of such employé shall be liable in damages to the employé injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employé, and, if none, then to such employé's parents; and,

if none, then to the next of kin dependent upon such employé, and if none, then to his personal representative, for the benefit of the estate of the deceased."

Section 7 requires that questions of contributory negligence and assumption of risk shall be left to the jury. (The full text of the act is in the margin.¹)

¹Laws of Arizona 1912, c. 89, p. 491; Rev. Stat. Ariz. Civil Code 1913, §§ 3153-3162, p. 1051.

"Section 1. That this act is and shall be declared to be an Employers' Liability Law as prescribed in section 7 of article XVIII of the state Constitution.

"Sec. 2. That to protect the safety of employés in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway, transportation or any other industry, as provided in said section 7 of article XVIII of the state Constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employé in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employé shall not have been caused by the negligence of the employé killed or injured.

"Sec. 3. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in section 4 of this act are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of section 2 of this act.

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

"Sec. 4. The occupations hereby declared and determined to be hazardous within the meaning of this act are as follows:

"1. The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines, trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use or repair of machinery, plant, tracks, switches, bridges, roadbeds, upon, over, and by which such railway business is operated.

"2. All work when making, using or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive.

"3. The erection or demolition of any bridge, building or structure in which there is, or in which the plans and specifications require, iron or steel frame work.

"4. The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure.

"5. All work on ladders or scaffolds of any kind elevated twenty (20) feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

"6. All work of construction, operation, alteration or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current.

"7. All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes."

"8. All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

*Likewise, the Legislature enacted a Compulsory Compensation Law, approved June 8, 1912, applicable to workmen in the same occupations as those declared hazardous by the Employers' Liability Law (Chapter 14, Laws of Ariz. *Spec. Sess. 1912, p. 23). Material portions of it are in the margin.²

*In Consolidated Arizona S. Co. v. Ujack (1914) 15 Ariz. 382, 384, 139 Pac. 465, 466, the Supreme Court declared:

"Under the laws of Arizona, an employé who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law

liability relieved of the fellow servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const. §§ 4, 5, art. 18. (2) Employers' Liability Law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const. § 7, art. 18. (3) The Compulsory Compensation Law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const. § 8, art. 18."

In Inspiration Consolidated Copper Co. v. Mendez (July 2, 1917) 19 Ariz. 151, 157, 166 Pac. 278, 279, 281, 283, the Supreme Court specifically held that the Employers' Liability

"9. All work in the construction and repair of tunnels, sub-ways and viaducts.

"10. All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

"Sec. 5. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations, or instructions, inform all employés in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employés in such employment.

"Sec. 6. When in the course of work in any of the employments or occupations enumerated in section 4 of this act, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employé shall not have been caused by the negligence of the employé killed or injured, then the employer of such employé shall be liable in damages to employé injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employé; and, if none, then to such employé's parents; and, if none, then to the next of kin dependent upon such employé, and if none then to his personal representative, for the benefit of the estate of the deceased.

"Sec. 7. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this act to recover damages for personal injuries to any employé, or where such injuries have resulted in his death, the question whether the employé may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times be left to the jury, as provided in section 5 of article XVIII of the state Constitution.

"Sec. 8. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any employer to exempt himself or itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such employer under or by virtue of any of the provisions of this act, such employer may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity or that it may have paid to the injured employé or his personal representative on account of the injury or death for which said action was brought.

"Sec. 9. In all actions for damages brought under the provisions of this act, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful, and the judgment of the lower court is sustained by the higher court or courts, then and in that

event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 per cent. per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

"Sec. 10. No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

"Sec. 11. All acts and parts of acts in conflict herewith are hereby repealed.

"Whereas, the state Constitution commands the enactment of an Employers' Liability law by the Legislature at its first session; and

"Whereas, this act being said Employers' Liability law is immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this act shall be in full force and effect from and after its passage and its approval by the Governor, and is hereby exempt from the operation of the referendum provision of the state Constitution."

* Employers' Liability Law.

Sec. 2. That compensation graduated according to average earnings and limited to \$4,000 "shall be paid by his employer to any workman engaged in any employment declared and determined * * * to be especially dangerous, whether said employer be a person, firm, association, company, or corporation, if in the course of the employment of said employé personal injury thereto from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employé or employés, to exercise due care, or to comply with any law affecting such employment."

"Sec. 4. In case such employé or his personal representative shall refuse to settle for such compensation (as provided in section 8 of article XVIII of the state Constitution) and chooses to retain the right to sue said employer (as provided in any law provided for in section 7, article XVIII of the state Constitution) he may so refuse to settle and may retain said right."

"Sec. 6. The common-law doctrine of no liability without fault is hereby declared and determined to be abrogated in Arizona as far as it shall be sought to be applied to the accidents hereinbefore mentioned."

"Sec. 14. * * * Provided, if, after the accident either the employer or the workman shall refuse to make or accept compensation under this act or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the state Constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively."

ty Law does not conflict with the Fourteenth Amendment, and among other things said:

*439 "That the liability statute must *be construed as one creating a liability for accidents resulting in injuries to the workmen engaged in hazardous occupations due to the risks and hazards inherent in such occupations, without regard to the negligence of the employer, as such negligence is understood in the common law of liability; in other words, such statute creates a liability for accident arising from the risks and hazards inherent in the occupation without regard to the negligence or fault of the employer. * * * In other words, this statute creates a liability of the master to damages suffered from any accident befalling his servant while engaged in the performance of duties in dangerous occupations without requiring the negligence of the master to be shown as an element of the right to recover; and it likewise takes away from the master his common-law right of defense of assumption of ordinary risk by the servant, and leaves to the master the right to defend upon the grounds that the servant assumed the ordinary risks other than risks inherent in the occupation."

(This opinion was reaffirmed in *Superior & Pittsburg Copper Co. v. Tomich* [July 2, 1917] 19 Ariz. 182, 165 Pac. 1101, 1185.)

In *Arizona Copper Co. v. Burciaga* (1918) 177 Pac. 29, 31, 32, 33, the Supreme Court said:

"As clearly intimated by this court in *Inspiration Consolidated Copper Co. v. Mendez*, 19 Ariz. 151, 166 Pac. 278, 1183, the Employers' Liability Law is designed to give a right of action to the employé injured by accident occurring from risks and hazards inherent in the occupation and without regard to the negligence on the part of the employer. Such is the clear import of the said Employers' Liability Law. * * *

*449 "The liability incurred by the employer from a personal injury sustained by his employé from an accident arising out of and in the course of labor, service, and employment in hazardous occupations specified in the statute, and due to a condition or conditions of such occupation *or employment, if such shall not have been caused from the negligence of such employé, is such an amount as will compensate such employé for the injuries sustained by him directly attributable to such accident. * * * 'Liable in damages,' as used in paragraph 3158, c. 6, of title 14, Employers' Liability Law, Rev. Stat. of Ariz. 1913, has reference to and means that the employer becomes obligated to pay to the employé injured in an accident while engaged in an occupation declared hazardous, occurring without fault of the employer, all loss to the employé which is actually caused by the accident and the amount of which is susceptible of ascertainment. * * * Of course, mental and physical suffering experienced by the employé injured, proximately resulting from the accident, the reasonable value of working time lost by the employé, necessary expenditures for the treatment of injuries and compensation for the employé's diminished earning power directly resulting from the injury, and perhaps other results causing direct loss, are matters of actual loss and as such recoverable."

From the foregoing it appears that we have for consideration a statute which undertakes, in the absence of fault, to impose upon all employers (individual and corporate) engaged in enterprises essential to the public welfare, not subject to prohibition by the state and often not attended by any extraordinary hazard, an unlimited liability to employés for damages resulting from accidental injuries—including physical and mental pain—which may be recovered by the injured party or his administrator for benefit of widow, children, parents, next of dependent kin or the estate. The individual who hires only one man and works by his side is put on the same footing as a corporation which employs thousands; no attention is given to probable ability to pay the award; length of service is unimportant—a minute seems enough; wages contracted for bear no necessary relationship to what may be recovered; and a single accident which he was powerless to prevent or provide against may pauperize the employer. And by reason of existing constitutional and statutory provisions an injured workman may claim under this act or under the Compensation Law or according to the common law materially modified in his favor by exclusion of the fellow-servant rule and otherwise. On the other hand, while the employer is declared subject to new, uncertain and greatly enlarged liability, notwithstanding the utmost care, nothing has been granted him in return.

In such circumstances, would enforcement of the challenged statute deprive employers of rights protected by the Fourteenth Amendment? Plainly, I think, nothing short of an affirmative answer is compatible with well-defined constitutional guaranties.

Of course, the Fourteenth Amendment was never intended to render immutable any particular rule of law, nor did it by fixation immortalize prevailing doctrines concerning legal rights and liabilities. Orderly and rational progress was not forestalled. *Holden v. Hardy*, 169 U. S. 366, 387, 18 Sup. Ct. 383, 42 L. Ed. 780. But it did strip the states of all power to deprive any person of life, liberty or property by arbitrary or oppressive action—such action is never due process of law.

In the last analysis it is for us to determine what is arbitrary or oppressive upon consideration of the natural and inherent principles of practical justice which lie at the base of our traditional jurisprudence and in spirit our Constitution. A legislative declaration of reasonableness is not conclusive; no more so is popular approval—otherwise constitutional inhibitions would be futile. And plainly, I think, the individual's fundamental rights are not proper subjects for experimentation; they ought not to be sacrificed to questionable theorization.

Until now I had supposed that a man's liberty and property—with their essential in-

cidents—were under the *protection of our charter and not subordinate to whims or caprices or fanciful ideas of those who happen for the day to constitute the legislative majority. The contrary doctrine is revolutionary and leads straight towards destruction of our well-tried and successful system of government. Perhaps another system may be better—I do not happen to think so—but it is the duty of the courts to uphold the old one unless and until superseded through orderly methods.

After great consideration in *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764, and *Coppage v. Kansas*, 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441, L. R. A. 1915C, 960, this court declared that the Fourteenth Amendment guarantees to both employer and employé the liberty of entering into contracts for service subject only to reasonable restrictions. "The principle is fundamental and vital."

In the first case an act of Congress prohibiting interstate carriers from requiring one seeking employment, as a condition of such employment, to enter into an agreement not to become or remain a member of a labor organization, was declared in conflict with the Fifth Amendment. In *Coppage v. Kansas* a state statute which declared it unlawful to require one to agree not to be a member of a labor association as a condition of securing employment was held invalid under the Fourteenth Amendment, and we said:

"An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the state."

In *Truax v. Raich*, 239 U. S. 33, 41, 36 Sup. Ct. 7, 10 (60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283) an Arizona statute prohibiting employment of aliens except under certain conditions was struck down. We there said:

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."

The right to employ and the right to labor are correlative—neither can be destroyed nor unduly hindered without impairing the other. The restrictions imposed by the act of Congress, struck down in the *Adair Case*, by the *Kansas statute*, declared invalid in the *Coppage Case*, and by the *Arizona statute*, held inoperative in the *Truax Case*, viewed as practical matters seem rather trivial in comparison with the burden laid on employers by the statute before us. And the grounds suggested to support it really amount in substance to asserting that the

Legislature has power to protect society against the consequences of accidental injuries, and therefore it may impose the loss resulting therefrom upon those wholly without fault who have afforded others welcomed opportunities to earn an honest living under unobjectionable conditions. As a measure to stifle enterprise, produce discontent, strife, idleness, and pauperism, the outlook for the enactment seems much too good.

In *New York Central R. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 61 L. Ed. 667, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, and *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260, 61 L. Ed. 635, Ann. Cas. 1917D, 642, as I had supposed for reasons definitely pointed out, we held the challenged statutes not in conflict with the Fourteenth Amendment although they imposed liability without fault and introduced a plan for compensating workmen, unknown to the common law. The elements of those statutes regarded as adequate to save their validity we specified; if such characteristics had not been found, the result, necessarily, would have been otherwise, unless we were merely indulging in harmful chatter.

Here, without fault, the statute in question imposes liability in some aspects more onerous than either the New York or Washington law prescribed; and the grounds upon which we sustained those statutes are wholly lacking. The employer is not exempted from any liability formerly imposed; he is given no quid pro quo for his new burdens; the common-law rules have been set aside without a reasonably just substitute; the employé is relieved from *consequences of ordinary risks of the occupation and these are imposed upon the employer without defined limit to possible recovery which may ultimately go to nondependents, distant relatives, or, by escheat, to the state; "the act bears no fair indication of a just settlement of a difficult problem affecting one of the most important of social relations"—on the contrary, it will probably intensify the difficulties.

The liability is not restricted to the pecuniary loss of a disabled employé or those entitled to look to him for support, but includes compensation for physical and mental pain and suffering; a recovery resulting in bankruptcy to an employer may benefit only a distant relative, financially independent; the prescribed responsibility is not "to contribute reasonable amounts according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries," but is unlimited, unavoidable by any care, incapable of fairly definite estimation in advance, and enforceable by litigation probably acrimonious, long drawn out, and expensive. While the statute is inattentive to the employé's fault, it permits recovery in excess of the employé's pecuniary misfortune, and provides for com-

pensation, not general, but sporadic, uncertain, conjectural, delayed, indefinite as to amount, and not distributed over such long period as to afford actual protection against loss or lessened earning capacity with insurance to society against pauperism, etc.

I am unable to see any rational basis for saying that the act is a proper exercise of the state's police power. It is unreasonable

and oppressive upon both employer and employé; to permit its enforcement will impair fundamental rights solemnly guaranteed by our Constitution, and heretofore, as I think, respected and enforced.

The CHIEF JUSTICE and Mr. Justice McKENNA and Mr. Justice VAN DEVANTER concur in this opinion.

END OF CASES IN VOL. 39

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